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By A. C. FREEMAN.

VOLUME 100.

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# AMERICAN STATE REPORTS.

## VOLUME 100.

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**NEW HAMPSHIRE.** — (64) **10**; (62) **13**; (65) **23**; (66) **48**; (67) **68**; (68) **73**; (69) **76**; (70) **85**; (71) **93**.

**NEW JERSEY.** — (43 N. J. Eq.) **3**; (44 N. J. Eq.) **6**; (50 N. J. L.) **7**; (51 N. J. L.) **45**; (52 N. J. Eq.) **14**; (46 N. J. Eq.) **52**; (53 N. J. L.) **19**; (47 N. J. Eq.) **24**; (53 N. J. L.) **26**; (48 N. J. Eq.) **27**; (49 N. J. Eq.) **31**; (54 N. J. L.) **33**; (50 N. J. Eq.) **35**; (55 N. J. L.) **39**; (51 N. J. Eq.) **40**; (56 N. J. L.) **44**; (52 N. J. Eq.) **46**; (57 N. J. L.) **53**; (53 N. J. Eq.) **51**; (54 N. J. Eq.) **58**; (58 N. J. L.) **55**; (59 N. J. L.) **59**; (55 N. J. Eq.) **62**; (60 N. J. L.) **64**; (56 N. J. Eq.) **67**; (61 N. J. L.) **68**; (62 N. J. L.) **72**; (57 N. J. Eq.) **73**; (63 N. J. L.) **76**; (58 N. J. Eq.) **78**; (64 N. J. L.) **81**; (59, 60 N. J. Eq.) **83**; (65 N. J. L.) **86**; (61 N. J. Eq.) **88**; (66 N. J. L.) **88**; (62 N. J. Eq.) **90**; (67 N. J. L.) **91**; (63 N. J. Eq.) **92**; (68 N. J. L.) **96**; (64 N. J. Eq.) **97**.

**NEW YORK.** — (107) **1**; (108) **2**; (109) **4**; (110) **6**; (111) **7**; (112) **8**; (113) **10**; (114) **11**; (115) **12**; (116, 117) **15**; (118, 119) **16**; (120) **17**; (121) **18**; (122) **19**; (123) **20**; (124, 125) **21**; (126) **22**; (127) **24**; (128, 129) **26**; (130, 131) **27**; (132, 133) **28**; (134) **30**; (135) **31**; (136) **32**; (137) **33**; (138) **34**; (139) **36**; (140) **37**; (141) **38**; (142) **40**; (143) **42**; (144) **43**; (145) **45**; (146) **48**; (147) **49**; (148) **51**; (149) **52**; (150) **55**; (151) **56**; (152) **57**; (153) **60**; (154) **61**; (155) **63**; (156) **66**; (157) **68**; (158, 159) **70**; (160) **73**; (161, 162) **76**; (163, 164) **79**; (165) **80**; (166, 167) **82**; (168) **85**; (169, 170) **88**; (171) **89**; (172) **92**; (173) **93**; (174) **95**; (175) **96**; (176) **98**.

**NORTH CAROLINA.** — (97, 98) **2**; (99, 100) **6**; (101) **9**; (102) **11**; (103) **14**; (104) **17**; (105) **18**; (106) **19**; (107) **22**; (108) **23**; (109) **26**; (110) **28**; (111) **32**; (112) **34**; (113) **37**; (114) **41**; (115) **44**; (116) **47**; (117) **53**; (118) **54**; (119) **56**; (120) **58**; (121) **61**; (122) **65**; (123) **68**; (124) **70**; (125) **74**; (126) **78**; (127) **80**; (128) **83**; (129) **85**; (130) **89**; (131) **92**; (132) **95**; (133) **98**.

**NORTH DAKOTA.** — (1) **26**; (2) **33**; (3) **44**; (4) **50**; (5) **57**; (6, 7) **66**; (8) **73**; (9) **81**; (10) **88**; (11) **95**.

**OHIO.** — (45 Ohio St.) **4**; (46 Ohio St.) **15**; (47 Ohio St.) **21**; (48 Ohio St.) **29**; (49 Ohio St.) **34**; (50 Ohio St.) **40**; (51 Ohio St.) **46**; (52 Ohio St.) **49**; (53 Ohio St.) **53**; (54 Ohio St.) **56**; (55, 56 Ohio St.) **60**; (57 Ohio St.) **63**; (58 Ohio St.) **65**; (59 Ohio St.) **69**; (60 Ohio St.) **71**; (61 Ohio St.) **76**; (62 Ohio St.) **78**; (63 Ohio St.) **81**; (64 Ohio St.) **83**; (65 Ohio St.) **87**; (66 Ohio St.) **90**; (67 Ohio St.) **93**; (68 Ohio St.) **96**; (69 Ohio St.) **100**.

**OREGON.** — (15) **3**; (16) **8**; (17) **11**; (18) **17**; (19) **20**; (20) **23**; (21) **28**; (22) **29**; (23) **37**; (24) **41**; (25) **42**; (26) **46**; (27) **50**; (28) **52**; (29) **54**; (30) **60**; (31) **65**; (32) **67**; (33) **72**; (34) **75**; (35) **76**; (36) **78**; (37) **82**; (38) **84**; (39) **87**; (40) **91**; (41) **93**; (42) **95**; (43) **99**.

PENNSYLVANIA. — (115, 116, 117 Pa. St.) **2**; (118, 119 Pa. St.) **4**; (120, 121 Pa. St.) **6**; (122 Pa. St.) **9**; (123, 124 Pa. St.) **10**; (125 Pa. St.) **11**; (126 Pa. St.) **12**; (127 Pa. St.) **14**; (128, 129 Pa. St.) **15**; (130, 131 Pa. St.) **17**; (132, 133, 134 Pa. St.) **19**; (135, 136 Pa. St.) **20**; (137, 138 Pa. St.) **21**; (139, 140, 141 Pa. St.) **23**; (142, 143 Pa. St.) **24**; (144, 145 Pa. St.) **27**; (146 Pa. St.) **28**; (147, 150 Pa. St.) **30**; (151 Pa. St.) **31**; (148 Pa. St.) **33**; (149, 152, 153 Pa. St.) **34**; (154, 155 Pa. St.) **35**; (156 Pa. St.) **36**; (157 Pa. St.) **37**; (158 Pa. St.) **38**; (159 Pa. St.) **39**; (160 Pa. St.) **40**; (161 Pa. St.) **41**; (162 Pa. St.) **42**; (163 Pa. St.) **43**; (164, 165 Pa. St.) **44**; (166 Pa. St.) **45**; (167 Pa. St.) **46**; (168, 169 Pa. St.) **47**; (170, 171 Pa. St.) **50**; (172, 173 Pa. St.) **51**; (174, 175 Pa. St.) **52**; (176 Pa. St.) **53**; (177 Pa. St.) **55**; (178 Pa. St.) **56**; (179, 180 Pa. St.) **57**; (181 Pa. St.) **59**; (182 Pa. St.) **61**; (183, 184 Pa. St.) **63**; (185 Pa. St.) **64**; (186 Pa. St.) **65**; (187 Pa. St.) **67**; (188 Pa. St.) **68**; (189 Pa. St.) **69**; (190 Pa. St.) **70**; (191 Pa. St.) **71**; (192 Pa. St.) **73**; (193 Pa. St.) **74**; (194 Pa. St.) **75**; (195 Pa. St.) **78**; (196 Pa. St.) **79**; (197 Pa. St.) **80**; (198 Pa. St.) **82**; (199 Pa. St.) **85**; (195, 200 Pa. St.) **86**; (201 Pa. St.) **88**; (202 Pa. St.) **90**; (203, 204 Pa. St.) **93**; (205 Pa. St.) **97**; (206 Pa. St.) **98**; (207 Pa. St.) **99**.

RHODE ISLAND. — (15) **2**; (16) **27**; (17) **33**; (18) **49**; (19) **61**; (20) **78**; (21) **79**; (22) **84**; (23) **91**; (24) **96**.

SOUTH CAROLINA. — (26) **4**; (27, 28, 29) **13**; (30) **14**; (31, 32) **17**; (33) **26**; (34) **27**; (35) **28**; (36) **31**; (37) **34**; (38) **37**; (39) **39**; (40) **42**; (41) **44**; (42) **46**; (43) **49**; (44) **51**; (45) **55**; (46) **57**; (47) **58**; (48) **59**; (49) **61**; (50) **62**; (51) **64**; (52) **63**; (53) **69**; (54) **71**; (55) **74**; (56, 57) **76**; (58) **79**; (59) **82**; (60, 61) **85**; (62) **89**; (63) **90**; (64) **92**; (65) **95**; (66) **97**; (67) **100**.

SOUTH DAKOTA. — (1) **33**; (2) **39**; (3) **44**; (4) **46**; (5) **49**; (6) **55**; (7) **58**; (8) **59**; (9) **62**; (10) **66**; (11) **74**; (12) **76**; (13) **79**; (14) **86**; (15) **91**.

TENNESSEE. — (85) **4**; (86) **6**; (87) **10**; (88) **17**; (89) **24**; (90) **25**; (91) **30**; (92) **36**; (93) **42**; (94) **45**; (95) **49**; (96) **54**; (97) **56**; (98) **60**; (99) **63**; (100) **66**; (101) **70**; (102) **73**; (103) **76**; (104) **78**; (105) **80**; (106) **82**; (107) **89**; (108) **91**; (109) **97**; (110) **100**.

TEXAS. — (68) **2**; (69, 24 Tex. App.) **5**; (70; 25, 26 Tex. App.) **8**; (71) **10**; (27 Tex. App.) **11**; (72) **13**; (73, 74) **15**; (75) **16**; (76) **18**; (77; 28 Tex. App.) **19**; (78) **22**; (79) **23**; (29 Tex. App.) **25**; (80, 81) **26**; (82) **27**; (30 Tex. App.) **28**; (83) **29**; (84) **31**; (85) **34**; (31 Tex. Cr. Rep.) **36**; (86; 32 Tex. Cr. Rep.) **40**; (87; 33 Tex. Cr. Rep.) **47**; (34 Tex. Cr. Rep.; 88) **53**; (89, 90) **59**; (35 Tex. Cr. Rep.) **60**; (36 Tex. Cr. Rep.) **61**; (91; 37 Tex. Cr. Rep.) **66**; (38 Tex. Cr. Rep.) **70**; (92) **71**; (39 Tex. Cr. Rep.) **73**; (40 Tex. Cr. Rep.) **76**; (93) **77**; (94) **86**; (95) **93**; (41, 42, 43 Tex. Cr. Rep.) **96**; (96) **97**; (44 Tex. Cr. Rep.) **100**.

UTAH. — (13) **57**; (14) **60**; (15) **62**; (16) **67**; (17) **70**; (18) **72**; (19) **75**; (20) **77**; (21) **81**; (22) **83**; (23) **90**; (24) **91**; (25) **95**; (26) **99**.

VERMONT. — (60) **6**; (61) **15**; (62) **22**; (63) **25**; (64) **33**; (65) **36**; (66) **44**; (67) **48**; (68) **54**; (69) **60**; (70) **67**; (71) **76**; (72) **82**; (73) **87**; (74) **93**; (75) **98**.

VIRGINIA. — (82) **3**; (83) **5**; (84) **10**; (85) **17**; (86) **19**; (87) **24**; (88) **29**; (89) **37**; (90) **44**; (91) **50**; (92) **53**; (93) **57**; (94, 95) **64**; (96) **70**; (97) **75**; (98) **81**; (99) **86**; (100) **93**; (101) **99**.



WASHINGTON. — (1) **22**; (2) **26**; (3) **28**; (4) **31**; (5) **34**; (6) **36**; (7) **38**; (8) **40**; (9) **43**; (10) **45**; (11) **48**; (12) **50**; (13) **52**; (14) **53**; (15) **55**; (16) **58**; (17) **61**; (18) **63**; (19) **67**; (20) **72**; (21) **75**; (22) **79**; (23) **83**; (24) **85**; (25) **87**; (26) **90**; (27) **91**; (28, 29) **92**; (30) **94**; (31) **96**; (32) **98**; (33) **92**.

WEST VIRGINIA. — (29) **6**; (30) **8**; (31) **13**; (32, 33) **25**; (34) **26**; (35) **29**; (36) **32**; (37) **38**; (38, 39) **45**; (40) **52**; (41) **56**; (42) **57**; (43) **64**; (44) **67**; (45) **72**; (46) **76**; (47) **81**; (48) **86**; (49) **87**; (50) **88**; (51) **90**; (52) **94**; (53) **97**.

WISCONSIN. — (69) **2**; (70, 71) **5**; (72) **7**; (73) **9**; (74, 75) **17**; (76, 77) **20**; (78) **23**; (79) **24**; (80) **27**; (81) **29**; (82) **33**; (83) **35**; (84) **36**; (85, 86) **39**; (87) **41**; (88) **43**; (89) **46**; (90) **48**; (91) **51**; (92) **53**; (93) **57**; (94) **59**; (95) **60**; (96, 97) **65**; (98, 99) **67**; (100) **69**; (101) **70**; (102) **72**; (103) **74**; (104, 105) **76**; (106) **80**; (107, 108) **81**; (109) **83**; (110) **84**; (111) **87**; (112) **88**; (113) **90**; (114) **91**; (115) **95**; (116) **96**; (117) **98**; (118) **99**; (119) **100**.

WYOMING. — (3) **31**; (4) **62**; (5) **63**; (6) **71**; (7) **75**; (8) **80**; (9) **87**; (10) **98**; (11) **100**.

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**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**ALABAMA.**

STATE v. SHUGART.

[138 Ala. 86, 35 South. 28.]

**LOTTERIES—Gift Enterprises.**—A lottery, or gift enterprise, is a scheme for the division or distribution of certain articles of property, to be determined by chance, among those who have taken shares in the scheme. The element of chance must enter into the scheme to render it unlawful. (p. 21.)

**LOTTERIES—Gift Enterprise—Trading Stamps.**—A person or corporation issuing trading stamps to merchants under contract with them that they are to issue such stamps to cash customers, who, when they have a designated number of stamps, can select and take one of a number of articles of property exhibited at the store of the person or corporation originally issuing such stamps, does not maintain or carry on an unlawful lottery or gift enterprise. (p. 21.)

Appeal from an order discharging one Shugart from custody on a writ of habeas corpus. Shugart was under arrest on an affidavit charging him with carrying on an unlawful lottery or gift enterprise. The bill of exceptions on appeal showed the following facts: "The Home Merchants' Trading Association, an incorporation under the laws of Kentucky, established a store in the city of Selma, with the defendant as its manager or solicitor, and entered into contracts with a large number of merchants in that city whereby the association agreed to print in their directory and check-book the name, business and address of each merchant contracting with it, and to deliver to the homes of the people of Selma twenty thousand copies of said book, soliciting their trade, and instructing and explaining how to use the book, to advertise, and in every way to use its best endeavor to promote the business interests of said merchants. Each merchant entering into such contract

agreed to receive from the association a sufficient amount of trading checks to supply all persons who might call for them; the check only to be given out as follows: one check to be given for each and every ten cents represented in a bona fide cash purchase from them, ten checks for one dollar, etc., the checks to be given when the purchases were paid for. The merchants agree to pay the association forty cents per hundred for all checks used and to make weekly settlements for each page of checks used or given out; the checks were gummed stamps similar to postage stamps, but not so large, and were bound in sheets in covers. The association furnished blank-books ruled in spaces wherein checks could be stuck, and these were the books referred to as the directory; this book gave minute directions how they were to be used, and the objects of the association and the merchants were particularly set forth. When a book containing five hundred checks or multiples of five hundred checks, or when that number of checks were presented at the storehouse of the association, the person presenting them could select any article from a large assortment of articles of value and use, such as household articles, bric-a-brac, furniture, etc. Many hundred of articles, useful and necessary in life, were kept in this store, and each article was plainly marked with its value in checks—the number of checks required to acquire it. None of these articles were marked in stamps above the market price of such article in money at any store in Selma—estimating the stamps or checks at four dollars per thousand. Many articles were marked at a less value than they could be purchased for in money in Selma, as the association through its central office in Louisville, Kentucky, made large purchases of goods and were thus able to purchase at the lowest figures. No lot or chance was in any way employed, nor was there any distribution of such articles. The system or character of the business was, that when a merchant member of the association sold as much as ten cents of merchandise, he gave the purchaser who paid cash therefor one check for each ten cents' worth so purchased, and when the holder of such checks to the number of five hundred or multiples of that number, presented such checks at the store of the association in Selma, he could select any article in the store he desired at the amount marked thereon in checks. It was not required that the checks be pasted in the book, as the book was provided for the convenience and safety of keeping the checks. The customer paid nothing for the checks; if he paid cash for the



goods and asked for the checks they were given to him. No merchant who had not entered into the contract with the association was permitted to purchase or use the checks. There were other merchants in Selma than those contracted with, engaged in each line of business, respectively, and there were many merchants in the same line of business who had contracted with and were merchants of the association. It reasonably appears from the evidence that the merchants who contracted with this association were induced to do so with the expectation that it would increase their cash sales of goods, and secure for them new customers, and increase their business. For each cash purchase to the amount of ten cents they gave the purchaser, if he requested it, a trading check which cost the merchant four dollars for one thousand checks; and the purchaser, if he preserved the checks until he accumulated as many as five hundred checks, or a multiple of five hundred, could go to the store of the association and select any article therein of the value of five hundred checks, or of greater value, if he had the checks to pay for such selected article. The association sold its goods in this way. Every purchaser who purchased to the amount of ten cents' worth of goods was entitled to the discount, and this discount was the same to every cash purchaser."

M. Wilson, attorney general, W. W. Quarles and W. R. Shafer, for the state.

J. C. Compton and Mallory & Mallory, for the appellee.

<sup>91</sup> DOWDELL, J. The present appeal is prosecuted from an order of the judge of the city court of Selma discharging the appellee on a writ of habeas corpus from custody. The petitioner, appellee here, was arrested on affidavit and warrant before a justice of the peace, and by the justice committed to jail. The offense described in the affidavit was that of "being concerned in setting up or carrying on a lottery, or a device of the like kind, or a gift enterprise, or a scheme in the nature of a lottery or gift enterprise." The evidence is without conflict, and the same will be set out by the reporter in the report of the case, and the only question is whether the business engaged in, or carried on, by the defendant, falls within the definition of a lottery, or a gift enterprise, or device of like kind, such as is denounced by section 4808, of the Criminal Code.

In the case of *Yellowstone Kit v. State*, 88 Ala. 199, 16 Am. St. Rep. 38, 7 South. 338, it was said by this court,

speaking through Somerville, J., after giving definitions of lottery from different lexicographers, as well as from adjudicated cases: "It may be safely asserted as the result of the adjudged cases, that the species of lottery, the carrying on of which is intended to be prohibited as criminal by the various laws of this country, embraces only schemes in which a <sup>92</sup> valuable consideration of some kind is paid, directly or indirectly, for the chance to draw a prize."

In *Loiseau v. State*, 114 Ala. 38, 62 Am. St. Rep. 84, 22 South. 138, it was said by this court, speaking through Coleman, J.: "To be a criminal lottery, there must be a consideration, and when small amounts are hazarded to gain large amounts, and the result of winning to be determined by the use of a contrivance of chance, in which neither choice nor skill can exert any effect, it is gambling by lot, or a prohibited lottery." It was also said in this case that "lot has been correctly defined to be 'a contrivance to determine a question by chance, or without the action of man's choice or will.'"

From these authorities, as well as from other adjudications, we think it may be safely said there can be no lottery in the absence of the element of chance.

What constitutes a "gift enterprise" such as is denounced by the statute, so far as we are advised, has never been decided by this court, and counsel say they are unable to cite any such case by this court. The statute does not in terms define it. The thing denounced, "gift enterprise," is used in the statute in connection with "lottery," which is likewise denounced and prohibited. The term "gift enterprise," therefore, must be construed in connection with the context, and the evil sought to be prohibited. The statute is manifestly directed against the vice of gaming. Without the aid of a statutory definition of a "gift enterprise," such as the statute intended to prohibit, we are left to determine its meaning by the context of the statute in which it is employed, and the definitions given by lexicographers, as well as by decisions of other courts. In *Lohman v. State*, 81 Ind. 17, the court took judicial notice that the phrase "gift enterprise" as used in the statute of the state—Indiana—against lotteries, meant substantially "a scheme for the division or distribution of certain articles of property, to be determined by chance, amongst those who had taken shares in the scheme."

In *Bouvier's Law Dictionary*, Rawle's Revision, volume 1, page 884, the following definition is given: "Gift enterprise:

A scheme for the division or distribution of certain articles of property, to be determined by chance, amongst <sup>93</sup> those who have taken shares in the scheme; the phrase has attained such a notoriety as to justify courts in taking judicial notice of what is meant and understood": Citing *Lohman v. State*, 81 Ind. 17, and *Meserve v. Andrews*, 106 Mass. 422. The same definition is given in *Black's Law Dictionary*, 539, as that above.

In *Anderson's Law Dictionary*, page 488, the following definition is given: "A gift enterprise, in common parlance, is a scheme for the division or distribution of certain articles of property, to be determined by chance, among those who have taken shares in the scheme."

Thus it will be seen that to constitute a "gift enterprise," such as is denounced by the statute, the element of chance must enter into the scheme. The business or transaction engaged in, or carried on, by the appellee is fully set forth in the bill of exceptions, and wholly fails to disclose any element of chance entering into its conduct. Moreover, the bill of exceptions expressly recites that "no lot or chance was in anywise employed nor was there any distribution of such articles." The scheme, if such it may be termed, was only a mode of advertising by those merchants who entered into it. The articles of property given away by the company, of which appellee was the manager, was not by lot or chance, nor by way of distribution of prizes among share or ticket-holders in any chance scheme. We are quite clear that there was nothing in the transaction offensive to the statute against "lotteries" and "gift enterprises."

The case of *Lansburgh v. District of Columbia*, 11 App. Cas. (D. C.) 512, relied on by appellant as an authority in this case, was based on a statute which in terms defined what should constitute a "gift enterprise" within the meaning of the statute. Our statute does not undertake to do this. And, as stated above, our statute is plainly intended to suppress the evil of gaming—and the "gift enterprise" denounced, like the lottery, is such a scheme, device, or contrivance into which the element of chance enters in the determination of results. The *Lansburgh* case, *supra*, can hardly be said to be in point since the statute in that case defined the "gift enterprise" prohibited. Besides, the following cases are opposed to the views expressed in that case, viz.: *Commonwealth v. Sisson*, 178 Mass. 578, 60 N. E. 385; *People* <sup>94</sup> *ex rel. Madden v. Dycker*, 72 App. Div. 308, 76 N. Y. Supp. 111; *State v. Dalton*, 22 R. I. 77, 84 Am.

St. Rep. 818, 46 Atl. 234; *Ex parte McKenna*, 126 Cal. 429, 58 Pac. 916.

We concur in the decision of the judge of the city court, that under the facts no legal cause existed for detaining the defendant, and he was properly discharged from custody.

As to whether the affidavit charged any offense at all, in affirming that such offense "was in the opinion of the complainant committed," etc., we merely call attention to the case of *Monroe v. State*, 137 Ala. 88, 34 South. 382. No objection, however, was made to the affidavit, and the conclusion reached by us on the facts in the case renders it unnecessary to express any opinion on the question, had an objection been raised.

Affirmed.

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*What Constitutes a Lottery* is the subject of a note to *Yellowstone Kit v. State*, 16 Am. St. Rep. 42-48. The three essential ingredients of a lottery, it is said, are consideration, prize, and chance: *Equitable Loan etc. Co. v. Waring*, 117 Ga. 599, 97 Am. St. Rep. 177, 44 S. E. 320. As to whether trading stamps transactions amount to gift enterprises or lotteries, see *State v. Hawkins*, 95 Md. 133, 93 Am. St. Rep. 328, 51 Atl. 850; *State v. Dalton*, 22 R. I. 77, 84 Am. St. Rep. 818, 46 Atl. 234.

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## VIBERG v. STATE.

[138 Ala. 100, 35 South. 53.]

**INDICTMENT—Sufficiency—Averment of Surname.**—An indictment averring the surname of the defendant under an alias is sufficient on demurrer. (p. 23.)

**EVIDENCE—Res Gestae.**—What was said between a defendant and the person from whom money is alleged to have been stolen, from the time of their meeting, up to the time of the commission of the larceny, is admissible as part of the *res gestae*. (p. 23.)

**LARCENY—Evidence.**—If it is shown that the defendant charged with larceny and the person from whom the money is alleged to have been stolen were strangers, and that immediately after the taking of the money the defendant fled, the prosecution may show by the person from whom the money is alleged to have been stolen that when he next saw the defendant he was under a circus tent and under arrest. Such evidence tends to identify the defendant and has some bearing on the question of his flight. (p. 23.)

**EVIDENCE—Witnesses.**—The occupation, residence, and whereabouts of a witness at a certain time may always be shown by his own testimony. (p. 23.)

**LARCENY—Former Conviction as Evidence.**—The record of a former conviction for larceny is admissible against a person charged with larceny, although such record shows a pending appeal from such former conviction. (p. 25.)

**LARCENY—Indictment.**—Ownership of Money stolen is properly alleged to be in one who holds it as a bailee. (p. 25.)



T. Richardson, for the appellant.

M. Wilson, attorney general, for the state.

<sup>104</sup> TYSON, J. In *Haley v. State*, 63 Ala. 89, it was held that the averment of the name of the defendant under an alias dictus was proper. In that case, the Christian name of the defendant was averred under an alias, while in this case the surname of the defendant is so averred. If proper in the one, it is necessarily proper in the other. It was unnecessary to repeat the Christian name, before the surname Viberg. To have done so would not have made the averment plainer. It would simply have been a mere repetition. The demurrer to the indictment was properly overruled.

What was said between defendant and Thomas, from whom it is alleged the money was stolen, from the time of their meeting at the bank until they reached the place where the larceny was committed, being part of the transaction which culminated in the commission of the offense, was clearly admissible as part of the *res gestae*: *Churchwell v. State*, 117 Ala. 124, 23 South. 72.

The evidence in behalf of the state tended to prove that after the defendant acquired the possession of the money and gave it to the negro, whom the jury was authorized to find was his accomplice, he ran rapidly away <sup>105</sup> in one direction, while the negro ran in an opposite one. It was shown that defendant and Thomas were strangers. It was, therefore, entirely competent for the solicitor to show by Thomas that when he next saw defendant, after the larceny, he was under the circus tent and under arrest. This evidence was competent for the purpose of identifying defendant and also had some bearing on the question of flight: *Bell v. State*, 115 Ala. 25, 38, 39, 22 South. 526; *Koch v. State*, 115 Ala. 99, 22 South. 471.

On cross-examination of defendant as a witness, he was asked, "Were you not connected with the circus that was here that day?" No objection was interposed to this question until after defendant had answered, "Yes." But had it been timely interposed, we apprehend there would have been no merit in the objection. For it is always competent to show by a witness his occupation and residence.

Nor can the objection to the question propounded to defendant, as a witness, on cross-examination: "Have you ever been in Montgomery before?" be of any avail. If error was committed



in allowing the question to be asked, which we do not concede, we cannot conceive how it could possibly prejudice the defendant. For the same reason, the question asked defendant if he resided in Alabama must be held to have been innocuous.

The prosecution was allowed to introduce in evidence, against the objection of defendant, the record of his former conviction of petit larceny. The record showed that he had taken an appeal, in that case, to this court, and we may assume, if that were important, though not affirmatively shown by the record before us, that the execution of that judgment had been suspended as required by section 4319 of the Code. Section 1795 of the Code provides that: "No objection must be allowed to the competency of a witness because of his conviction for any crime, except perjury or subornation of perjury; but if he has been convicted of other infamous crime, the objection goes to his credibility." It cannot be doubted that a judgment of conviction is necessary, before the provisions of the statute can be availed of: *Clark's Manual of Criminal Law*, sec. 2437; *Powell v. State*, 72 Ala. 194. Nor can it be seriously doubted that petit larceny <sup>106</sup> is an infamous crime and that a conviction for that offense goes to the credibility of the person convicted as witness: *Sylvester v. State*, 71 Ala. 17; *Smith v. State*, 129 Ala. 89, 87 Am. St. Rep. 47, 29 South. 699. This seems to be conceded, but it is insisted that the appeal to this court and the suspension of the judgment operated to annul the judgment of conviction. Clearly, if this is true, then the judgment of conviction was improperly admitted in evidence. On the other hand, if it is not true, but the execution thereof was simply suspended pending the appeal, the ruling of the trial court was proper. At common law the judgment of conviction would have disqualified the witness: *Sylvester v. State*, 71 Ala. 17. This disqualification or disability can be removed in two ways: 1. By a reversal of the judgment; and 2. By a pardon. Until one of these modes had been successfully resorted to, the convicted person continued to be infamous and the disability created by the judgment of conviction was still upon him: 1 *Greenleaf on Evidence*, sec. 377, and note. The point under consideration was directly presented and decided by the supreme court of Missouri in the case of *Ritter v. Democratic Press Co.*, 68 Mo. 458. In that case the witness had been convicted of obtaining money under false pretenses, but had appealed his case to the supreme court and obtained a supersedeas. Pending the appeal and a suspension of the judgment, he was

offered as a witness, but was excluded. The court, after quoting the statute disqualifying the witness, said: "The only question is whether Saunders, sentenced as he has been to the penitentiary, though he had appealed to this court, where the judgment was reversed, was, at the time he was offered as a witness, a competent one. We think the circuit court properly excluded him. He was convicted of a crime which disqualified him as a witness, and the subsequent reversal of that judgment by this court could not be anticipated by the circuit court." Although the court does not in express terms hold that the judgment of conviction was not annulled by Saunders' appeal, yet, it is clear that this is the principle underlying the decision. Under our statutory system, a mere appeal does not, in any case, operate to suspend a final judgment or decree. In civil cases, in order to <sup>107</sup> prevent the enforcement of the judgment or decree, where an appeal is taken therefrom, a supersedeas is necessary. And doubtless, if it were not for the provisions in the statutes making it mandatory on the court in criminal cases, when defendant's desire to appeal is made known, to suspend the execution of the judgment of conviction pending the appeal, the judgment would be enforced notwithstanding an appeal was taken: Code, secs. 4318, 4319; *White v. State*, 134 Ala. 197, 32 South. 320. These statutes go no further than indicated above. They simply provide that, upon its being made known to the court that the defendant desires to take an appeal, "judgment must be rendered on the conviction, but the execution thereof must be suspended pending the appeal." They do not in anywise interfere with the finality of the judgment or its validity. Nor do they make its finality dependent upon an affirmance or a reversal by the court. Their effect is to prevent the enforcement or execution of the judgment while the appeal is pending, and this clearly marks the limit of their operation. Our conclusion is, that the judgment of conviction remained in full force and effect in so far as it was an adjudication of the guilt of the defendant for the purpose for which it was offered in evidence.

The evidence showed that the money stolen was proceeds of cattle which Thomas, in whom the ownership of the money is alleged, had been intrusted to sell for his father. This constituted him a bailee of the money and the ownership of it was properly laid in him: *Fowler v. State*, 100 Ala. 96, 14 South. 860.

The two written charges requested by defendant were properly refused.

There is no error in the record, and the judgment must be affirmed.

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*The Crime of Larceny* is discussed in the monographic notes to *People v. Miller*, 88 Am. St. Rep. 599-608; *State v. Homes*, 57 Am. Dec. 271-286.

*The Credibility of a Witness* may be impeached by proof of his conviction of larceny: See the monographic note to *Lodge v. State*, 82 Am. St. Rep. 35, on evidence admissible as bearing upon the credibility or bias of witnesses.

*What Evidence is Admissible as Part of the Res Gestae* is considered in the monographic note to *People v. Vernon*, 95 Am. Dec. 51-76. No fixed time or distance from the main occurrence can be established as a rule to determine what shall be part of the res gestae: *Keefer v. Pacific Mut. Life Ins. Co.*, 201 Pa. St. 448, 88 Am. St. Rep. 822, 51 Atl. 366. Time is not necessarily a controlling element or principle in the matter: *Coffin v. Bradbury*, 3 Idaho, 770, 95 Am. St. Rep. 37, 35 Pac. 715; *Honeycutt v. State*, 42 Tex. Cr. 129, 96 Am. St. Rep. 797, 57 S. W. 806. Evidence of circumstances leading up to the main fact are admissible: *Hannabalsen v. Sessions*, 116 Iowa, 457, 93 Am. St. Rep. 250, 90 N. W. 93.

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## STATE v. SMITH.

[138 Ala. 111, 35 South. 42.]

**HABEAS CORPUS—Discharge After Commitment.**—If the statute forbids a conviction for felony upon the uncorroborated testimony of an accomplice, such evidence alone is not sufficient to justify a magistrate in committing a prisoner for trial for a felony, and he is entitled to his discharge upon habeas corpus. (p. 29.)

M. Wilson, attorney general, for the state.

J. F. Sanders, for the appellee.

**112** McCLELLAN, C. J. Some doubt was expressed or implied in *Ex parte West*, 100 Ala. 65, 14 South. 901, of the soundness of the propositions announced in *Ex parte Champion*, 52 Ala. 311, to the effect that when a prisoner committed on preliminary examination applies for his discharge on habeas corpus, he "ought not to be discharged without all the witnesses that had been previously examined against him, if still living and attainable, being produced and examined," and that "in the absence of any material witness who previously testified against <sup>113</sup> him, the question for consideration should re-

late to the amount of bail, if the case be bailable." What was thus said in Champion's case and also what was said in West's case in criticism thereof seem to have been dicta. We do not propose to declare here which of these dicta is sound, for, being unnecessary to the decision of the case in hand, our declaration would be dictum also; but we refer to those cases here for the purpose of convenience in future discussions of the question when its determination may become necessary.

In the present case we hold that the bill of exceptions shows that all the testimony adduced before the committing magistrate was before the probate judge on the trial had in response to the petition for habeas corpus and discharge. It was shown that only one witness was examined by the magistrate, that that witness was present at the trial on habeas corpus before the probate judge so that he might have been examined by the state if its prosecuting officer had desired to examine him, and that the petitioner admitted not only that he would testify on this trial what he had deposed to on the preliminary hearing, stating what his testimony on that hearing was, but also that that testimony would be sufficient to show probable cause to believe the petitioner guilty of the offense charged and hence to require a denial of his prayer to be discharged, but for the fact that the witness, as shown by his testimony as adduced on the former trial and as brought before the court in the manner we have indicated on this trial, was an accomplice of the petitioner if the latter was at all implicated in the offense. In our opinion, the whole of the evidence on preliminary hearing was in this manner laid before the probate judge; and we shall consider the case here as if that witness had been sworn and examined, saving the possible complication that might have resulted from the petitioner's having introduced him.

The above conclusion leaves but one question in the case. That is whether the uncorroborated testimony of an accomplice may be sufficient to show probable cause to believe that a felony has been committed and that the party under inquiry is guilty thereof. An accomplice <sup>114</sup> was a competent witness at common law, when in the discretion of the court or prosecuting officer he was admitted as a witness; but his testimony was regarded as issuing from a polluted source, and it was the recognized practice of the courts to charge juries that it should be received with caution and closely and doubtingly examined, and to advise them that a conviction should not be had upon it unless it was corroborated in some material particular to the



connection of the defendant with the act charged: 1 Am. & Eng. Ency. of Law, 393, 397-400.

Many years ago the foregoing principles of the common law were accentuated and crystallized into a statute in this state which positively forbade a conviction in any case, felony or misdemeanor, on the uncorroborated testimony of an accomplice. By an act of 1863 it was provided that said statute should "not extend to trials on indictments for misdemeanor," and thereafter the original statute took on the form it now has as embodied in section 5300 of the Code, viz.: "A conviction of felony cannot be had on the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the commission of the offense; and such corroborative evidence, if it merely shows the commission of the offense, or the circumstances thereof, is not sufficient." It is to be noted that this statute in terms operates only to prevent convictions of felony on the testimony of an accomplice. It does not in terms apply to preliminary examinations nor to trials on habeas corpus nor to the exclusion of a finding of probable cause for believing that an offense has been committed and that the accused is guilty thereof, on such examination or trial. Yet, in our opinion, its effect is to stamp a policy upon the administration of the law in this connection which cannot be carried out unless it be given operation upon cases where the inquiry is probable cause *vel non*, as well as where the inquiry is as to absolute guilt. The statute infects the testimony of accomplices with such absolute infirmity as that not only may the citizen be not convicted upon it, but as also that he should not be deprived of his liberty <sup>115</sup> in anticipation of a final trial upon it. A consideration of practicabilities in the administration of the criminal law, so to speak, would seem to enforce the same conclusion. Why should the citizen be held to the grand jury, or indicted by the grand jury on testimony upon which no petit jury could possibly convict him? What good end could be served by such a proceeding? Can there be said to be even probable cause shown in any case by testimony which the law expressly and positively declares to be insufficient to support a conviction? We think not. The whole theory of holding accused persons to the grand jury is that the evidence before the examining magistrate or the judge on habeas corpus is sufficient to sustain a finding of guilt by a petit jury when he shall be indicted and brought to the bar of the court. When there is not such evidence, it is not the contemplation of the law that



the accused shall be held. To hold him would be a vain and useless thing, involving his incarceration not as a punishment for crime and not really to the end that he should be tried for a crime charged, of his probable guilt of which there is evidence to prove, but at the best upon a mere speculation that evidence may be found to corroborate that of the accomplice. The evidence before the probate judge in this case tending to show the guilt of the petitioner was that of the accomplice alone and uncorroborated. The judge correctly discharged the petitioner, and his order to that effect is affirmed.

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**RIGHT OF PRISONER TO DISCHARGE ON HABEAS CORPUS  
AFTER COMMITMENT AND BEFORE TRIAL.\***

- I. Attack on Jurisdiction.
- II. Inquiry into Sufficiency of Evidence.
  - a. Practice in National Courts.
  - b. Practice in State Courts.
- III. Inquiry into Want of Probable Cause.
- IV. Right to Speedy Trial.
- V. Defective Commitment.
- VI. Defective Indictment.
- VII. Extradition.
  - a. Jurisdiction.
  - b. Sufficiency of Evidence.
  - c. Identity of Prisoner.
  - d. Guilt of Accused.

**I. Attack on Jurisdiction.**

After a prisoner has been committed by a magistrate to answer for a crime, he is entitled to test the jurisdiction of such magistrate to commit him, by a writ of habeas corpus; but such writ cannot be used as a mere substitute for a writ of error or review and can be issued only to relieve from imprisonment under a commitment by a court, when such court has acted without jurisdiction or has exceeded its jurisdiction, and its order is for that reason void: *In re Boyd*, 49 Fed. 48; *Ex parte Dela*, 25 Nev. 346, 83 Am. St. Rep. 603, 60 Pac. 217. If a prisoner is held under a legal commitment, the writ of habeas corpus raises only the question of the jurisdiction of the court to make the order of commitment: *In re Eldred*, 46 Wis. 530, 1 N. W. 175. The writ of habeas corpus does not extend beyond the question of jurisdiction, and the validity of the process of commitment upon its face: *Ex parte Long*, 114 Cal. 159, 45 Pac. 1057. The proceedings on habeas corpus after commitment and before indictment are limited to an inquiry whether the magistrate had jurisdiction to commit, the sufficiency of the proceedings, and whether there is any testimony

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\*REFERENCE TO MONOGRAPHIC NOTE.

When prisoner may be released on habeas corpus after judgment and sentence: 87 Am. St. Rep. 167-203.

tending to show probable cause: *In re Chamberlin*, 62 Kan. 866, 61 Pac. 805; *Ex parte Rickelt*, 61 Fed. 203. Where there can be no inquiry whether the charge upon which the prisoner is committed constitutes an offense against the statute until the meeting of the grand jury, and no relief from imprisonment meantime, even if the charge is unfounded, a writ of habeas corpus may issue: *In re Barber*, 75 Fed. 980. If the commitment is clearly illegal, objection to it and to the jurisdiction of the court may be taken by habeas corpus: *McClaghry v. Deming*, 186 U. S. 49, 22 Sup. Ct. Rep. 786; *People v. Barrett*, 203 Ill. 99, 96 Am. St. Rep. 296, 67 N. E. 742. If the evidence certified by the committing magistrate fails to show the venue, the commitment is fatally defective and his jurisdiction to make such order may be attacked by habeas corpus: *Ex parte Brenner*, 3 Wyo. 412, 26 Pac. 993. In the absence of any evidence whatever that a crime has been committed, or that the prisoner was guilty thereof, the magistrate is without jurisdiction to issue an order of commitment, and the prisoner is entitled to the writ of habeas corpus to ascertain such facts and to obtain his discharge: *People v. Wells*, 57 App. Div. (N. Y.) 140, 68 N. Y. Supp. 59; *Matter of Henry*, 13 Misc. Rep. (N. Y.) 734, 35 N. Y. Supp. 210. On the hearing of a writ of habeas corpus to test the jurisdiction of the committing magistrate, the prisoner can have no inquiry made as to his guilt or innocence of the crime charged: *Farmer v. Lewis*, 92 Ind. 444, 47 Am. Rep. 153.

## II. Inquiry into Sufficiency of Evidence.

a. *Practice in National Courts.*—The practice in the national courts on application for a writ of habeas corpus after commitment and before trial seems to be settled that if there is evidence tending to show that a person who has been committed by a United States commissioner for an offense against the laws of the United States is guilty, the sufficiency of such evidence is not open to review on a proceeding by habeas corpus, and while the relator is held according to the judgment of such commissioner upon any competent evidence, he is not held in custody contrary to law: *In re Byron*, 18 Fed. 722; *In re Barber*, 74 Fed. 980. The court will not inquire into the merits of the decision of the commissioner, but only as to whether an offense is charged and whether the commissioner has power to inquire into and adjudge the complaint: *In re Morris*, 40 Fed. 824.

Habeas corpus will not lie to determine the simple question of law, whether the facts proved before the commissioner on preliminary hearing are sufficient to constitute the crime for which the prisoner has been committed: *Ex parte Rickelt*, 61 Fed. 203. "The writ of habeas corpus cannot be used as a writ of error to renew the action of the United States commissioner within his jurisdiction. If it were a question whether the crime charged had been committed in the district to which the removal was about to be made—that is, whether the crime charged was within the jurisdiction of the courts of that district—this would be a proper proceeding to test it. If it were a question whether the act under which the prosecution is being con-

ducted was constitutional, that, too, might be tested by habeas corpus proceedings. Not so, however, the simple question whether the facts alleged and proven are in law sufficient to constitute the crime described in the statute. That is a question for the consideration of the regular tribunals before whom it may be raised in the due procedure of indictment and trial. The writ of habeas corpus is a collateral proceeding, and its scope is limited, as above stated. This conclusion is fully supported by the decision of the supreme court of the United States in *Horner v. United States*, 143 U. S. 570, 12 Sup. Ct. Rep. 522': *Ex parte Rickelt*, 61 Fed. 205. In *Re Martin*, 5 Blatchf. 303, Fed. Cas. No. 9151, and in *Re Campen*, Fed. Cas. No. 16,835, it was held however, that the court on habeas corpus is not concluded by the finding of the committing magistrate, but may go behind his order of commitment, and, by a certiorari, look into, and determine, the sufficiency of the evidence taken before him, and upon the hearing of the writ, after an examination of all of the evidence taken before the magistrate, do what in its judgment ought to be done in the premises, and either remand or discharge the prisoner.

**b. Practice in State Courts.**—Although there is great conflict in the authorities, undoubtedly the better rule in the state courts is, that if one has been committed to jail for trial by magistrate on any evidence tending to show that he is guilty of the offense charged, he is not entitled to his release on habeas corpus, on the ground that the evidence is not sufficient to sustain the charge against him. The proceedings before indictment being generally limited to the inquiry as to whether the magistrate had jurisdiction to commit and the sufficiency of the proceedings, but not whether the testimony adduced was sufficient or not: In *re Chamberline*, 62 Kan. 866, 61 Pac. 805. "The court or judge is not, in such cases, to sit as a court of review, to determine the sufficiency of the evidence as respects the guilt or innocence of the accused, but to inquire whether the proceedings were without jurisdiction, or the determination of the magistrate unsupported by evidence. His judgment in the premises, upon the evidence, must stand if there is any evidence reasonably tending to support it": *State v. Hayden*, 35 Minn. 283, 28 N. W. 659. The same court lays down a little broader rule in *Re Snell*, 31 Minn. 110, 16 N. W. 692, where it holds that the evidence upon which a prisoner is bound over and committed by a justice of the peace may be examined by the court before which the prisoner is brought on habeas corpus for the purpose of determining whether it fairly and reasonably tends to show the commission of the offense charged, and whether it tends fairly and reasonably to make out probable cause for charging the prisoner with its commission. The judgment of the committing magistrate should not be rejudged by an inquiry into the weight of the evidence further than is necessary to determine these two propositions.

The supreme court will, in the exercise of its original jurisdiction in matters of habeas corpus, decline to review the evidence or the

sufficiency of the testimony, taken before a district judge on a preliminary examination. To thus review his commitment, shown to be regular and legal in form, would be in reality a sort of collateral appeal, not granted by law or sanctioned by the constitution: *State v. Levy*, 38 La. Ann. 918; *State v. Scott*, 43 La. Ann. 857, 9 South. 501. On a writ of certiorari to review the action of a court in refusing to discharge a prisoner on habeas corpus, if it appears that he is held under a regular commitment by a magistrate, having jurisdiction of the case, the sufficiency of the evidence upon which the commitment was made will not be inquired into: *Ex parte Perdue*, 58 Ark. 285, 24 S. W. 423. If the examining court or magistrate has jurisdiction, and it is clearly shown by the record that an offense has been committed and that the accused probably committed it, the supreme court will not, on a writ of habeas corpus, weigh such evidence to see if it is sufficient: *In re Balcom*, 12 Neb. 316, 11 N. W. 312. On habeas corpus to avoid a commitment the court should never consider the weight or credibility of the evidence under which such commitment is made: *People v. Dunlap*, 32 Misc. Rep. (N. Y.), 390, 66 N. Y. Supp. 161. The writ of habeas corpus is not intended as a writ of review to correct the errors of inferior tribunals, and if the court finds that the committing magistrate had jurisdiction and assumed to hear evidence which he adjudged sufficient to justify the commitment, the court will not undertake to review his adjudication upon that question, nor undertake to say whether he erred in adjudging the evidence to be sufficient. If the court finds that the warrant under which the relator is imprisoned is prima facie sufficient to justify the imprisonment, and if, on looking beyond the warrant it is satisfied from the record that there was at least colorable proof before the court on which he might exercise his judgment in awarding the commitment, the prisoner will not be discharged; and this is as far as the court will go upon habeas corpus: *In re Prime*, 1 Barb. 340; *Bennae v. People*, 4 Barb. 31.

On habeas corpus the court will not examine the proceedings of the committing magistrate for the purpose of determining the sufficiency of the evidence to justify the commitment: *In re Powers*, 25 Vt. 261. If a prisoner is held under a commitment regular and valid on its face, the writ of habeas corpus raises only the question of jurisdiction of the court to issue such process: *In re Powers*, 25 Vt. 261; *In re Eldred*, 46 Wis. 530, 1 N. W. 175. In some states, however, a contrary rule prevails. Thus in Alabama, a prisoner, not under indictment, committed by a justice of the peace after a preliminary examination may apply to a higher court for a writ of habeas corpus, and it is the duty of that court and he may be compelled to hear and pass upon the evidence touching the prisoner's guilt or innocence, to judge of its sufficiency, and to discharge the prisoner if it appears that no offense has been committed, or that there is not probable cause for charging the prisoner with it: *Ex parte Mahone*, 30 Ala. 49, 68 Am. Dec. 111; *Ex parte Champion*, 52



Ala. 311; *Ex parte Charleston*, 107 Ala. 688, 18 South. 224. Under the earlier statutes of New York, proceedings by habeas corpus were in the nature of an appeal from the decision of the committing magistrate, and the whole question as to the guilt or innocence of the accused was open for examination on the return of the writ, and all the evidence adduced before the magistrate was subject to be weighed by the court to which the writ was returnable: *People v. Martin*, 1 Park. Cr. Rep. 187; *People v. Tompkins*, 2 Edm. Sel. Cas. 191. And additional proof might be received to enable it to decide upon the legality of the detention: *People v. Richardson*, 4 Park Cr. Rep. 656.

In an early case, it was held that the court, on a writ of habeas corpus, might re-examine the causes of commitment, and remand or discharge the prisoner, according to its belief of his innocence or guilt, based upon the weight of the evidence adduced: *State v. Doty*, 1 Walk. (Miss.) 230. In a late case it was held that if a committing magistrate acting upon evidence, the weight of which, looking at it from the most favorable standpoint, does not reasonably justify the commitment, the error is jurisdictional, strictly speaking, and remediable by the writ of habeas corpus, within the rule that such errors only can be reached by such writ: *State v. Huegin*, 110 Wis. 191, 85 N. W. 1046.

### III. Inquiry into Want of Probable Cause.

While the court will not generally, on a writ of habeas corpus, go behind the commitment issued by the examining magistrate and weigh the sufficiency of the evidence adduced to establish the guilt of the accused, yet the court may examine the evidence produced before the committing magistrate for the purpose of ascertaining if it shows probable cause for believing that a crime has been committed, and whether the warrant of commitment states a sufficient probable cause to believe that the person charged has committed the offense stated. If the evidence and the warrant fail to show this the prisoner must be discharged: *United States v. Johns*, 4 Dall. 382, Fed. Cas. No. 15,481; *United States v. Bates*, Fed. Cas. No. 14,544; *Horner v. United States*, 143 U. S. 570, 12 Sup. Ct. Rep. 522. If the evidence shows probable cause to believe that the accused is guilty of the crime charged, he must be remanded: *Ex parte King*, 102 Ala. 182, 15 South. 524. Upon a return to a writ of habeas corpus, it is proper for the court to look into the evidence taken before the committing magistrate to ascertain whether there is probable cause to suppose that a felony has been committed by the prisoner: *People v. Smith*, 1 Cal. 9; *Ex parte Sternes*, 82 Cal. 245, 23 Pac. 38. But if there is some evidence, other than extrajudicial admissions of the party charged with the crime, tending to show that an offense has been committed, he will not be released on the ground of want of probable cause for the commitment: *Ex parte Becker*, 86 Cal. 402, 25 Pac. 9. "I am of opinion that if, upon review, it appear that there



was any evidence before the magistrate that the crime was committed by the defendant, jurisdiction is established," and the function of the court is not to review the preliminary examination in order to decide the question anew, or to supplant the examination of the magistrate by its own examination, but to ascertain if there was probable cause for committing the prisoner: Per Mr. Justice Jenks, in *People v. Wells*, 57 App. Div. (N. Y.) 151, 68 N. Y. Supp. 59. The court issuing the writ, in the petition for which it is alleged that the prisoner is restrained of his liberty without probable cause, may, even though the process of commitment is legal and perfect, examine the evidence to ascertain if the allegation of the petition is true, and discharge, let to bail, or recommit the prisoner, as may be just and legal: In re *Snyder*, 17 Kan. 542. Upon application by habeas corpus for the discharge of a defendant from arrest the court may determine from an examination of the testimony taken before the committing magistrate whether or not there is probable cause for holding the prisoner, and if it appears therefrom that there is not such probable cause, it is the duty of the court to discharge him: *People v. Stanley*, 18 How. Pr. 179; *People v. Tomkins*, 2 Edm. Sel. Cas. 191; *Ex parte Taylor*, 5 Cow. 39.

#### IV. Right to Speedy Trial.

If a person who has been committed to answer upon a criminal charge is not indicted by the grand jury at the term of court next after his commitment, he is entitled to be discharged on habeas corpus, unless good cause is shown for his further detention, and the mere recommendation of the grand jury that such person be detained to answer before another grand jury is not of itself good cause for his detention: *Ex parte Bull*, 42 Cal. 196. But if one who has been committed to jail by a justice of the peace on a criminal charge seeks to be discharged from custody by a habeas corpus proceeding, on the ground that, since his commitment, a regular term of court having jurisdiction of his case has been held and no indictment has been found against him, he must show in addition to this that the charge against him was fully investigated by the grand jury: *Ex parte Jefferson*, 62 Miss. 223.

A magistrate committing a prisoner to jail to await trial by a higher court for a crime of which such magistrate has jurisdiction to finally try may decline to hold such trial, and the prisoner is not entitled to a writ of habeas corpus to secure a remand of his case to such magistrate for a final trial, on the ground that he is entitled to a speedy trial for the crime charged in the commitment: *Ex parte Smith*, 79 Miss. 373, 30 South. 710.

#### V. Defective Commitment.

If the examining court or magistrate has jurisdiction of the person and of the crime charged, the fact that the commitment issued by such court or magistrate is informal, defective or erroneous is

not a ground which entitles the prisoner to his discharge upon habeas corpus. This rule must necessarily result because such writ cannot be issued to perform the office of an appeal, writ of review, or writ of error: *Manor v. Donahoo*, 117 Ga. 304, 43 S. E. 719; *O'Malia v. Wentworth*, 65 Me. 129; *In re Prime*, 1 Barb. 340; *Commonwealth v. McCabe*, 22 Pa. St. 450; *Petition of Semler*, 41 Wis. 517. A prisoner is not entitled to his release upon habeas corpus because of a defective commitment, and a good commitment may be substituted even after the hearing on the writ: *In re Rogers*, 75 Vt. 329, 55 Atl. 661. If the order of commitment is sufficient in substance, it must be held good on habeas corpus, although it contains more than is necessary to be stated therein; in such case the unnecessary matter will be regarded as surplusage: *People v. Smith*, 1 Cal. 9. If the commitment is under process legal and valid on its face, this precludes any inquiry into the cause of the imprisonment: *Ex parte Sifford*, Fed. Cas. No. 12,848. The omission of the name of the prisoner from the commitment is not such a defect as will entitle him to his discharge on habeas corpus: *Ex parte Bull*, 42 Cal. 196; *Ex parte Keil*, 85 Cal. 309, 24 Pac. 742. If a justice of the peace in making out a commitment for a prisoner charged with petit larceny inserts the phrase "grand larceny" instead, such error is harmless, and may be corrected on motion, but cannot sustain a collateral attack by writ of habeas corpus: *Davis v. Bible*, 134 Ind. 108, 33 N. E. 910.

#### VI. Defective Indictment.

Although the indictment under which the prisoner is held in custody is defective, yet he is not entitled to his discharge upon habeas corpus, if enough appears from the face of the indictment to charge the prisoner with a crime: *Ex parte Whitaker*, 43 Ala. 323; *Ex parte Kowalsky*, 73 Cal. 120, 14 Pac. 399; *Ex parte Kitchen*, 19 Nev. 178, 18 Pac. 886. Statutes sometimes provide that no person can be discharged from an imprisonment, under the habeas corpus act, who is imprisoned on an indictment, or by virtue of process to enforce such indictment. It must necessarily result that under such statutes, defects in an indictment will not be inquired into on habeas corpus: *Ex parte Phillips*, 7 Kan. 48; *In re Spradleud*, 38 Mo. 547. The sufficiency of the indictment is a question of law for the trial court, and if such court errs in its conclusion, the remedy generally is by appeal or writ of error, and not by habeas corpus: *Ex parte Le Roy*, 3 Okla. 322, 41 Pac. 615. Hence, a prisoner will not be entitled to his discharge, if it appears upon the return of the writ that an indictment has been preferred against him and has been adjudged sufficient by the court in which it is pending, or if there has been no judgment affirming the validity of the indictment, he is not entitled to his discharge on account of its insufficiency, if it charges any crime: *Emanuel v. State*, 36 Miss. 627. Where a prisoner is held to answer an indictment, he will not be discharged on habeas corpus for insufficiency of the indictment, unless it affirma-

tively appears from the facts alleged that they cannot under any possible statement constitute a crime, and also, that there are special circumstances requiring earlier judicial action than can be had, by demurrer or otherwise, through the ordinary course of procedure: *In re Hacker*, 73 Fed. 464. On such proceeding the indictment must be considered sufficient, unless it is so fatally defective in its material averments, that it would be the manifest duty of a court before which it was presented by the grand jury to decline to take action upon it: *Matter of Clark*, 2 Ben. C. C. 540, Fed. Cas. No. 2797.

The statement of some offense known to the law is essential to the jurisdiction of the court, and is, therefore, under well-settled rules, a fact which may be inquired into on habeas corpus: *Matter of Corryell*, 22 Cal. 178; and if it appears from the face of the indictment that it fails to state a crime, or is so fatally defective as to justify its being quashed on demurrer, the prisoner should be discharged: *Matter of Corryell*, 22 Cal. 178; *United States v. Fowkes*, 49 Fed. 50; *In re Terrell*, 51 Fed. 213. If an attack is made under a writ of habeas corpus, upon an indictment on the ground that it is defective, the guilt or innocence of the accused can never be inquired into on the proceeding following the return and hearing of the writ: *State ex rel. Hunter v. Brewster*, 35 La. Ann. 605; *People v. McLeod*, 1 Hill, 377, 25 Wend. 483, 37 Am. Dec. 328; *People v. Rulloff*, 5 Park. Cr. Rep. 77.

A court is not authorized, upon a writ of habeas corpus, to inquire into the question of fact as to whether or not an indictment, regular on its face, was ever found by the grand jury: *Ex parte Twohig*, 13 Nev. 302. Nor will the fact as to whether or not the grand jury that found the indictment was illegal be considered upon a hearing upon habeas corpus: *Ex parte Springer*, 1 Utah, 214.

## VII. Extradition.

a. **Jurisdiction.**—In order that a person may be lawfully held for extradition it must appear that there is a charge of crime against him in the state from which he is alleged to be a fugitive. There must also be a demand by the governor of that state for his arrest and detention. There must also be an indictment found in the state from which he has fled, or an affidavit made and a copy thereof certified by the governor, that he has committed a crime; that the prisoner is the person named for extradition and that he was in the demanding state when the crime was committed. These are jurisdictional facts necessary to a valid commitment of the alleged fugitive, and in habeas corpus proceedings, in extradition cases, although the court will not go into the merits of the case, it will go into the sufficiency of the papers before it and of the evidence to show such jurisdictional facts: *Kurtz v. State*, 22 Fla. 36, 1 Am. St. Rep. 173; *Ex parte McKean*, 3 Hughes, 23, Fed. Cas. No. 8848. In habeas corpus proceedings in extradition cases, the writ cannot perform the office of a writ of review, and the court can inquire only as to the

existence of the jurisdictional facts, the jurisdiction of the committing officer over the subject matter and whether there was any legal evidence before him to support his judgment. If these facts exist the prisoner is not entitled to his discharge: *In re Luis Oteiza y Cortes*, 136 U. S. 330, 10 Sup. Ct. Rep. 1031; *In re Adutt*, 55 Fed. 376; *In re Macdonnell*, 11 Blatchf. 170, Fed. Cas. No. 8772; *Matter of Clark*, 9 Wend. 212. Courts in habeas corpus proceedings, in extradition cases, have no authority to inquire into the merits of the decision made by the committing magistrate, and to determine that he erred in his construction of the law or the evidence. They will only inquire whether the prisoner stood charged before the magistrate with a criminal offense subjecting him to imprisonment and whether the magistrate possessed competent authority to inquire into and adjudge upon that complaint: *Ex parte Van Aernam*, 3 Blatchf. 160, Fed. Cas. No. 16,824. If the committing magistrate had no jurisdiction of the case, or if there was no legal evidence before him tending to prove the accusation, or if the mandate for the arrest of the prisoner was issued without warrant of law, the court must discharge him: *Ex parte Van Aernam*, 3 Blatchf. 160, Fed. Cas. No. 16,824. The court on habeas corpus has a right to inquire into the legality of the arrest of the demanded fugitive: *Ex parte Morgan*, 20 Fed. 298; and it may look behind the warrant of arrest for the purpose of ascertaining whether the complaint made was sufficient to give the committing magistrate jurisdiction: *Matter of Heilbona*, 1 Park. Cr. Rep. 430. If the return to the writ sets forth a warrant of arrest containing recitals of facts necessary to confer authority to issue it, there is sufficient justification for holding the prisoner, without producing the papers or evidence on which the governor acted in issuing the warrant: *People v. Pinkerton*, 77 N. Y. 245. If the prisoner applies for the writ, on the ground that the indictment pending against him in the demanding state is wholly defective and insufficient as a charge for any crime, the validity of the copy of such indictment will not be inquired into on the return of the writ if it reasonably appears that the prisoner is charged by indictment in the demanding state: *Ex parte Pearce*, 32 Tex. Cr. 301, 23 S. W. 15.

**b. Sufficiency of Evidence.**—The writ of habeas corpus in a case of extradition cannot perform the office of a writ of error. Hence, as a general rule, if the committing officer had jurisdiction of the subject matter and of the person of the accused, and the offense charged is within the terms of a treaty of extradition, and the officer in arriving at a decision to hold the accused has before him competent legal evidence on which to exercise his judgment as to whether the facts are sufficient to establish legal ground to hold the accused for the purpose of extradition, such decision cannot be reviewed as to the sufficiency of such evidence by any higher or other court: *In re Luis Oteiza y Cortes*, 136 U. S. 330, 10 Sup. Ct. Rep. 1031; *In re Adutt*, 55 Fed. 376; *In re Veremaitre*, Fed. Cas. No. 16,915; *Ex parte Van Aer-*



nam, 3 Blatchf. 160, Fed. Cas. No. 16,824. The court issuing the writ may inquire and adjudge whether the officer acquired jurisdiction of the subject matter by conforming to the requirements of the treaty and the statute, and whether he exceeded his jurisdiction, and whether he had any legal and competent evidence of facts before him on which to exercise judgment as to the criminality of the accused, but the court is not to judge of the sufficiency of such evidence to warrant the conclusion reached, nor interfere with such conclusion even if, on a consideration of all of the evidence adduced, it would have reached a different conclusion: *In re Maedonnell*, 11 Blatchf. 170, Fed. Cas. No. 8772; *In re Stupp*, 12 Blatchf. 501, Fed. Cas. No. 13,563. If a requisition for the return of a fugitive from justice is accompanied by a copy of the information and of the evidence taken before the committing magistrate, and the prisoner after arrest is denied a discharge on habeas corpus in the surrendering state, such evidence on a review of the judgment on habeas corpus by petition in error cannot be examined to see whether it sustains a charge of crime or a finding by the magistrate that there was probable cause for committing the prisoner: *In re Van Sciever*, 42 Neb. 772, 47 Am. St. Rep. 730, 60 N. W. 1037. In such cases it is incompetent to attempt to show that the indictment upon which the requisition issued was procured improperly, or upon insufficient evidence: *United States v. McClay*, Fed. Cas. No. 15,660.

**c. Identity of Prisoner.**—On habeas corpus the question of the identity of the prisoner with the person named in the warrant of extradition is always open, and unless such identity is in some way established he is entitled to his discharge; *Matter of Leary*, 10 Ben. C. C. 198, Fed. Cas. No. 8161; *In re White*, 55 Fed. 54; *Ex parte McKean*, Fed. Cas. No. 8848, 3 Hughes, 23; *United States v. McClay*, Fed. Cas. No. 15,660. Parol evidence is always admissible to show that there has never been any presence of the accused in the demanding state, and that he is not the person named in the warrant or indictment: *Kurtz v. State*, 22 Fla. 36, 1 Am. St. Rep. 173; *Wilcox v. Nolze*, 34 Ohio St. 520. A person arrested as a fugitive from justice on a warrant issued by the governor of one state based on an indictment found in that state is entitled to show, on habeas corpus, to prevent extradition from another state, that he was not in the former state at the time that the offense was alleged to have been committed, that he has never been there since, that he is not the person named in the indictment or warrant and that he is not a fugitive from justice: *In re Mohr*, 73 Ala. 503, 49 Am. Rep. 63. In *Matter of Leary*, 10 Ben. C. C. 198, Fed. Cas. No. 8162, it was held that where the petition for habeas corpus and the traverse to the return denied that the prisoner was a fugitive from justice, or the person named in the warrant, a witness is entitled to testify that he attended the session of the grand jury in the county in which by the warrant it appeared that the crime was charged to have been committed, that the subject of such inquiry was the said crime, that he testified at that



time relative to one J. L., who was the same person as the prisoner, and that such evidence was *prima facie* proof of the identity of the prisoner with the person named in the warrant, although such witness testified that he never personally saw the prisoner in the demanding state.

**d. Guilt of Accused.**—On habeas corpus a court or judge before whom is brought a prisoner, arrested as a fugitive from justice by a warrant from the executive of one state on the requisition of the executive of another state, will not inquire as to the probable guilt of the accused; the only inquiry open is whether the warrant on which he is arrested states that such fugitive has been demanded by the executive of the state from which he is alleged to have fled, whether he is such fugitive, and whether the copy of the indictment or an affidavit charging him with having committed an extraditable crime certified by the executive demanding him, has been presented: *Matter of Clark*, 9 Wend. 212.

It is a general rule that in a case arising on a writ of habeas corpus sued out to determine the legality of an arrest under proceedings for extradition, the court cannot investigate the question as to the guilt or innocence of the defendant: *Matter of Manchester*, 5 Cal. 237; *Robinson v. Flanders*, 29 Ind. 11; *In re Fowler*, 4 Fed. 303; *In re Roberts*, 24 Fed. 132; *In re White*, 55 Fed. 54.

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## KIRBY *v.* RAYNES.

[138 Ala. 194, 35 South. 118.]

### **FRAUDULENT CONVEYANCES—Effect Between Parties.**—

Conveyances made to hinder, delay, or defraud creditors are binding between the parties when fully consummated. Neither can rescind nor defeat them, nor will a court of equity lend its aid to disturb the acquired rights of either, at the instance of the other. (p. 40.)

**MORTGAGES to Secure Future Advances.**—It is not necessary to the validity of a mortgage to secure future advances that it should express on its face that it was given for such purpose. If it is not attended with fraud or bad faith, it is valid, not only between the parties, but also as against subsequent purchasers or encumbrancers, so far at least as respects advances made before the equities of the latter persons have attached. (p. 41.)

**MORTGAGES to Secure Future Advances.**—**Parol Proof** is admissible to show that a mortgage was given to secure future advances. (p. 41.)

Street & Isbell, for the appellants.

J. A. Lusk, for the appellees.

**197 HARALSON, J.** What claim the defendants, Webb and Morgan, have in this case as creditors of the defendants has

not been shown. It does not appear that they are the owners of the land embraced in the mortgage here sought to be foreclosed, by conveyance executed by the defendants to them, nor that they have a mortgage or other encumbrance on it, superior to the mortgage of complainants. It is true, reference is made, incidentally in the evidence, to a sale by defendants to them, but when it occurred is not shown, nor whether the sale, if made, was ever executed. So that, if they are creditors of defendants, there is no allegation or proof to that effect, nor are they making claim as prior or superior creditors to complainants as against their mortgage. The litigation is really between the complainants and the defendants, Kirby and wife. They set up that they executed the mortgage to complainants to hinder, delay and defraud one W. Seibold in the collection of a debt which the defendant, F. M. Kirby owed said Seibold, and that complainants, Raynes and Hodge, participated in said purpose, with full knowledge thereof. It is well understood that conveyances or gifts made to hinder, delay or defraud creditors are operative between the parties when fully consummated and that neither can rescind nor defeat them: *Glover v. Walker*, 107 Ala. 545, 18 South. 251; *Williams v. Higgins*, 69 Ala. 623.

It is alleged that this mortgage was given to complainants by defendants for the purpose, known and participated in by complainants, to hinder, delay and defraud one Seibold, a creditor of defendants. If such were the case, a court of equity might not lend its aid to complainants to disturb the acquired rights of either at the instance of the other—both being in *pari delicto*: *Hill v. Freeman*, 73 Ala. 200, 49 Am. Rep. 48; *Clark v. Colbert*, 67 Ala. 92.

198 The defendants' evidence tends to show that such was the purpose of the mortgage. That of complainants tends to show that such was not its purpose, but that it was executed to secure a past due indebtedness and to secure future advances. The evidence, we take it, preponderates, as the court below seems to have held, to satisfactorily establish the contention of the complainants as to this question, and we are not inclined to disagree with its conclusion.

The note which the mortgage secures was for three hundred dollars, and neither it nor the mortgage refers to future advances, but to an indebtedness generally, in that sum. It was not necessary that the mortgage should express on its face that it was given to secure future advances, to make it operate as

a security for that purpose. It was competent to give it for a specific sum, and it would stand as a security for a debt to that amount. If not tainted with fraud or bad faith, such a mortgage is as valid as if made to secure past indebtedness, not only as between the parties, but also as against subsequent purchasers and encumbrancers, so far, at least, as respects advances made before the equities of such purchasers or encumbrancers attached. Parol proof is also admissible to show that the mortgage was given to secure advances: 1 Jones on Mortgages, secs. 374-377; Wilkerson v. Tillman, 66 Ala. 532, 537; Lovelace v. Webb, 62 Ala. 271; Collier v. Faulk, 69 Ala. 58; Lawson v. Alabama Warehouse, 80 Ala. 341; Huckaba v. Abbott, 87 Ala. 410, 6 South. 48.

That the defendants were indebted to the complainants in some forty dollars or fifty dollars at the date of this mortgage, and that they traded with them and got advances for the year 1897, and continued to do so for the years subsequent thereto, up to and including a part of 1902, is not denied. The mortgage, meanwhile, was held by the complainants and no satisfaction or payment of it was pretended. An account of their dealings between them, from February 12, 1897, to February 10, 1902, shown, without dispute, to be correct, was introduced in evidence, which account contains the items of debit and credit during that time, leaving a balance, on April 1, 1902, due from defendants to complainants, of <sup>199</sup> two hundred and thirty-seven dollars and sixty-two cents. The court ascertained for itself, as was competent to be done, that the amount due on the date of the decree was two hundred and forty-eight dollars and forty-seven cents, and decreed foreclosure of the mortgage by a sale of the lands, for the payment of that sum, with costs and expenses of sale, if not paid within thirty days. Much has been said in briefs, on the doctrine of the application of payments as applicable to the account. But we take the same view that the chancellor evidently did, and hold that the mortgage was a security for the balance, and was so intended, and that the payments made must be confined to advances in 1897 is not, under the evidence, tenable, but that the mortgage stood as a valid security for all that was advanced up to the end of the transactions between the parties in 1902.

We discover no error in the decree, and it must be affirmed.

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*A Fraudulent Conveyance* is valid as between the parties: Mallow v. Walker, 115 Iowa, 238, 88 N. W. 452, 91 Am. St. Rep. 158, and cases cited in the cross-reference note thereto; Steinmeyer v. Steinmeyer

64 S. C. 413, 92 Am St. Rep. 809, 42 S. E. 184. And the law provides no remedy to either of them, if in *pari delicto*, either to disturb or enforce the conveyance: *Brady v. Haber*, 197 Ill. 291, 64 N. E. 264, 90 Am. St. Rep. 161, and cases cited in the cross-reference note thereto.

*On Mortgages to Secure Future Advances*, see *Balch v. Chaffee*, 73 Conn. 318, 84 Am. St. Rep. 155, 47 Atl. 327; *Central Trust Co. v. Continental Iron Works*, 51 N. J. Eq. 605, 40 Am. St. Rep. 539, 28 Atl. 595. Such mortgages are valid, if properly recorded, as against subsequent encumbrances, except as to advances made after actual, as distinguished from record, notice of a subsequent encumbrance, although the mortgage does not disclose on its face that it was given in part for future advances: *Tapia v. Demartini*, 77 Cal. 383, 11 Am. St. Rep. 288, 19 Pac. 641.

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### HARDEN v. COLLINS.

[138 Ala. 399, 35 South. 357.]

**COTENANCY—Foreclosure of Mortgage—Demand for Possession.**—If land owned by cotenants is mortgaged and the mortgage is foreclosed, a demand for possession by the purchaser under foreclosure and refusal thereof, such as will destroy the right to redemption, must be made upon each of the cotenants. A demand upon one is not a demand upon the other in this connection, imposing any duty of surrendering possession, although such cotenants are husband and wife. (p. 43.)

**COTENANCY—Foreclosure of Mortgage—Right of Redemption—Demand for Possession.**—If a mortgage on their land by cotenants is foreclosed, the right of one cotenant to redeem from the purchaser is not affected by the fact that the other cotenant has refused to surrender possession demanded by the purchaser, if no such demand has been made upon the cotenant seeking to redeem. (pp. 43, 44.)

**COTENANCY—Right to Redeem from Mortgage Foreclosure.**—A cotenant having the right to redeem from a sale of the land of the cotenancy under mortgage foreclosure, has a right to redeem the land in its entirety, not merely his undivided interest in it. (p. 44.)

**COTENANCY—Mortgage Foreclosure—Sufficiency of Offer to Redeem.**—If a cotenant having the right to redeem from a sale of the land of the cotenancy under mortgage foreclosure, tenders the purchaser the full amount bid and paid by him, and ten per cent per annum thereon, and offers to pay him in addition all lawful charges, consisting in the value of his permanent improvements, to be ascertained by a disinterested person, and such tender and offer is declined by the purchaser, such declination is sufficient to revest the title in the cotenant with no liability in respect to the permanent improvements. (p. 44.)

**COTENANCY—Mortgage Foreclosure—Sufficiency of Offer to Redeem.**—If a cotenant having a right to redeem from a mortgage foreclosure sale of the property of the cotenancy, makes a valid and sufficient tender and offer, except that he annexes the condition that he will redeem on the terms offered if the purchaser under the fore-



closure will rent the land at a specified rental, the condition annexed vitiates the tender and offer rendering it ineffective to revest the title in the cotenant, and releasing the foreclosure purchaser from any duty to accept it. (p. 44.)

**MORTGAGE—Foreclosure—Right of Purchaser to Deny Mortgagor's Title.**—A purchaser at a foreclosure sale under a mortgage, holding under the mortgagor, cannot deny the latter's original estate in the land, in an action of unlawful detainer brought by such mortgagor against such purchaser. (p. 45.)

J. M. Chilton and F. L. Smith, for the appellant.

W. M. Lackey and J. W. Batson, for the appellee.

**403** McCLELLAN, C. J. Action of unlawful detainer brought by M. A. Collins against Harden before a justice of the peace, and removed on defendant's petition into the circuit court, under the provisions of sections 2147 and 2148 **404** of the Code. By the terms of section 2149 the case was determinable in the circuit court on the inquiry of title vel non of the plaintiff. If the plaintiff had the right to redeem and before suit brought had made a sufficient tender for that purpose to the defendant, title to the land was vested in her by the force of section 3507 of the Code, and upon that title she was entitled to recover. If she did not fail for ten days after demand upon her to surrender possession to the purchaser at the foreclosure sale, the defendant, she did have the right to redeem, though her tenant in common and joint mortgagor did fail and refuse to surrender possession for ten days after demand upon him. A demand upon one tenant in common is not a demand upon the other in this connection, and imposes no duty of surrendering possession upon such other. And it is not of consequence that the tenant in common upon whom the demand is made happens to be the husband of the tenant upon whom no demand is made. If the land belonged solely and severally to the husband and the mortgage was executed by him as sole grantor, it would be his duty under section 3506 of the Code, upon demand for possession, to remove his family, including, of course, his wife, from the premises within the prescribed period (*Nelms v. Kennon*, 88 Ala. 329, 6 South. 744), but the fact that his tenant in common is his wife gives him no power over her as a tenant in common, and neither his acts nor his omissions can affect her estate in the land nor her rights under the statute after foreclosure of a mortgage executed upon it by him and her as grantors. If, as there is a tendency of the evidence to show, no demand for possession was made upon her, she was in no



default nor lost her right to redeem by failing for any length of time to deliver possession to the purchaser, and her right of redemption, if it existed at all, was the right to redeem the land in its entirety, not merely her undivided interest in it: *Lehman, Durr & Co. v. Moore*, 93 Ala. 186, 9 South. 590. Assuming, as the jury had a right to find, that the plaintiff had a right to redeem, was her effort to that end efficacious? Was her tender sufficient? It is alleged, and the evidence, without conflict, proves, that she tendered the purchaser the full <sup>405</sup> amount bid and paid by him at the foreclosure sale and ten per cent per annum thereon. It is also alleged that she offered to pay him in addition to this all lawful charges. Plaintiff's evidence tends to support this averment in substance. It goes to show that she offered to leave the ascertainment of the amount of lawful charges—that is, in this instance, the value of defendant's permanent improvements upon the land—to disinterested parties, and to pay the amount ascertained by them, and that defendant declined the proposition absolutely. This flat declination of the purchaser rendered it unnecessary for the plaintiff to appoint a referee to ascertain the value of the permanent improvements, as such appointment would have been a vain and useless thing to do; and if the facts were as this evidence tends to show them to be, in our opinion the tender was sufficient and operated a revestiture of the title in the plaintiff, with no liability on her in respect of permanent improvements. But, on the other hand, the evidence for the defendant went to show that the only offer made by or on behalf of the plaintiff as to paying for permanent improvements was to this effect: That if the defendant would pay three dollars per acre rent for the land, the plaintiff would leave the ascertainment of the permanent improvements to disinterested persons, and pay the amount found by them. There is no warrant in the statute for such a conditional offer. The plaintiff had no right to inject such a condition into the tender or offer, and with it injected the purchaser was under no duty to accept the tender and offer: *Prichard v. Sweeney*, 109 Ala. 651, 19 South. 730. If the facts were in line with this evidence the tender was insufficient and inefficacious to invest title in the plaintiff. The jury had a right to find these to be the facts, and they should have been allowed to exercise it. The charge given at the request of the plaintiff invaded their province and took from them this right. It was equivalent to a declaration by the court either that the offer to pay for improvements was not conditional or that it was

sufficient though conditional. Moreover, even laying the defendant's evidence in this connection to one side, it was a matter of inference and deduction by the jury from plaintiff's evidence that she offered to pay <sup>400</sup> the value of the permanent improvements—there was no positive evidence to that effect—and the charge should have left the question open before the jury even had there been no evidence as to the offer, if the jury found an offer to have been made, being coupled with an unwarranted condition. The court erred in giving the charge.

The defendant, holding through the mortgage executed by the plaintiff as a grantor and not merely as the wife of a grantor, was in no position to deny her original estate in the land. Charge 3 requested by defendant was properly refused.

What we have said above will sufficiently indicate the ground of our conclusion, that the other charges requested by the defendant were well refused. The defendant should have been allowed to prove that permanent improvements of value had been made by him. It is unnecessary to discuss the other rulings on the admissibility of the evidence. So far as they may be at all questionable, they are clearly innocuous. They involved no prejudice to the defendant.

Reversed and remanded.

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*Either Cotenant may Redeem* the entire estate from a sale thereof under foreclosure: *Horton v. Maffitt*, 14 Minn. 289, 100 Am. Dec. 222. To the same effect, see *Watkins v. Eaton*, 30 Me. 529, 50 Am. Dec. 637; *Gentry v. Gentry*, 1 Sneed, 87, 60 Am. Dec. 137; notes to *Curl v. Watson*, 95 Am. Dec. 767; *Horn v. Indianapolis Nat. Bank*, 21 Am. St. Rep. 248.

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## HUNNICUTT v. HIGGINBOTHAM.

[138 Ala. 472, 35 South. 469.]

**TROVER—Conversion of Money.**—Trover lies for the conversion of money, if there is an obligation on the part of the defendant to return specific coin or notes intrusted to him. (p. 46.)

**TROVER for Conversion of Money by Administrator.**—Trover lies for the conversion of specific money capable of identification, such as money in a bag or package which has been intrusted to a person for safekeeping, and by his administrator mingled with other money without authority to the exclusion of the owner's dominion over it and in denial of his rights. (p. 46.)

**EVIDENCE.—Ownership of Property** is a fact to which a witness may always testify. (p. 47.)

**EVIDENCE.—If a Party on Cross-examination** of a witness, himself calls out evidence, he cannot afterward have it excluded. (p. 47.)

**TORTS, Waiver of.—Presentation of Claim Against an Estate** after the time allowed therefor has expired does not show an election to charge the estate therewith, nor a waiver of any tort committed by the executor or administrator in connection with such claim. (p. 49.)

Smith & Smith, for the appellants.

McCarty & Merrill, for the appellee.

**474 HARALSON, J.** This suit is for the conversion by defendant of \$282, alleged to be the property of the **475** plaintiff. It seems to be well settled that trover lies for the conversion of money, where there is an obligation on the part of defendant to return specific coin or notes intrusted to him: *Moody v. Keener*, 7 Port. 210, 231; 26 Am. & Eng. Ency. of Law, 1st ed., 766. "It may be stated as a general rule that although an obligation to pay money is ordinarily enforceable by assumpsit or debt, yet trover lies for the conversion of 'ear-marked' money or specific money capable of identification, e. g., money in a bag or coins or notes which have been intrusted to defendant's care": 21 Ency. of Pl. & Pr. 1020, 1021. "An intermeddling with, or dominion over the property of another, whether by the defendant alone, or in connection with others, which is subversive of the dominion of the true owner, and in denial of his rights, is a conversion": *Bolling v. Kirby*, 90 Ala. 221, 24 Am. St. Rep. 789, 7 South. 917.

It also seems to be well settled on authority that when the alleged conversion consists in whole or in part of a sale of the property without the plaintiff's authority and the property has been converted into money or its equivalent, the plaintiff may bring either trover, or, waiving the tort, assumpsit: 21 Ency. of Pl. & Pr. 1022.

The proof for the plaintiff tended to show that the plaintiff, B. Higginbotham, after his intermarriage with his wife, in 1894, gave her \$180 in twenty-dollar gold pieces wrapped up to itself, and \$102 in paper money wrapped up to itself, to put away for him in her safe, which she did, and kept it in that condition until she died, when the defendant, who had qualified as her executor, took possession of the money and converted it, refusing on demand of plaintiff to deliver it to him.

The evidence on the part of the defendant tended to show that the packages of money which were claimed by plaintiff were not found in the safe of his testatrix after her death, and that the money, gold and paper, which was found therein, was

commingled with other money and bore no marks by which the money of plaintiff, if he had any in the safe, could be identified and distinguished from any other money of like kind therein.

<sup>476</sup> The case was tried by the court without a jury, and judgment rendered in favor of plaintiff, against defendant for the sum claimed in the complaint. The main question for review seems to be, whether or not the plaintiff ever deposited said sums in the safe of his wife, as his funds, and if so, if the deposit was in packages, separate from other funds of his wife in the safe, so as they could be, and were, identified at the time the defendant took the money in the safe into his custody, and refused to turn the same over on demand to the plaintiff. The plaintiff testified without objection that defendant took \$180 in gold and \$102 in greenback or paper money of his from a safe in which he had it. This was the substance of his testimony on the direct examination, which related alone to his ownership of the money. On his cross-examination by defendant, he testified that he had \$180 in gold and \$102 in greenbacks, that the day after his marriage to Nancy Higginbotham, in 1894, he gave her \$180 in gold, in twenty-dollar gold pieces which was wrapped up, to be put away in the safe, and a few days before her death, he gave her \$102 in paper money to be put in said safe for him, but he did not see her put the paper money in the safe, and that the money he was testifying about was the money he was claiming in this suit. He further stated that he did not know that the \$180 in gold was in a separate package when the safe was opened by defendant, who was the executor of his wife. In rebuttal he testified also, without objection, that his wife had money of her own in the safe, and sometimes lent her money out, but she never loaned his money; that the money when taken by the defendant was in the same condition as when it was put in the safe, and that he had access to the safe all the time, and the money remained in the same condition as at first.

After the plaintiff had thus testified, defendant moved the court "to exclude from its consideration all the witness had testified to about the ownership of said money in his direct, cross, rebutting examination, which motion the court overruled." In this there was no error. He testified to nothing on the direct and rebutting examination <sup>477</sup> which was objected to, and all he stated further was called out by the defendant himself. Having called out the evidence, if illegal, he could not afterward move to exclude it: *American etc. Extract Co. v. Ryan*, 112 Ala. 344, 20 South. 644; *Farrow v. Nashville etc.*



Ry. Co., 109 Ala. 454, 20 South. 303; East Tennessee etc. Ry. Co. v. Turvaville, 97 Ala. 122, 12 South. 63. Furthermore, the objection went to the exclusion of what the plaintiff had said about his ownership of the money and no further. Ownership of property is a fact to which a witness may always testify: *Steiner v. Trantum*, 98 Ala. 315, 13 South. 365. The objection was general and went to all the witness had testified to, a part of which was legal if some of it may have been illegal. The objection was certainly not good as to all the evidence, without which the objection was properly overruled.

James Bennett testified for plaintiff that he was one of the appraisers of the estate of Mrs. Higginbotham, that he was present when defendant opened the safe, and that they found \$180 in gold wrapped up in a separate paper free from the rest (of the gold) and \$102 in a separate paper to itself, just as the plaintiff said they would find before the safe was opened; that defendant counted the money and handed it to Mr. Greer, one of the appraisers, to count; that witness was in a position to see the money and was not mistaken about the matter. Mrs. Gibbs testified for plaintiff, that she was living with Mrs. Higginbotham when she died, and had lived there from 1894; that a few weeks before she died, she saw the plaintiff give to her \$102 to put away, that she took the money and said, "I will put it away"; that witness was with her almost all the time afterward, up to her death, and no one paid her any money.

The defendant's witness Tyler testified that he was present when the safe was opened; that there was paper money in the safe amounting to \$3,230, and gold to the amount of \$500, \$490 of which was in a little box, and \$10 in another place, and that there was no package of \$102 of paper money separate from the other; that there was not \$180 in gold wrapped up separate to itself, and that the gold was all together. 478 He had just testified that \$490 in gold was in a box and \$10 in another place. He testified on the cross that the gold was in a pigeon-hole behind the package of paper money. He also testified that the paper money was wrapped up in a cloth.

The defendant testified substantially, as did his witness Tyler, that there were no separate packages of gold and paper money in the safe when opened, in separate packages, such as the plaintiff claimed, distinguishable from other gold and paper money in the safe. He differed from his witness Tyler as to the amount of paper money in the safe, and the condition it was in. He said: "I found the following packages of which I made a



memorandum at the time: 1. Package of \$180; 2. \$334; 3. \$500; 4. \$100; 5. \$1,245—all paper money.” This aggregated \$2,359 in paper currency. Tyler had sworn that the amount was \$3,250. He stated that there were five packages of this money, and Tyler swore to but one package.

It thus appears that the witness Tyler deposed at one time that the gold in the safe was in a little box, and at another that it was in a pigeon-hole; that he and defendant differ as to the amount of currency on hand, and the condition it was in when found. As to that matter, the evidence for plaintiff was the more consistent and reliable, and in giving it the greater value, and having the witnesses before him, we are unable to conclude that the court erred in rendering judgment for the plaintiff.

The defendant, for the purpose of showing that plaintiff had waived any tort that might have been committed by defendant and had elected to charge the estate of the deceased with his claim for the money sued for, offered a claim for \$282 filed against the estate of deceased by the plaintiff, which claim was marked filed after the expiration of twelve months after letters testamentary issued to defendant. It was not shown that the claim was ever recognized by the executor or paid by him, but on the other hand, it appears he refused to recognize or pay it. There was no error, on the objection of plaintiff, <sup>479</sup> that the evidence offered was immaterial, irrelevant and inadmissible, in the refusal of the court to admit it. There was no offer to show that the claim presented was the same as the one here sued on, and even if it had been the same, the bare presentation of this claim to the executor was no election to rely on it as a claim against the estate and not against defendant individually for the alleged tort. Mistaken or unsuccessful suits are held not to be an election, and the mere bringing of a suit, or the presentation of a claim against an estate, without prosecuting it to final determination or judgment cannot determine the right of election to pursue that, and no other remedy open to plaintiff: *Harrison v. Harrison*, 39 Ala. 306. We fail to discover in the bare presentation of this claim against said estate, which was barred by nonclaim at the time of prosecution, and never insisted on afterward, was a waiver of plaintiff's right to sue the defendant in this action. If the money did not belong to the estate, the defendant had no right to it as administrator or executor, and his taking possession of it, and his refusal to pay it to the plaintiff on demand was on his individual responsibility: *Daily v.*

Daily, 66 Ala. 266; *Godball v. Roberts*, 7 Ala. 466; *Alabama State Bank v. Glass*, 82 Ala. 280, 2 South. 641.

Affirmed.

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*An Action of Trover* may be maintained in a proper case for the conversion of money: See the monographic note to *Bolling v. Kirby*, 818. But it is held in *Larson v. Dawson*, 24 R. I. 317, 96 Am. St. Rep. 716, 53 Atl. 93, that trover will not lie for money delivered to one person to be expended in behalf of another and by the former converted to his own use.

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## FLORENCE COTTON AND IRON COMPANY v. LOUISVILLE BANKING COMPANY.

[138 Ala. 588, 36 South. 456.]

**JUDGMENTS—Reversal—Restitution.**—If payment has been coerced on a judgment which is afterward reversed, the party paying has an absolute right to restitution of the money paid from the party to whom it was paid. (p. 51.)

**JUDGMENTS—Reversal—Restitution—Setoff.**—If payment has been made on a judgment afterward reversed and upon the calling of the case for another trial, the plaintiff renounces his cause of action and dismisses his suit, the defendant has a right to recover the money thus paid, and the fact that the debt claimed in the first suit is unpaid is no defense, nor can it be set off in a suit to recover the money paid under the reversed judgment. (p. 52.)

**JUDGMENTS—Reversal—Restitution—Assignment.**—An assignee of a judgment afterward reversed, to whom money has been paid thereon, is in the same position as his assignor or the plaintiff in the judgment, and is liable for restitution of the money thus received from the defendant in such judgment. (p. 52.)

**JUDGMENTS—Reversal—Restitution—Accrual of Right.**—If money has been paid on a judgment afterward reversed, the right to restitution accrues from the date of the judgment of reversal, with interest on the amount paid from that date. (p. 52.)

T. R. Roulhac and R. T. Simpson, Jr., for the appellant.

E. O'Neal and J. T. Ashcraft, for the appellee.

591 **SHARPE, J.** By execution on a judgment recovered by Fields against this plaintiff, defendant as assignee of the judgment collected money. Subsequently the supreme court reversed the judgment and remanded the cause, whereupon Fields dismissed the suit. Plaintiff brought this suit for the money it paid on the judgment. The complaint consists of three counts, the first declaring on an account and the second for money had and received for plaintiff's use. The third count was upon special facts, and a demurrer thereto was

sustained. It is unnecessary to review the ruling on this demurrer since the second count was adapted to a full presentation of plaintiff's case. Before the final disposition of the third count, there was filed a number of special pleas, all of which were stricken out except those numbered respectively 6, 12, 13, and 18, each of which set up as a defense the existence of the debt claimed by Fields in the first suit. These pleas we construe as having been interposed to the third count alone. The disposition of that count under the demurrer had the effect to eliminate these special pleas, but for the purpose of this review we will treat the plea of the general issue which was interposed to the whole complaint as available for any defense which could properly have been based on injustice of the plaintiff's claim.

The authorities generally sustain the proposition that where payment has been coerced on a judgment which is <sup>592</sup> afterward reversed, the party paying has, *prima facie*, a right to restitution of the money. Some cases elsewhere, and in some of the earlier cases in this court including *Duncan v. Ware*, 5 Stew. & P. 119, 24 Am. Dec. 772, *Dupuy v. Roebuck*, 7 Ala. 486, which were referred to in *Crocker v. Clements*, 23 Ala. 307, seem to indicate that under such facts the further fact that the debt claimed in the original suit was due may be shown in defense of an action of *assumpsit* brought for the money paid. This view, however, is inconsistent with other authorities. In *Carson v. Suggett*, 34 Mo. 364, 86 Am. Dec. 112, which case was in the main like the present, the decision is expressed in the headnote as follows: "Where the judgment of the inferior court is reversed by the supreme court, the plaintiff in error or the appellant is to be restored to all that he has lost by the original judgment, and this without any reference to the rights of the plaintiff in the original suit. Where the plaintiff, after the reversal of the judgment in his favor, voluntarily dismissed his suit, and the defendant sued for restoration of what he had lost by the judgment, an answer setting up the original claim of the plaintiff was properly stricken out." In *Bickett v. Garner*, 31 Ohio St. 28, it was held in an action on a restitution bond for money paid on a judgment afterward reversed, that the claim on which the original action was brought could not be made available as an offset by dismissing the original cause of action or otherwise. Many authorities by making general affirmation of the right to restitution indicate that such right is absolute: See *Ex parte Walter Brothers*, 89 Ala. 237, 18 Am. St. Rep.

103, 7 South. 400; Marks v. Cowles, 61 Ala. 299; Freeman on Judgments, secs. 481, 482; Freeman on Executions, sec. 347; Bank of U. S. v. Washington, 6 Pet. 8; Ranck v. Becker, 13 Serg. & R. 41; Clark v. Pinney, 6 Cow. 297; McJilton v. Love, 13 Ill. 486, 54 Am. Dec. 449; Reynolds v. Hosmer, 45 Cal. 616; Fish v. Toner, 40 Minn. 211, 41 N. W. 972.

In *Ex parte Walter Brothers*, 89 Ala. 237, 18 Am. St. Rep. 103, 7 South. 400, the question arose in the chancery court which had undoubted jurisdiction to determine it on equitable principles; and this court said with reference to a party who had enforced the collection <sup>593</sup> of money on a decree thereafter reversed: "He had no right to the money involved in the litigation in contemplation of law until there should be a correct determination of the matters in dispute, however clear his rights may have been in point of fact. He therefore proceeds with the cause having an undue advantage of his adversary, and is in fact in the attitude of having joined what he claimed before his right to it had or could have been determined. We entertain no doubt, therefore, of the absolute right to have restitution made on the one hand and the absolute correlative duty to make restitution on the other, wholly regardless of considerations looking to the final equities of the parties."

We adopt this latter expression as applicable to this case and accordingly hold that the existence of the debt claimed by Fields in the suit he dismissed is not a defense to this suit, and this without regard to the merit of the suit, or to the question discussed by counsel of whether the dismissal operated as a retraxit.

To the extent that it accepted the benefit of the execution defendant must be held to have ratified the act of Fields' attorneys in enforcing the same, though it may not have otherwise participated in the enforcement of the judgment. As assignees of the judgment it is in no better situation to defend than Fields would have been had he recovered the money and been sued therefor; Freeman on Judgments, sec. 483; Reynolds v. Hosmer, 45 Cal. 616; McJilton v. Love 13 Ill. 486, 54 Am. Dec. 449.

The judgment of the circuit court will be reversed and one will be here entered for the amount collected by defendant out of the money paid by plaintiff on the execution, viz., four thousand dollars, with interest thereon from the thirteenth day of November, 1894, that being the time when the right to res-



titution accrued by the reversal of the judgment. See as to the time of such accrual Crocker v. Clements, 23 Ala. 307.

Reversed and rendered.

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*The Reversal of Judgments*, including the right to restitution thereafter is considered in the monographic note to Cowdery v. London etc. Bank, 96 Am. St. Rep. 124-146.

*The Assignee of a Judgment* which is vacated on appeal takes no interest under the assignment: See the monographic note to Chilstrom v. Eppinger, 78 Am. St. Rep. 56, on the effect of the assignment of a judgment.

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## AMERICAN TELEPHONE AND TELEGRAPH COMPANY v. MORGAN COUNTY TELEPHONE COMPANY.

[138 Ala. 597, 36 South. 178.]

**MUNICIPAL CORPORATIONS—Rights of Telephone Companies in Streets.**—If two telephone companies are occupying parts of the same street in a city with the permission and under the direction, regulation, and control of the city authorities, the rights of each company in the street are equal, and neither has superior rights to the other, at least so long as the holder of the junior franchise does not interfere in some unlawful manner with the rights of the holder of the older franchise. (p. 54.)

**MUNICIPAL CORPORATION — Exclusive Franchise in Street.**—If a city street has sufficient width and capacity to admit of more than one public enterprise therein without unduly obstructing it as a public highway, an exclusive right in the street should not be granted, nor can it be claimed by any one corporation. (p. 54.)

**MUNICIPAL CORPORATIONS—Exclusive Franchise in Street—Injunction—Want of Equity.**—If a bill and answer in a suit by one telephone company against another to enjoin the latter from erecting its poles and stringing its wires on the same side of the street as those of the complainant shows that the defendant's poles are being placed between those of the complainant, but of sufficient height to enable the stringing of wires without interference by contact with those of the complainant and that defendant's poles were being well set into the ground and well braced, that any contact with complainant's wires during the process of stringing would be of a temporary and incidental character, and that scientific appliances for insulation would be provided, preventing defendant's wires from acting as conductors from those of complainant, except from possible unavoidable causes, such as winds, storms or electrical disturbances, that defendant's system is not complete but in a formative state, and, that the things complained of and damages arising therefrom are not in existence, but are conjectural and imaginary, no such case of pressing necessity is shown as authorizes injunctive relief. (p. 57.)

**INJUNCTIONS to Restrain Monopoly—Unresponsive Answer.** In a suit by one telephone company to enjoin another from erecting its poles and stringing its wires on the same side of the street, averments in an answer tending to show complainant's purpose to maintain a monopoly in the city are not responsive to the bill, when considered as one for present injunctive relief. (p. 58.)



Callahan & Harris, for the appellant.

E. W. Godbey and Blackwell & Fite, for the appellee.

**603** HARALSON, J. The contention on the part of the complainant is that without its consent the defendant has no right to erect its poles on Moulton or other streets in the city of New Decatur between the poles of complainant, and to string its wires on or near the top of these poles, above the wires of complainant, in the manner set forth in its bill; while that of the defendant is, conceding an equal right to the complainant with itself to the use of the streets of said city for its telephone or telegraph purposes, that complainant has no right to said streets superior to the right of defendant to erect, maintain and operate its telephone system, so long as defendant does not, in some serious and permanently injurious manner, interfere with the complainant's rights.

It is shown that both companies are occupying parts of the street in said city with the permission and under the direction of the city authorities, duly invested with authority to this end, and under their regulation and control. The rights of each are equal, and not superior to the rights of the other—the principle being well settled that no company can, under ordinary circumstances, assert and maintain a right to the exclusive enjoyment of a public street in a city. “Monopolies are not favorites in the law, and if a street has sufficient width and capacity to admit of more than one public enterprise, without unduly obstructing it as a public highway, an exclusive right should not be granted to one company, and if granted, except under peculiar circumstances it may and should be revoked”: *Consolidated Electric Light Co. v. People's Electric Light etc. Co.*, 94 Ala. 374, 10 South. 440. As was said by us in another and similar connection: “It may be safely stated, as applicable to all conditions, that no one public corporation of the kind should be given a monopoly to the exclusion of others in the use of the streets of a city. Ordinarily, such privileges should be granted, equal with and not superior to other like enterprises established for the use of the public. The state licenses such enterprises, not simply that the owner of them may earn profits by establishing and operating them, but that the general **604** public may enjoy the benefits of their existence; and when two are authorized by law to use the same street or avenue, it should be with the express or implied condition that each shall respect the rights and interest of the other and occasion no injury or harm

to the other. The matter of the regulation of such public corporations is usually committed to the municipalities, where they are established." The two companies are in the legal attitude of using, in a sense, their own property, the obligation of each being to so use its own property as not to do unnecessary injury to that of another; and for any default in that particular the rule is applicable that the negligent party is liable to the one injured in an action of damages resulting from its own negligence: *Birmingham Traction Co. v. Southern Bell etc. Tel. Co.*, 119 Ala. 148, 151, 24 South. 731. The principle is familiar that: "If one do an unlawful act upon his own premises, he cannot be held responsible for injurious consequences that may result from it, unless it was so done as to constitute actionable negligence." So, it was announced in the case referred to that, "whatever incidental annoyance or injury may result from the rightful and lawful use of the streets, with no want of care for the rights and interests of others entitled to like use, is *damnum absque injuria*, and so far as persons operating under legislative grants are concerned, something more than individual damages to another must be proved—something in fact in the nature of an abuse of the franchise—to entitle the party to an injunction": *Cumberland etc. Tel. Co. v. W. Electric Co.*, 42 Fed. 273; 25 Am. & Eng. Ency. of Law, 1st ed., 764, 767.

In *Rouse v. Martin*, 75 Ala. 513, 51 Am. Rep. 463, referring to the case of private nuisances—directly applicable here—it was held that in such cases an injunction will generally be granted only when there is a strong and mischievous case of pressing necessity, and not because of a trifling discomfort or inconvenience suffered by the party complaining; that when the injury complained of is not a nuisance *per se*, but may become so by reason of <sup>605</sup> circumstances—being uncertain, indefinite or contingent—equity will not interfere; that public benefit will preponderate over private inconveniences; that in doubtful cases, an injunction will always be denied, or dissolved on motion when granted *ad interim*, and that a very strong case must be made by the bill for injunction, and if there be reasonable doubt as to the probable effect of an alleged nuisance either on proof, affidavit or on the construction of the facts stated in the bill, there will be no interference until the matter is tested by experiment in the actual use of the property: 1 High on Injunctions, sec. 788. "Nor will the court interfere when the thing complained of is not in existence, but may be called into exist-

once by the threatened acts of the defendant, in the exercise of his lawful dominion over his property, and it is uncertain, dependent upon circumstances in the future, whether it will or will not operate injuriously": *Kingsbury v. Flowers*, 65 Ala. 484, 39 Am. Rep. 14. In the case cited from 75 Alabama, the court added: "Great caution should always be exercised before interfering with establishments which have a tendency to promote public utility or conveniences, and in cases of this nature, equity will not enjoin the lawful use of such property in a city, when by the proper application of scientific appliances and machinery the torts complained of may be removed; and in such cases the court will go no further than to require such appliances to be used." Where it is sought to restrain a business established, not per se a nuisance, but only liable to become such by the manner of its carrying on, the bill may, in the discretion of the court, be held until the objectionable results can be remedied by scientific and skillful appliances, especially when the answer discloses that such remedies are practicable and will be applied, if necessary: *Rouse v. Martin*, 75 Ala. 515, 51 Am. Rep. 463; *English v. Progress Electric Light Co.*, 95 Ala. 259, 10 South. 134.

From the principles above announced as here applicable the case may be readily disposed of. It appears that the averments of the bill upon which the right of injunctive relief is claimed have been directly and fully ~~606~~ denied by the sworn answer of the defendant. Starting with the proposition, which cannot be denied, that the defendant has the same right to the street that complainant has so long as it does not interfere in some unlawful manner with the rights of the complainant, we have failed to discover, after a careful examination of the averments of the bill and the answer thereto, that defendant has been guilty of any interference with complainant's rights. The fact that defendant's poles are being erected between those of complainant, on the same side of the street, of itself is of but little importance. These poles, it reasonably appears, are of a size and height to make them, for the purposes intended, equal to those used by complainant; that they extend above those of complainant sufficiently far to enable defendant to string its wires above the complainant's, and at such distance from them as not to interfere by contact with them, or to act as conductors of electricity from them. It further appears that these poles are to be let into the ground about six feet, and will be braced as well as may be against swaying. If these poles and wires, in the

process of erection, come into contact with those of complainant, such contact must be temporary and incidental to their erection; and the defendant's wires, on the completion of its system, are designed not to touch, and in all reasonable expectation will not interfere with complainant's system. It is to the interest of defendant to avoid the contact of its poles and wires with the wires of the complainant, since such contact would be as injurious to the operation of defendant's business as to that of complainant. Moreover, it reasonably appears that scientific appliances of insulation may and will be provided to prevent the wires and poles of defendant from ever acting as conductors of electricity from the wires of complainant, except possibly from accidents arising from wind and storms and electrical disturbances from without—accidents that cannot be foreseen, calculated upon, nor provided against. But if such disturbances should occur, their results must be temporary and of easy repair. 607 Without the presence of defendant's poles and wires, such accidental disturbances are just as liable to befall the poles and wires of complainant. These difficulties, are, however, conjectural, incidental and temporary, if they should come, and are not to be considered as meritorious grounds for interfering by injunction with defendant in the erection, maintaining and operating of its telephone system.

The damages that complainant insists will be done to it by defendant are remote, conjectural and imaginary. The defendant company is merely proceeding to erect its system of poles, preparatory to stringing its wires thereon. Its system is not complete, but in the formative state. The things complained of are not in existence, but may be called into existence by threatened acts of defendant, to be done in the lawful exercise of its rights dependent upon circumstances in the future, as to whether they will or not operate injuriously, having no other foundation except in the apprehension and fears of complainant. Whether those apprehensions are real or not, the conduct of defendant alone will disclose. It is sufficient to say, having reference to the denials of the answer, that complainant has not presented such a case of pressing necessity as authorizes interference by injunction.

Much of the answer sets up facts tending to show that the purpose of the complainant is to maintain a monopoly of telephoning in the city, and to exclude defendant therefrom. These matters are not directly responsive to the averments of the bill, when considered as one for present injunctive relief.

The defendant introduces several affidavits sustaining the denials of the answer. The complainant introduced none to support the averments of the bill. It is urged that these affidavits should not have been received or considered by the chancellor. It is unnecessary to pass upon that question. We have confined our decision, as the chancellor might well have done, to a consideration of the denials by the answer of the material averments of the bill, and for the purposes in <sup>608</sup> hand these are sufficient without any resort to the affidavits, no fuller or more satisfactory than the answer itself.

Assuming that the bill has equity, the denials of the answer fully justified the dissolution of the injunction; but in our opinion the other ground of the motion for a dissolution of the injunction, namely, that the bill had no equity, was well taken, and the decree dissolving the injunction may be well rested on that ground.

Affirmed.

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*The Grant of a Franchise* to a street railway company does not confer an exclusive privilege, nor prevent the city from extending similar privileges to other railway companies: *Mayor etc. of Houston v. Houston City St. Ry. Co.*, 83 Tex. 548, 29 Am. St. Rep. 679, 19 S. W. 127. And an electric light company which receives a license to erect its poles on certain streets does not obtain an exclusive privilege; a second company upon which a similar privilege is conferred acquires merely subordinate rights, and any interference of its wires with those of the prior licensee may be restrained by injunction: *Rutland Electric Light Co. v. Marble City Electric Light Co.*, 65 Vt. 377, 36 Am. St. Rep. 868, 26 Atl. 635. See, also, *Union Pac. R. R. Co. v. Colorado Postal Tel. Co.*, 30 Colo. 133, 97 Am. St. Rep. 106, 69 Pac. 564.



CASES  
IN THE  
SUPREME COURT  
OF  
ARKANSAS.

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RANKIN v. SCHOFIELD.

[71 Ark. 168, 70 S. W. 306.]

**APPEAL AND ERROR—Time for Taking Appeal.**—A statute providing that an appeal or writ of error shall not be granted except within one year next after the rendition of judgment, unless the party applying therefor was an infant or of unsound mind, in which case the appeal may be granted within six months after the removal of the disability, is prospective, and does not apply to judgments rendered prior to its enactment. (p. 60.)

**CONSTITUTIONAL LAW—Time of Taking Appeal—Persons Under Disability.**—A statute limiting the time within which an appeal may be taken from all judgments, and making no provision for an appeal, after the removal of disability, by a person then under disability by reason of infancy, coverture, insanity, or otherwise, is unconstitutional as depriving them of the right of appeal. (p. 61.)

**JUDGMENTS—Compromise Decree.**—A decree reciting that in order “to put an end to tedious litigation, and as an amicable settlement and adjustment of a family affair,” “it is hereby ordered, considered, and decreed by the court, as well as by the consent and agreement of the parties,” shows affirmatively on its face that it is merely a consent decree, without investigation of the merits, enforcing the compromise of the parties. (p. 62.)

**JUDGMENTS—Consent Decree—Right of Infant to Appeal.**—An infant, on arriving of age, is not barred from taking an appeal from a compromise decree, assented to by his guardian, unless the court concurrently sanctioned such compromise. (p. 62.)

G. Jones and J. A. Watkins, for the appellant.

O. W. Scarborough, J. W. House and M. House, for the appellees.

**170** WOOD, J. The decree from which this appeal was taken was rendered in February, 1889. This appeal was granted by the clerk of this court February 19, 1900. The appellant

was born June 24, 1881. She was therefore eighteen years, seven months, and twenty-five days old when this appeal was granted. The decree from which she appeals had been rendered eleven years before. The act approved March 16, 1899, to regulate the time in which appeals and writs of error may be taken to this court, is as follows:

"Section 1. An appeal or writ of error shall not be granted except within one year next after the rendition of the judgment, <sup>171</sup> order or decree sought to be reviewed, unless the party applying therefor was an infant or of unsound mind at the time of its rendition, in which cases an appeal or writ of error may be granted to such parties or their legal representatives within six months after the removal of their disabilities or death.

"Sec. 2. The parties to all judgments, orders or decrees rendered within two years prior to the passage of this act shall have one year from the time it shall take effect within which to pray an appeal or sue out a writ of error. The time for taking an appeal or suing out a writ of error on all judgments, final orders and decrees rendered more than two years prior to the passage of this act shall be three years from the date of the judgment, order or decree": Acts 1899, p. 111.

This act was passed to amend section 1027 of Sandel & Hill's Digest, which is as follows: "An appeal or writ of error shall not be granted, except within three years next after the rendition of the judgment or order, unless the party applying therefor was an infant, married woman, or of unsound mind at the time of its rendition, in which case an appeal or writ of error may be granted to such parties, or their legal representative, within one year after the removal of their disabilities, or death, whichever may first happen."

Appellee contends that the appeal was barred under either of the sections of the act of March 16, 1899, *supra*.

(a) The first section is prospective in its operation. It applies only to appeals from judgments, orders, and decrees rendered after the act took effect. This is the general rule of construction, and that it is the true rule to apply to this section is manifest when considered in connection with the second section, for that section expressly provides the time for appeal from all judgments, orders, or decrees rendered prior to the passage of the act. The first section has therefore no application.

(b) The first clause of the second section has no application here, for that refers to appeals from judgments, etc., rendered within a period of two years prior to the date of the passage of

the act. The decree in this case was rendered about ten years prior to the passage of the act, so it comes within the latter clause of the second section of the above act, which prescribes: "The time for taking an appeal or suing out a writ of error on all judgments, final orders and decrees rendered more than two years prior to the <sup>172</sup> passage of this act shall be three years from the date of the judgment, order or decree." From all judgments, final orders, and decrees rendered three years or more prior to the passage of the act, no time is given in which to appeal. This would, *eo instanti*, deprive infants of the right to appeal. The legislature could not do that: Const., sec. 15, art. 7; *O'Bannon v. Ragan*, 30 Ark. 181.

2. The decree appealed from, after setting out the issues, proceeds as follows: "And it appearing that numerous depositions have been taken in this case, and the litigation herein is likely to be long and tedious of family matters: Now, therefore, in order to put an end to litigation, and as an amicable adjustment and settlement of a family affair in regard to the descent, inheritance and settlement of the rights of the plaintiffs and defendants in regard to all the real and personal estate of the said J. N. S. Gibson, as above described and mentioned as being in the hands or control of his administrator, L. D. Snapp, as aforesaid, it is hereby ordered, considered and decreed by the court, as well as by the consent and agreement of all the parties hereto, both plaintiffs and defendants, that," etc. It appears that the court did not enter upon the merits of the controversy, but rendered the decree "to put an end to litigation, and as an amicable settlement and adjustment of a family affair." The question then is, Can appellant appeal from a compromise decree entered by the consent of her regular guardian? The statute provides that "no judgment can be rendered against an infant until after a defense by a guardian": Sandel & Hill's Digest, sec. 5647. We have held under the statute that the defense of the guardian must be not merely formal, but real and earnest. He should put in issue and require proof of every material allegation to the infant's prejudice, whether it be true or not, and make no concessions on his own knowledge: *Pinchback v. Graves*, 42 Ark. 222. Again, we have held that an infant is not prejudiced by admissions of his guardian: *McCloy v. Trotter*, 47 Ark. 445, 2 S. W. 71; *Moore v. Woodall*, 40 Ark. 42; *Evans v. Davies*, 39 Ark. 235. Now, every compromise involves an admission or concession to some extent of the claims of the other party. Anderson says it is the mutual yielding of opposing claims; the

surrender of some right or claimed right in consideration of a like surrender of some counterclaim: Anderson's Law Dictionary, verbo "Compromise"; Gregg v. Town of Wethersfield, 55 Vt. 387. In the absence of authority given by statute, the general rule is, says Mr. Rodgers, that a guardian cannot agree to <sup>173</sup> any compromise or settlement by which the property interests of his ward are affected without the concurring sanction of the court to which he must look for authority to bind his ward: Rodgers on Domestic Relations, sec. 859. The recitals of the record supra show affirmatively that the chancellor performed no judicial act of investigation into the merits of the controversy before entering the decree. On the contrary, it appears that was purposely avoided, out of consideration of mere expediency, "to put an end to tedious litigation, and as an amicable settlement and adjustment of a family affair." Such added dignity to the compromise of the guardian did not make it any less his compromise. In the face of such a record we cannot indulge the maxim, "*Omnia praesumuntur rite et solemniter esse acta.*" It was plainly not the compromise of the court. There was nothing to show that it was for the benefit of the infant. The facts shown by this record do not bring the appellant within the maxim of "*Consensus tollit errorem,*" and bar her right to appeal. To hold otherwise, we think, would be contrary to the trend of our own statute and decisions, as well as the weight of authority: Walton v. Coulson, 1 McLean, 120, Fed. Cas. No. 37,132; Bank v. Ritchie, 8 Pet. 128; 1 Black on Judgments, sec. 197, and authorities cited; 15 Ency. of Pl. & Pr. 13, and authorities cited.

The motion to dismiss the appeal is therefore overruled. In the absence of a request from the attorneys and an opportunity to be heard, it would not be proper to go further, and determine whether the decree should be affirmed or reversed on the merits.

OPINION DELIVERED NOVEMBER 15, 1902.

WOOD, J. The court erred in rendering the consent decree without looking into the merits to determine whether same was for the benefit of the infant. The proceedings under this erroneous decree have brought about new conditions. Appellant asks here for an order of restitution. It appears that the trial court did not pass upon either the pleadings or the proof, and we will not do so. It may be that an order of restitution will be proper before further proceedings are had in the lower court. We will not, however, pass upon that question. The parties

may desire to amend their pleadings, make new parties and take further proof. Appellant may, if she deems proper, ask for restitution in the lower court.

Reversed and remanded, with leave to amend pleadings and with directions to proceed according to law.

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*Judgments Against Infants*, including their rights to show cause after coming of age, are considered in the note to *Joyce v. McAvoy*, 89 Am. Dec. 184-193. As to the effect of statutes giving to minors the right to show cause against a decree or order upon arriving at majority, see *Harrison v. Walton*, 95 Va. 721, 64 Am. St. Rep. 830, 30 S. E. 372; *Manfull v. Graham*, 55 Neb. 645, 70 Am. St. Rep. 412, 76 N. W. 19. In general, infants have no absolute right to avoid a judgment rendered against them: *Robertson v. Blair*, 56 S. C. 96, 76 Am. St. Rep. 543, 34 S. E. 11.

*The Powers of Guardian* are considered in the monographic note to *Schmidt v. Shaver*, 89 Am. St. Rep. 257-316. As to the effect of a compromise by a next friend, see *Tripp v. Gifford*, 155 Mass. 108, 31 Am. St. Rep. 530, 29 N. E. 208; note to *Fletcher v. Parker*, 97 Am. St. Rep. 999.

*Statutes Limiting the Time* in which an action may be brought usually operate prospectively only: *Tice v. Fleming*, 173 Mo. 49, 72 S. W. 689, 96 Am. St. Rep. 479, and cases cited in the cross-reference note thereto.

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## STATE MUTUAL INSURANCE COMPANY v. LATOURETTE.

[71 Ark. 242, 74 S. W. 300.]

**INSURANCE—Waiver of Warranty by Agent.**—A warranty in a policy of insurance that the title to the property insured is in the insured, is waived when the authorized agent of the insurer, before delivery of the policy and payment of the premium, is informed that the title to the property is in the wife of the insured, and stated that that made no difference. (p. 63.)

**INSURANCE—Power of Agent to Waive Warranty.**—An insurance agent with power to forward applications, receive and deliver policies, and accept premiums, has power to waive a warranty contained in the contract of insurance, notwithstanding conditions against such waiver contained in the application for insurance. (p. 63.)

J. W. and M. House, for the appellants.

Lamb & Gautney, for the appellee.

**246** HUGHES, J. It is contended by the appellant that the husband has no insurable interest in his wife's **247** property, and that L. Latourette had none in Mrs. Latourette's property in this case. But this question was not raised in the pleadings below in this case, nor in the instructions asked, and it would



therefore not be proper for us to undertake to decide that question here on this appeal.

The only question here is one of waiver. When the agent was informed by L. Latourette before delivery of the policy that the title to the property was in Mrs. Latourette, and in reply thereto said that that made no difference, and delivered the policy thereafter, and collected the premium, he thereby waived the provisions of the policy in regard to the title of the property being in L. Latourette.

Upon this point there is conflict of testimony as to what the agent said, but this was settled by the jury, and we cannot disturb their verdict on a question of fact, there being undisputed testimony to support it.

It is contended that Cooley, the agent, was only a local agent, with no authority or power to waive anything, but we find he was agent to forward the applications, to receive the policy, and to deliver it and accept the premium, and that he made this waiver in delivering the policy, and that it was made while performing a duty within the scope of his agency.

In *Insurance Co. v. Brodie*, 52 Ark. 15, 11 S. W. 1016, 4 L. R. A. 458, this court, quoting approvingly from *Insurance Co. v. Williamson*, 13 Wall. 222, said: "The powers of the agent are, *prima facie*, coextensive with the business intrusted to his care. . . . An insurance company establishing a local agency must be held responsible to the parties with whom they transact business for the acts and declarations of the agent within the scope of his employment as if they proceeded from the principal." In *Peoria etc. Ins. Co. v. Hall*, 12 Mich. 202, Judge Christiancy said: "Notice to the agent is notice to the principal. . . . If he knew that power was kept at the time of the insurance, or to be kept during its continuance, the company must be regarded as having known it also. They had power to waive the condition, and by taking the premium and issuing the policy with such notice or knowledge they must be regarded as having waived the condition which prohibited its keeping. It would be a gross fraud in the company to receive the premium for issuing a policy on which they did not intend to be liable, and which they intended to treat as void in case of loss."

"The issue of a policy by an insurance company, with a full  
248 knowledge of all the facts affecting its validity, is tantamount to an assertion that the policy is valid at the time of its delivery, and is a waiver of the known ground of invalidity":

*Brodie v. Insurance Co.*, 52 Ark. 16, 11 S. W. 1016, 4 L. R. A. 458, and cases cited.

We therefore conclude that the statement in the application by L. Latourette that his title to the property to be insured was "absolute and unqualified and undivided," though made a warranty, was waived when the agent was informed by Latourette before the policy was delivered that the title to the property was in Mrs. Latourette to which the agent replied that it made no difference, and delivered the policy, and collected the premium thereon, and that the company is estopped to insist that this rendered the policy invalid. The judgment is therefore affirmed

BUNN, C. J., dissents. Cooley was only a limited agent, and was expressly not authorized to waive anything for the company.

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*A Local Insurance Agent*, who has power to make contracts of insurance in the name of the company, to issue policies, and receive premiums, may waive conditions in a policy: *Springfield Steam Laundry Co. v. Traders' Ins. Co.*, 151 Mo. 90, 74 Am. St. Rep. 521, 52 S. W. 238; *Horton v. Home Ins. Co.* 122 N. C. 498, 65 Am. St. Rep. 717, 29 S. E. 944. See, too, *Magoun v. Fireman's Fund Ins. Co.*, 86 Minn. 486, 91 Am. St. Rep. 370, 91 N. W. 5; *Otte v. Hartford Life Ins. Co.*, 88 Minn. 423, 97 Am. St. Rep. 523, 93 N. W. 608, and compare *Thornton v. Travelers' Ins. Co.*, 116 Ga. 121, 94 Am. St. Rep. 99, 42 S. E. 287; *Russell v. Prudential Ins. Co.*, 176 N. Y. 178, 98 Am. St. Rep. 656, 68 N. E. 252. That notice to a soliciting agent of the condition of the title to property is notice to the company, see *Germania Ins. Co. v. Ashby*, 112 Ky. 303, 99 Am. St. Rep. 295, 65 S. W. 611.

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## ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY v. HAIST.

[71 Ark. 258, 72 S. W. 893.]

**INFANCY**—**Substitution of Guardians.**—If a suit is brought by an infant through a foreign guardian, such infant has a right to substitute a resident of the state as next friend. (p. 66.)

**CONFLICT OF LAWS**—**Death by Wrongful Act.**—If a parent is killed by wrongful act in another state, and the statute of that state and of the state where action is brought both give a minor child the right to recover for such act, the cause of action is transitory, and an action thereon may be maintained in the latter state. (p. 67.)

**PLEADING FOREIGN STATUTES.**—A pleading need not set out the statute of another state in *hæc verba*. To set out its substance and effect is sufficient. (pp. 68, 69.)

**NEGLIGENCE—Vice-principals.**—A railroad company is liable for the death of its fireman caused by the combined negligence of a fellow-servant and a vice-principal, such as a conductor in its employ. (p. 70.)

**NEGLIGENCE—Death by Wrongful Act—Measure of Damages.**—In an action by a minor to recover for the death of her father caused by wrongful act, if the evidence shows that plaintiff's intestate was an honest, hard-working man, who had provided for plaintiff and treated her properly, she is entitled to recover for such care, support, and maintenance, and such advantages and benefits in the way of training and education, both moral and intellectual, as she would have received from him if his injury and death had not occurred. (p. 72.)

Dodge & Johnson, for the appellant.

Murphy & Mehaffy and Robertson & Martineau, for the appellee.

**262 HUGHES, J.** In this case, Anna Elizabeth Haist, a minor, was the real plaintiff, and by amendment to the complaint, by leave of the court, T. N. Robertson was her next friend who represented and cared for her interest in the suit which had been brought for her. There was no error in the allowance of the amendment by the substitution of T. N. Robertson as next friend, instead of the **263** foreign guardian, H. E. Burnham. In discussing this question, the supreme court of the United States, in *Morgan v. Potter*, 157 U. S. 198, 15 Sup. Ct. Rep. 590, said: "It is the infant, and not the next friend, who is the real and proper party. The next friend, by whom the suit is brought on behalf of the infant, is neither technically nor substantially the party, but resembles an attorney, or a guardian ad litem, by whom a suit is brought or defended in behalf of another." This is the doctrine of the more modern decisions on this question: *Whittem v. State*, 36 Ind. 214; *George v. High*, 85 N. C. 113.

Though the suit was brought by a foreign guardian, who was not qualified to sue in this state, the court ought not to have dismissed it, the infant being the real and proper plaintiff, but did right in appointing someone as next friend to look after her interest in the suit, who was qualified to sue for her: *Hoskins v. White*, 13 Mont. 70, 32 Pac. 163; *Young v. Young*, 3 N. H. 345; *Johnson v. Blair*, 126 Pa. St. 426, 17 Atl. 663; *Tate v. Mott*, 96 N. C. 19, 2 S. E. 176.

Did the circuit court have jurisdiction of the subject matter of this suit? The plaintiff, Anna Elizabeth Haist, was a minor, residing in the state of Nebraska, and brought this suit to re-

cover damages alleged to have been caused by the negligence of the defendant in the state of Louisiana, by the killing of William Haist, her father. That William Haist, the father, was killed in the state of Louisiana, while acting as fireman on defendant's train, without any negligence upon his part, in a collision between a freight train and a passenger train on defendant's railway, about four miles from Howcott, in Rapides Parish, is clear from the evidence in the case. That that collision was caused by the negligence of the servant or servants of the defendant on the defendant's train is equally clear from the proof in the case. A right of action therefore accrued to the said Anna Elizabeth Haist. It was brought in Hot Spring county, Arkansas. The action is transitory: *Chicago etc. Ry. Co. v. Doyle*, 60 Miss. 977. Will the courts of Arkansas enforce such rights of action as this arising in the state of Louisiana by virtue of her laws? It is not a question whether the laws of Arkansas have any extraterritorial force.

Counsel for appellant contend that the acts of Arkansas and the acts of Louisiana giving the right of action for the wrongful killing of a human being are so dissimilar that such right accruing under the Louisiana statute cannot be enforced in the courts of <sup>264</sup> Arkansas. But it seems to us "quite evident that the two statutes are of similar import. They are founded upon the same principles, are aimed at the same evil, construct the same kind of action, and give it for the benefit of the same class of individuals. In both the utter failure of redress at common law where the injury ended in death was the injustice for which a remedy was enacted; and in both the new action was given for the benefit of those who had suffered an injury as the consequence of the wrong. This fundamental agreement in the main and substantial characteristics of the two statutes is not affected by the differences of detail which the demurrer points out": *Wooden v. Western New York etc. R. R. Co.*, 126 N. Y. 10, 22 Am. St. Rep. 803, 26 N. E. 1050, 13 L. R. A. 461; *Stoeckman v. Terre Haute etc. R. R. Co.*, 15 Mo. App. 509; *Stewart v. Baltimore etc. R. R. Co.*, 168 U. S. 448, 18 Sup. Ct. Rep. 105; *St. Louis etc. Ry. Co. v. Brown*, 62 Ark. 254, 35 S. W. 225. Public policy in this state is not violated by the enforcement of the Louisiana statute in our courts.

The laws of Louisiana read as follows: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it; the right of this action survives, in case of death, in favor of the minor children and widow of the



deceased, or either of them, or in default of these in favor of the surviving father and mother, or either of them, for the space of one year from the death. The survivors above mentioned can also recover the damages sustained by them by the death of the parent or child, or husband or wife, as the case may be": Civ. Code, art. 2315.

The Arkansas statutes (Sandel & Hill's Digest) read as follows:

"Sec. 5908. For wrongs done to the person or property of another, an action may be maintained against the wrongdoers, and such action may be brought by the person injured, or, after his death, by his executor or administrator against the wrongdoer, or, after his death, against his executor or administrator, in the same manner and with like effect in all respects as actions founded on contracts."

"Sec. 5911. Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or company or corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding <sup>265</sup> the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony.

"Sec. 5912. Every such action shall be brought by, and in the name of, the personal representatives of such deceased person, and if there be no personal representatives, then the same may be brought by the heirs at law of such deceased person; and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased persons, and shall be distributed to such widow and next of kin, in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and, in every such action, the jury may give such damages as they shall deem a fair and just compensation, with reference to the pecuniary injuries resulting from such death, to the wife and next of kin of such deceased person. Provided, every such action shall be commenced within two years after the death of such person."

Did the complaint state facts sufficient to constitute a cause of action? It was not necessary that it should set out the Louisiana statute in haec verba in pleading the statute. To set out



the substance and effect of the statute was sufficient: *Hanley v. Donoghue*, 116 U. S. 1, 7, 6 Sup. Ct. Rep. 242; *Louisville etc. Ry. Co. v. Shires*, 108 Ill. 628; *Stacy v. Baker*, 1 Scam. 418; *Consolidated Tank Line Co. v. Collier*, 148 Ill. 266, 39 Am. St. Rep. 181, 35 N. E. 756.

Is the verdict sustained by the evidence? The conductor, Farrar, was asleep or dozing when his train passed Howcott, where it ought to have been run onto the sidetrack to let the approaching passenger train pass. The engineer of the freight train disregarded his duty, and failed to sidetrack at Howcott. Consulting his watch, which was fifty or sixty minutes slow, he had concluded that he had time enough to reach Antoine, the next station ahead, before the passenger would reach it, and, disregarding his duty under this mistake as to the time, he ran by Howcott without stopping, and without any signal from the conductor. This was evidently negligence on the part of the engineer which contributed to the collision between the passenger train and the freight train, which collision caused the death of William Haist. But William Haist was a fellow-servant with the engineer, and could not recover if the negligence of the engineer alone caused the injury. But did the negligence of the conductor, Farrar, contribute to the collision of the trains, and is the company liable for the combined negligence of the conductor and the engineer? It is held under the decisions <sup>266</sup> in Louisiana that, if injury is caused by the combined negligence of a fellow-servant and a vice-principal on a railroad the railroad company is liable, and that a conductor personates the company, and is a vice-principal.

It was the duty of the conductor to see to it that all the employés under him understood and discharged their duties. He and the engineer both had time-tables, and knew when and where to stop. The trains were running on time. He, the conductor, had means of signaling the engineer, and of stopping the train by the brakes and brakeman at his command, when necessary. He knew, or ought to have known, when the freight train passed Howcott, and, knowing that the passenger was on time and would soon be at Howcott, and that it was all-important that his train should be sidetracked there to prevent the fatal collision which occurred a few miles farther on, it was his duty to have his train sidetracked at Howcott to await the passing of the passenger. As he was asleep at Howcott, and made no effort to have the freight stop there, it does seem that there can be no question that he was not in the discharge

of a plain and very important duty, and that his negligence contributed to the collision which deprived the fireman, William Haist, of his life; and, being a vice-principal, the company is liable.

Was there error of law in the court's instructions to the jury? They are as follows: The court, on plaintiff's request, gave the following instructions:

"1. If you believe, from the evidence, that William Haist was in the employ of defendant as fireman on a locomotive drawing one of its freight trains on one of its tracks or lines of railroad, in the state of Louisiana, on the seventh day of February, 1899; that while in such employ, the locomotive or train on which he was serving came into collision with a passenger train of defendant, or an engine drawing it, and that he was thereby killed, or so badly injured that he died in a short time thereafter; (b) that the freight train on which he was serving should have been sidetracked at Howcott, so as to let the passenger pass it, and that if it had been so sidetracked, the collision would not have occurred; (c) that the conductor knew that Howcott was the proper place to take the sidetrack with his freight train, and let the passenger train pass it, but that he was negligently asleep, dozing or inattentive when Howcott was reached, and so failed to know when it was reached, and thereby negligently permitted the freight train to go ahead on the main <sup>267</sup> track, and thereby caused the collision; (d) that under the unwritten law of the state of Louisiana, as it is and then was, the conductor of a railroad train in that state represents or personates the railway company, and that the company is liable under said law for any damages or injury caused to its other employes on the train by or through such conductor's negligence or inattention in conducting the train; (e) that under and by provision of the statute law of the state of Louisiana, as it is and then was, any person who by any act whatever causes damages to another is bound to repair the damage, and that the right of action therefor survives in case of death in favor of the minor children or widow of deceased who survive him, and that such survivors have also the right to recover the damages sustained by them by the death of the deceased; (f) that said William Haist left no widow, but left the plaintiff, Anna Elizabeth Haist, as his only child and heir at law, whose mother was then dead; (g) that he contributed to plaintiff's support, and that plaintiff is

a minor, and was damaged by his death—you should find for the plaintiff.

“2. If from the evidence you find the facts and the law of Louisiana as stated in the foregoing instruction, then it makes no difference whether the injury or death of William Haist was or was not contributed to by any negligence or mistake of the engineer.

“3. If you find for the plaintiff, your verdict should be for such a sum of money as you believe from the evidence would be a just and fair compensation for all the pecuniary injury suffered by her by reason of the injury and death of the said William Haist, and, in arriving at this sum, you may take into consideration such care, support and sustenance, and such advantages and benefits in the way of training and education, both moral and intellectual, if any, as you may believe from the evidence she would receive from or through him if his injury and death had not occurred.

“4. If you find from the evidence that the conductor of the freight train personated or represented the defendant as vice-principal, under the law of Louisiana, then he was not a fellow-servant of the fireman.”

Defendant excepted separately to the giving of each of paragraphs a, b, c, d, e, f and g, of plaintiff's instruction numbered 1. It also objected to the giving of instructions 2, 3 and 4, and its separate objections being overruled, exceptions were saved.

Defendant asked the following instructions, which were given:

“1. The court instructs the jury that the mere fact that the **268** intestate, Haist, was killed in a collision on defendant's road while he was engaged in his duties as fireman does not make the defendant liable to plaintiff in this suit for damages occasioned thereby; but the proof must show further, and show affirmatively, that the collision which caused his death was due to some negligence upon the part of the defendant.”

“12. The court instructs the jury that they are not at liberty to take the aggregate of any such amounts for any such years, nor a sum which, at interest, would yield such amounts; but the true measure of damages is the present value of such sum, judged by the number of years that such contributions might be expected to continue, as shown by the proof.

“13. The court instructs the jury that, in assessing damages in a case of this kind, they are not assessed by way of penalty, or punishment, nor of sentiment, nor to compel the defendant

to contribute to the support of a minor, but are allowed only upon the basis of such pecuniary loss as the proof shows the party in interest has sustained; and this is to be determined by the rules given you in the previous instructions."

We are of the opinion that there is no reversible error in the instructions. Particular objection is urged to the instruction as to the measure of damages—that the jury might take into "consideration such care, support and sustenance, and such advantages and benefits in the way of training and education, both moral and intellectual, if any, as you may believe from the evidence she would receive from or through him if his injury and death had not occurred." It is said there is no evidence in the record to warrant this instruction. It is shown that William Haist, the deceased, was an honest, hard-working, square man and a good fellow. This, it seems, would warrant an inference that he would properly provide for his child, being governed by the natural inclination of an honest, hard-working and sober father, which the deceased was shown to be. He had provided for her care and keeping after her mother's death, and it was shown that she was treated by her parents as a child ought to have been treated. As was said in *Railway Co. v. Sweet*, 60 Ark. 559, 31 S. W. 571: "That was enough. . . . The attributes of such a character being shown in the father, the law would presume them of some value to his children until the contrary was made to appear": *Railway Co. v. Maddry*, 57 Ark. 306, 21 S. W. 472; *McIntyre v. New York Cent. Ry. Co.*, 57 N. Y. 287; 1 *Greenleaf on Evidence*, sec. 33. We think that the evidence shows that the verdict is not excessive. Finding no reversible error, the judgment is affirmed.

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*A Right of Action for Wrongful Death* is, by the weight of authority, transitory; and when it arises in one state may be enforced in another, with this qualification, that the statute of the state under which the cause of action arose is not inconsistent with the statute or policy of the state in which it is sought to be enforced: See the monographic note to *Attrill v. Huntington*, 14 Am. St. Rep. 353, 354. Compare *McGinnis v. Missouri Car etc. Co.*, 174 Mo. 225, 97 Am. St. Rep. 553, 73 S. W. 586; *Wabash etc. Ry. Co. v. Fox*, 64 Ohio St. 133, 83 Am. St. Rep. 739, 59 N. E. 888; and see *Williams v. Pope Mfg. Co.*, 52 La. Ann. 1417, 78 Am. St. Rep. 390, 27 South. 851; *Eingartner v. Illinois Steel Co.*, 94 Wis. 70, 59 Am. St. Rep. 859, 68 N. W. 664; note to *Gray v. Telegraph Co.*, 91 Am. St. Rep. 726, 727.

*In Estimating the Value of the Life* of a deceased to the survivors, in an action for wrongful death, the jury may take into consideration his age, health, habits of life, capacity for making a living for himself and family, the wages he was earning, and his disposition to be frugal and industrious: See the monographic note to *Louisville*



etc. Ry. Co. v. Goodykoontz, 12 Am. St. Rep. 379. Consult, also, the recent cases of Dugan v. Myers, 30 Ind. App. 227, 96 Am. St. Rep. 341, 65 N. E. 1046; Lipscomb v. Houston etc. Ry. Co., 95 Tex. 5, 93 Am. St. Rep. 804, 64 S. W. 923; Pittsburgh etc. Ry. Co. v. Parish, 28 Ind. App. 189, 91 Am. St. Rep. 120, 62 N. E. 514; Railroad Co. v. Bentz, 103 Tenn. 670, 91 Am. St. Rep. 763, 69 S. W. 317.

## FRANKLIN LIFE INSURANCE COMPANY v. GALLIGAN.

[71 Ark. 295, 73 S. W. 102.]

**INSURANCE, LIFE—Warranties in Application.**—If answers given in an application for life insurance are made warranties, replies to questions as to how long since the applicant was attended by a physician and as to the nature of the ailment must be construed as referring to some ailment that would affect the contract of insurance; and the failure of the applicant to mention some slight indisposition or trivial or temporary ailment, for which he was treated, but which in no wise affected his general health, and did not increase the risks of insurance, does not avoid the policy. (p. 74.)

**INSURANCE, LIFE—Warranties—Estoppel Against Insurer.**—Knowledge on the part of an examining physician of an insurance company that the answers given to, and written by, him in an application for life insurance are false estops the insurer from forfeiting the policy for such false answers, although under the contract of insurance such answers are made warranties. (p. 75.)

**INSURANCE, LIFE—Warranties in Application—Answer as to Attending Physician.**—If answers given in an application for life insurance are made warranties, and the applicant, in response to an inquiry, gives the name of the physician who attended him during the greater portion of his last illness, without giving the name of the physician who attended him during the earlier part of such illness, his answer does not constitute a breach of warranty avoiding the policy. (p. 75.)

**INSURANCE, LIFE—Warranties—Use of Liquor and Tobacco.** If answers given in an application for life insurance are made warranties, inquiry as to the appellant's use of liquors and tobacco calls for the habit of the insured in these respects at the time of the application, and does not direct his mind to a single or incidental use. (p. 75.)

**INSURANCE, LIFE—Conflict of Laws—Place of Contract.**—A policy of life insurance, by its terms to be performed in another state, is governed by the statute of that state providing that no misrepresentation made in obtaining or securing a policy of life insurance shall be deemed material, or render the policy void, unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due and payable. (p. 76.)

**INSURANCE, LIFE—Conflict of Laws—Amendment of Statute.**—A contract of life insurance, by its terms to be performed in another state, is governed by the statute of that state as it existed at the time the contract was entered into, and an amendment to



such statute does not affect a nonresident policy-holder, whose contract was entered into prior to such amendment. (p. 76.)

**INSURANCE, LIFE—Vested Rights—Change of Beneficiary.**

The interest of a beneficiary in a policy of life insurance is vested by the terms of the contract, and the assured cannot change the beneficiary without authority derived from the contract itself. (p. 77.)

Austin & Taylor, Cypert & Cypert and Bridges & Wooldridge, for the appellants.

White & Altheimer and F. T. Vaughan, for the appellee.

298 WOOD, J. By the contract of insurance the answers given in the application are warranties. If untrue, they avoid the policy. But they must be construed in the sense contemplated by the parties to the contract. By the questions, "How long since you were attended by a physician, or had occasion to consult one?" "State the nature, gravity, and duration of the ailment or disease," "Give the name and address of that physician," and the answers thereto, the parties had in view some ailment or disease that would affect the contract of insurance. They did not, evidently, have in mind some slight indisposition, or trivial and temporary ailment that in no wise affected the general health or constitution of the assured, and therefore did not increase the risks of insurance. In *Providence Life Assur. Soc. v. Reutlinger*, 58 Ark. 528, 25 S. W. 835, the court said: "Where questions propounded to an applicant for insurance upon his life as to his physical condition are in such terms as include the most trivial ailments or injuries, they should be interpreted as referring only to such illness or injuries as affect the risk to be assumed, unless they are in words which exclude such interpretation. The presumption is that trivial ailments or injuries are not within the contemplation of the parties, and that the questions, in the absence of words directing attention to them, are not asked with the view or purpose of ascertaining the existence of the same. The answers of the applicant should be interpreted in the same manner as the questions eliciting them; that is to say, as responsive to the questions in the sense in which they are asked." The fact, therefore, that the assured had since 1893 a "mild remittent or bilious fever," and was attended during this illness by another physician than Dr. Lindsay, did not falsify the answers to the question in the application *supra*, because Dr. Pry, the physician who attended him during this sickness, testified that "he was not very ill; having mild remittent or bilious fever, that did not af-

fect his constitution." Moreover, Dr. Pry, the witness who attended the assured during this illness, was also the examining physician for the company, who propounded the questions to the assured in the application, and took down his <sup>299</sup> answers. Being fully cognizant of the fact that the assured had been ill with bilious fever since 1893, and that he attended him for such illness, he should not have permitted the assured to have given false answers, which he knew would forfeit his policy. The fact that the assured answered the questions as he did, and that its physician took them down as the assured gave them, shows that they both concluded that the bilious attack of 1898 was not within the scope of the question in the application, and did not affect the question of insurance. Even if it had been material to the contract of insurance, the knowledge of the physician, the company's agent, under such circumstances was the knowledge of the company; and the company would be estopped from taking advantage of any false answers to forfeit the policy, when it knew the same to be false at the time the contract was executed: *Dwelling-house Ins. Co. v. Brodie*, 52 Ark. 11, 11 S. W. 1016, 4 L. R. A. 458. See, also, *Pudritzky v. Supreme Lodge K. of H.*, 76 Mich. 428 43 N. W. 373; *Miller v. Mutual Ben. Life Co.*, 31 Iowa, 216, 7 Am. Rep. 122.

The fact that the assured failed to disclose the name and address of one Dr. A. L. McLard, who attended him the first four or five days during his illness with typhoid fever, did not falsify the answer that Dr. R. W. Lindsay, of Little Rock, was the physician who attended him. The question was, "Give the name and address of that physician." It does not require the name and address of all the physicians that might have been in attendance upon him during a serious illness. Dr. McLard attended the assured only during the first four or five days of his illness, when he was removed to Little Rock, where Dr. Lindsay was called and attended him during the remainder of his illness—something over three weeks. The assured correctly answered that Dr. Lindsay, of Little Rock, was the physician who attended him and gave by such answer all the information called for by the question. The object of the question was to apprise the company of the name of a physician who was in attendance, and who would know about the nature of the disease and the effect it may have had upon the constitution of the one who was contemplating insurance. If the question had called for the names of the physicians who attended him, there might be some room for the contention.

As to the use of liquors and tobacco, the question called for the habit of the assured in these respects at the time of the application, and there was proof to sustain the finding that at that time the assured was not addicted to their use. It was held in *Van Valkenburg* <sup>300</sup> v. *American etc. Life Ins. Co.*, 70 N. Y. 605, that the question, "Did the insured use any intoxicating liquors or substances?" did not direct the mind to a single or incidental use, but to a customary or habitual use."

2. But even if there were a breach of warranty by the assured in the matters discussed *supra*, still appellant could not avail itself of such breach, under a statute of Missouri, which is as follows: "No misrepresentation made in obtaining or securing a policy of insurance on the life or lives of any person or persons shall be deemed material, or render the policy void, unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due and payable, and whether it so contribute in any case shall be a question for the jury." The proof justified the conclusion that the company taking the insurance was a Missouri corporation; that the contract of insurance was a Missouri contract, to be performed in Missouri. Therefore the laws of Missouri governed in its enforcement: *State Ins. Assn. v. Brinkley Stave Co.*, 61 Ark. 5, 54 Am. St. Rep. 191, 31 S. W. 157, 29 L. R. A. 712; *Seiders v. Merchants' Ins. Co.*, 93 Tex. 194, 54 S. W. 753. Since the law of Missouri governs, the only question is, Did the matters alleged to have been misrepresented contribute to the death of the assured? This question was properly submitted to the jury, and their verdict should stand. The appellant contends that the above statute was not applicable, because since its enactment it had been amended so as to make it applicable alone to citizens of Missouri, and that the statute as amended should apply to the enforcement of the contract. We cannot adopt that view. The law in force when the contract was made entered into it, and controlled upon the assured and the beneficiary under the contract rights which subsequent legislation could not annul. The right vested by this law not to have the contract forfeited by any matter misrepresented, unless such matter contributed to the contingency on which the policy became payable, was a most important one, and, for aught we know, the one that controlled in the making of the contract. But for this right we are not warranted in saying that the assured would have entered upon the contract at all. What was said by the court in *St. Louis etc.*

Ry. v. Alexander, 49 Ark. 190, 4 S. W. 753, is apposite here: "It is not material to ascertain whether the provision of the act of 1883 which is relied upon was intended to be retroactive in its operation or not. The plaintiff's right to recover all that was adjudged to him had vested before the repealing <sup>301</sup> act was passed. The law in force when the sale was made, regulating its obligations and defining the rights and duties of the purchaser—all the provisions beneficial to him and constituting a material inducement to the purchase—entered into and became a part of his contract, and passed beyond the legislative control." The instructions of the court were correct, and judgment against the company was correct. This determines the controversy as to appellant.

3. The remaining question is to determine whether appellee, Galligan, or cross-appellant, Lawton, should recover. This question, we think, is settled in favor of cross-appellant by the decisions of this court in Block v. Valley Mut. Ins. Co., 52 Ark. 201, 20 Am. St. Rep. 167, 12 S. W. 477, and Johnson v. Hall, 55 Ark. 210, 17 S. W. 874. These were cases against mutual benefit societies. In the first case we said: "But, regardless of the character of the company, the rights of persons claiming insurance arise out of and depend upon contract. . . . When the courts are invoked, the contract measures the rights of one and the obligation of the other party, and relief must be granted, if at all, according to its terms." In both of the above cases we held that the holder of a policy in a mutual benefit society cannot change the beneficiaries named therein, unless expressly authorized to do so by the policy itself, or by the articles of association or by-laws of the society, where these are by the terms of the policy made a part of it. If this doctrine be sound as to mutual benefit societies, a fortiori must it be when applied to regular life policies issued by an ordinary life insurance company. If the rights of the beneficiary are so vested by the contract as to preclude the assured from changing the beneficiary while she is living, then the assured certainly could not name another beneficiary after her death. Upon the death of the beneficiary, the law, *eo instanti*, fixes the devolution of her rights. The right to recover on the policy was a chose in action expectant or contingent upon the death of the assured, which passed upon the death of the beneficiary like any other of the personal assets. These, under our statute, do not pass to the husband, as did choses in action of the wife not reduced to possession during their joint lives under the common law, but



they go to her estate: Sandel & Hill's Digest, sec. 4946; also sec. 2470, par. 2. Such we believe to be the logical sequence of the doctrine that the interest of a beneficiary in a policy of life insurance is vested by the terms of the contract, and that the assured cannot change the beneficiary without authority derived from the contract itself. The decisions are not harmonious, **302** but the doctrine of our own court is supported by eminent authority, and is, perhaps, the prevailing rule: 2 Am. & Eng. Ency. of Law, 2d ed., 980, 987; Drake v. Stone, 58 Ala. 133; 1 Bacon on Benefit Societies, secs. 292-294, and cases cited; Cook on Life Insurance, and cases cited; 2 Joyce on Insurance, sec. 828.

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*A Medical Examiner is the Agent of the Insurer* in making an examination and taking down and recording the answers of the applicant for insurance. His knowledge thus acquired, his interpretation of the answers given, and his errors in recording them, are the knowledge, interpretation, and errors of the company itself, which it is estopped from taking advantage of: Sternaman v. Metropolitan Life Ins. Co., 170 N. Y. 13, 88 Am. St. Rep. 625, 62 N. E. 763; Leonard v. State Mut. Life Assur. Co., 24 R. I. 7, 96 Am. St. Rep. 698, 51 Atl. 1049; Otte v. Hartford Life Ins. Co., 88 Minn. 423, 97 Am. St. Rep. 532, 93 N. W. 608.

*False Answers as to His Health* by an applicant for life insurance are considered in the note to Continental Life Ins. Co. v. Young, 3 Am. St. Rep. 634-637; March v. Metropolitan Life Ins. Co., 186 Pa. St. 629, 40 Atl. 1100, 65 Am. St. Rep. 887, and cases cited in the cross-reference note thereto. Such answers as to specific diseases have been held to avoid the contract of insurance, without regard to their materiality: Mutual Life Ins. Co. v. Simpson, 88 Tex. 333, 53 Am. St. Rep. 757, 31 S. W. 501.

*Representations as to the Use of Liquors* by an applicant for life insurance have reference to the customary or habitual use thereof, and not to single or occasional indulgences: Chambers v. Northwestern Mut. Life Ins. Co., 64 Minn. 495, 58 Am. St. Rep. 549, 67 N. W. 367. As to the waiver of conditions against the excessive use of liquor, see Northwestern Masonic Aid Assn. v. Bodurtha, 23 Ind. App. 121, 77 Am. St. Rep. 414, 53 N. E. 787.

*The Interest of the Beneficiary* named in a life insurance policy or a benefit certificate is not, according to the weight of authority, a vested interest during the life of the insured. There are, however, decisions to the contrary: Middeke v. Balder, 198 Ill. 590, 64 N. E. 1002, 92 Am. St. Rep. 284, and cases cited in the cross-reference note thereto; United States Casualty Co. v. Kacer, 169 Mo. 301, 69 S. W. 370, 92 Am. St. Rep. 641, and cases cited in the cross-reference note thereto.



## KANSAS AND TEXAS COAL COMPANY v. GALLOWAY.

[71 Ark. 351, 74 S. W. 521.]

**MALICIOUS PROSECUTION—Burden of Proof.**—In malicious prosecution it devolves upon plaintiff to show affirmatively that there was both malice and want of probable cause on the part of the defendant in instituting the prosecution complained of. (p. 82.)

**EVIDENCE—Former Testimony.**—The testimony of a witness given on a former trial may be proved by a witness who was present and heard him testify. (p. 85.)

**MALICIOUS PROSECUTION—Evidence.**—The testimony of the judge who dismissed a prosecution alleged to have been malicious and his written opinion rendered at the time, tending to show that he hesitated in dismissing such prosecution, are admissible in the action for malicious prosecution to rebut the charge of want of probable cause in instituting it. (pp. 85, 86.)

**MALICIOUS PROSECUTION.—Probable Cause** in criminal cases is such a state of facts known to the prosecutor or such information received by him from sources entitled to credit, as would induce a man of ordinary caution and prudence to believe that the accused was guilty of the crime alleged. (pp. 86, 87.)

**MALICIOUS PROSECUTION.**—An instruction that probable cause for a prosecution is such a state of facts known to the prosecutor, or which he could have ascertained by reasonable diligence as would induce a man of ordinary caution and prudence to believe that the accused was guilty of the crime alleged, is fatally defective, as imputing to the prosecutor a knowledge of whatever he could have ascertained by the exercise of reasonable diligence when there was nothing to put a cautious man on inquiry. (p. 87.)

**MALICIOUS PROSECUTION—Probable Cause.**—One who is going to institute a criminal prosecution need not, in order to protect himself, make inquiry of the suspected person as to his guilt. (p. 88.)

**MALICIOUS PROSECUTION—Probable Cause—Advice of Counsel.**—It is a good defense to an action for malicious prosecution that the defendant acted on the advice of learned counsel in the law advised of the full facts, in instituting the prosecution. (pp. 88, 89.)

**MALICIOUS PROSECUTION—Damages.**—In malicious prosecution plaintiff is not entitled to recover damages to compensate him for peril caused him in regard to his life or liberty if there is neither allegation nor proof of peril of his life. (p. 90.)

Hill & Brizzolara, for the appellant.

R. A. Rowe, for the appellee.

353 BUNN, C. J. This is a suit for malicious prosecution, originating in the Greenwood district circuit court of Sebastian county, and tried on a change of venue in the Scott county circuit court by a jury. Verdict and judgment in the sum of five hundred dollars in favor of the plaintiff, and the defendants duly and in due time appealed to this court.

The malicious prosecution complained of in the present suit arose from the following circumstances, according to the abstracts in the case: There was a strike, commencing February 1, 1899, throughout this (Sebastian) county, which embraced the miners in the employment of the Kansas and Texas Coal Company at Huntington in said county. The said coal company employed a great many negroes, presumably to fill the places of the strikers, some of whom it had shipped by earloads from other counties. We gather, from the evidence and statements made in the progress of the trial in the court below, that this strike was the occasion of much excitement and anxiety in the community, and on the twenty-second day of April, 1899, the Kansas and Texas Coal Company, being extensively engaged in operating its mines in the vicinity of the said town of Huntington, sued out in the United States circuit court, of the western district of Arkansas, at Fort Smith, an order of injunction, whereby said court enjoined and restrained said striking miners from interfering in any manner whatsoever with the business of said coal company; from intimidating their employés, using force or violence or unlawful persuasion to induce them to <sup>354</sup> leave the employment of said coal company; from deterring others from entering the services of the said company, and from doing any act to prevent said company and its managers and employés from exercising free control over its said business and its property there or elsewhere; and the plaintiff herein, with one George Bunch and others, was made defendant in said injunction proceeding, served with process, and was put under said order of injunction and restraint, and such injunction was in full force and effect, when an encounter of considerable violence occurred in the said town of Huntington between the said Gus Galloway, George Bunch and McCowan, the town marshal, all alleged to be of the strikers or in strong sympathy and close connection with them, on the one part, and one Albert Evans, an employé of the company, and one Battles, on the other part, as set forth in an affidavit of Joseph M. Hill, one of the attorneys of the company, made on the fifth day of July, 1899, as part of a petition of the company for a warrant of arrest to have the plaintiff brought before said court for violating said order of injunction on the occasion named, which was on the third day of July, 1899, and, leaving out mere formal parts, is as follows, to wit: "That Gus Galloway and George Bunch, two of the defendants named in said complaint [for the injunction], and upon whom process had been duly served, did on the third day of July, 1899,

intimidate, threaten, maltreat and attempt to coerce said Albert Evans, one of the employés of the plaintiff, by beating, cursing and abusing him, the said Albert Evans; that the object and purpose of such intimidation, coercion and threats was to prevent the said Albert Evans [from] laboring for the plaintiff, and to injure him on account of the fact that he was employed by the plaintiff. Wherefore writ of attachment was prayed against the said Bunch and Galloway, that they be brought before the court, and there dealt with according to law."

On the 7th of July, 1899, another affidavit by the same party, as attorney for the coal company, was filed in said court charging the plaintiff herein and others with the violation of said order of injunction on the fifth day of July, 1899, which said affidavit, after setting forth the petition or order of injunction made thereon, contained the recital and prayer, to wit:

"That, while said injunction was still in force and effect and after service upon said defendants, to wit, on the fifth day of July, 1899, the said defendants, in furtherance of a conspiracy and combination to hinder the plaintiff and its officers and employés in <sup>355</sup> the free and unhindered control of its business, did violate said injunction in the following manner, to wit, the said George Bunch and Gus Galloway did direct and assist in the formation of a large number of persons in the town of Huntington who avowed their intention of going to the mine of the plaintiff (coal company) known as Mine No. 53, and then and there forcibly and violently eject the employés of the plaintiff therefrom, and cause said employés to cease working for plaintiff; that, in furtherance of said combination and conspiracy, in which the said George Bunch and Gus Galloway participated, sentinels were established along the various roads leading between the town of Huntington and said mine. No one was permitted to go to said mine except by the consent of said sentinels, and emissaries were sent to the employés of the company to unlawfully persuade them to leave the employment of the company. And by carrying out said threatening combination and conspiracy the said George Bunch and Gus Galloway, in company with various and divers others, did intimidate and cause many of the employés of the company to leave its employ on account of fear of personal violence to them, the said employés, by reason of such threats made by said combination of persons. That said George Bunch and Gus Galloway participated, aided, assisted and abetted in all the acts and deeds of such combination and conspiracy existing in the town of Huntington on the fifth day

of July, 1899." Prayer for attachment and arrest of said Gus Galloway and George Bunch, and that they be dealt with according to law for contempt in violating the injunction of said court.

Galloway was accordingly arrested on the warrant issued on the two affidavits on the 7th of July, 1899, by the United States marshal of the district, and carried to Fort Smith and there by the order of said court was committed to the United States jail, where he was imprisoned six or seven days to await the investigation of the charges of contempt made against him in the affidavits aforesaid, filed by the attorney of the said company as aforesaid, and on the fourteenth day of July, 1899, on the hearing of the evidence in the cause, he was fully discharged by said court.

This arrest and imprisonment and subsequent discharge of the plaintiff, Gus Galloway, constitute the ground of this his suit for malicious prosecution against the said Kansas and Texas Coal Company and its manager, Bennett Brown, who answered the complaint, the first paragraph of which is a demurrer to the complaint, and in the other paragraphs they specifically deny each and <sup>356</sup> every material allegation of the complaint, to which complaint are attached the warrant of arrest, the injunction of the court in full, and the judgment of discharge of the court in the contempt proceedings, and they are made exhibits thereto.

Trial before a jury. Verdict and judgment for plaintiff in the sum of five hundred dollars against the defendants, and they in due time and in due form appeal to this court.

In this kind of proceeding it devolves upon the plaintiff to show affirmatively that there was both malice and a want of probable cause on the part of the defendants in the prosecution of the contempt proceedings against the plaintiff. It is not the object of the investigation in this suit to determine the guilt or innocence of the defendant in the former or contempt proceedings, but solely to determine whether that proceeding was prosecuted by the defendants in this suit maliciously and without probable cause.

The first error complained of in this action was the trial court's exclusion of the testimony of the said Gus Galloway offered by the defendants to reproduce the testimony of Albert Evans as given in the contempt proceedings, the court holding that the testimony of Evans himself as to what he testified in the contempt proceedings is alone admissible for that purpose.



This testimony of Evans was directly to the effect that on the occasion named in the first affidavit, on the 3d of July, 1899, he (Evans) was set upon by McCowan, the town marshal, Bunch and Galloway, by them called a "scab" and other opprobrious terms, and a pistol demanded of him; that he denied having a pistol, and other things, the effect of which was to convict Galloway of a violation of the injunction, if believed, and thus to put a different face entirely upon the conduct and nature of the parties to that encounter; said marshal and Galloway and Bunch claiming to have been in the discharge of official duty in attempting to arrest Evans for carrying a pistol, and the latter asseverating that he had no pistol when the alleged attempt to arrest him was made, but that the pistol he had and subsequently used on the occasion he took from Bunch in the progress of the melee between them on the occasion.

This evidence of Evans, who, it appears, was at the time of this trial in the state penitentiary for assaulting the said Bunch on the occasion named, was of vital importance to the defense in this case, and so the question is solely as to the court's refusal to permit Galloway to testify as to what Evans testified in the contempt proceedings.

<sup>357</sup> The question was discussed in *Burt v. Place*, 4 Wend. 597, as long ago as 1830, in which the court sustained the view of the trial court in this case. Upon this decision Greenleaf (2 Greenleaf on Evidence, 17th ed., sec. 457) cites with approval the case of *Burt v. Place*, 4 Wend. 597. In still an older case, *Richards v. Foulke*, 3 Ohio, 52, decided in 1827, it was held that the evidence of a witness in the former trial can only be reproduced by the witness himself.

The case of *Burt v. Place*, 4 Wend. 597, was manifestly influenced by the very palpable fraud and oppression shown in the former trial, while the case of *Richards v. Foulke*, 3 Ohio, 52, went off on the familiar doctrine that the best evidence attainable is alone admissible to prove any fact, and also upon another misconception of the law, that is, that the case on trial is to be governed by the facts of the case, other than such facts as were before the court and in the mind of the prosecutor in the former proceeding. In these exceptional cases the fact that malicious prosecutions forms an exception to the rule as to the admission of evidence appears to have been overlooked.

The true doctrine approved by all the authorities we have been able to examine, other than those named, is plainly and argumentatively set forth in *Bacon v. Towne*, 4 Cush. (58 Mass.)



217. In that case the defendants, having opened and stated their defense, offered Mark Doolittle, Esq., the magistrate, to prove what the testimony before him was on the part of the government to prove probable cause and rebut the allegation of malice; but the presiding judge ruled that this could only be done by the same witnesses who were produced on the stand, or their depositions, except as to testimony then given by the defendants or their wives. To this rejection of evidence the defendants objected. In speaking for the court, Chief Justice Shaw said: "The court are of opinion that this exception must be sustained. It was of vital importance for the defendants, in answer to any proof of want of probable cause, to prove affirmatively that they had reasonable and probable cause for the prosecution at the time the proceedings in it were commenced.

"Probable cause is such a state of facts in the minds of the prosecutor as would lead a man of ordinary caution and prudence to believe, or entertain an honest and strong suspicion, that the person arrested is guilty. The facts testified to on the examination may have been very influential in raising such suspicion or belief, and are therefore competent evidence to show the ground he had <sup>358</sup> of cause to believe, whether they were true or not. They are therefore facts material to the issue, to be proved by any witnesses who can testify to them, as well as by those who testified at the examination. These witnesses may be dead, absent or insane; they may have forgotten them, or refuse to testify to them, or even deny them; it is not the less true that they did so testify, and if the testimony was of a character to evidence a belief or strong suspicion, in the mind of a reasonable man, of the guilt of the accused of the crime charged, they had a direct bearing on the issue of probable cause or not, in the action for malicious prosecution."

"Probable cause does not depend on the actual state of the case, in point of fact, but upon the honest and reasonable belief of the party commencing the prosecution."

"The only cause we are aware of which seems to countenance an opposite rule is that of *Burt v. Place*, 4 Wend. 591, which was a case of gross fraud and oppression under the forms of law, practised by the defendant himself, and in which there was abundant evidence of malice, groundlessness and fraudulent design in the suits complained of as malicious": Citing authorities. This ruling is supported by *Goodrich v. Warner*, 21 Conn. 432, and a large number of other cases.

The inquiry is not as to the facts which constitute the defendant in the former proceeding guilty or innocent, but rather what was said by witnesses in the former proceeding, which, it is to be presumed, determined whether or not there was probable cause for the prosecution, not that the defendants were guilty or innocent, for the rule is that, while the defendant in the former proceeding may have been found innocent and acquitted, yet that does not show a want of probable cause in the prosecution, it being not conclusive of anything as against the prosecutor, but a mere circumstance which, taken along with others, may induce the jury to find that there was a want of probable cause, and also that there was malice. The rule is quite different if the defendant in the prosecution is found guilty, for that is conclusive of the fact that there was probable and reasonable cause for the prosecution. Some authorities, probably a majority of them, go to the extent of holding that this is the effect of a conviction, notwithstanding the fact that the judgment of conviction may be reversed on appeal, and there is the best of reasons for that position. We conclude, therefore, that there was reversible error of the court in the conclusion of this testimony.

**359** The court also excluded the testimony of Bennett Brown as to what was testified to in the contempt trial by witnesses Glare, Blackwell and Gentry. Each testified that he saw the plaintiff, Gus Galloway, in the mob on the 5th of July, as stated in the second affidavit, and that he was participating in the violent acts of the mob on that occasion. Now, in view of the fact that plaintiff attempted to show by his evidence that he was not present on that occasion, this testimony of Glare, Blackwell and Gentry is very important and material to the defense in this case, and the exclusion of the evidence by the court was error for the same reason assigned in the case of the exclusion of the like testimony of Gus Galloway, just disposed of.

Various statements made in the depositions of Honorable John H. Rogers, judge of the federal court, who heard the contempt case, were excluded by the trial court, mostly on the ground that these statements were the mere conclusions of the judge as to the legal effect of the excluded testimony upon his mind in making up his opinion disposing of the case. In this connection the judge's written opinion, filed in the contempt case, was excluded on the same ground. These statements and the opinion of the judge disclose the reasons which moved him to decide the case as he did, and it appears from them that, as to the charge made in the first affidavit touching the occurrence on the 3d

of July, giving the benefit of the reasonable doubt as is the rule in criminal trials, with some misgivings and doubt, the judge discharged the defendants on the ground that Evans may have had a pistol as charged against him, and that the defendants in that case may have been in the exercise of lawful duty in attempting to arrest him. Again, as to the matters set forth in the second affidavit, which details the occurrences on the 5th of July, the evidence on the part of the defendants was to the effect that the said Gus Galloway and the other defendants therein were not present. In other words, Galloway sought to prove an alibi, and the judge's testimony and opinion, sought to be introduced, tended to explain that this alibi, resolving all reasonable doubt in favor of the defendants, was sustained by the court. Granting, then, that the federal judge fully discharged the defendant, as shown by the exhibits to the complaint herein, nevertheless the discharge was on such grounds as to render it of little weight on the question of probable cause, because the evidence of the judge and his written opinion shows that he was hesitating as to his conclusion, and the question was only solved by applying the <sup>360</sup> rule of reasonable doubt. If this argument be correct, the judgment of the court in the contempt cases not only did not support the charge of a want of probable cause, but really and in fact showed probable cause for the prosecution. This shows the materiality of such evidence, and under the rule laid down in *Bacon v. Towne*, 4 Cush. (58 Mass.) 247, it was error to exclude it.

The next question arises on the objections of the defendants to the giving of the third, sixth and seventh instructions in the shape they were given. The third instruction is as follows, to wit: "Probable cause is defined to be such a state of facts known to and influencing the prosecutor as would lead a man of ordinary caution and prudence, acting conscientiously, impartially, reasonably and without prejudice upon facts within the knowledge of the prosecutor, *or which he could have ascertained by reasonable diligence, which would lead him to believe or entertain a strong suspicion, supported by circumstances sufficiently strong to warrant in the mind of the prosecutor an honest belief that the person accused was guilty.*" The italicized clause is that which the defendants except to, and the same is contained in the sixth and seventh instructions, and is the subject of the same exception as in the third instruction.

The definition of probable cause in these instructions is not correct. Probable cause in criminal cases, as defined by this

court, "is such a state of facts known to the prosecutor, or such information received by him from sources entitled to credit, as would induce a man of ordinary caution and prudence to believe, and did induce the prosecutor to believe, that the accused was guilty of the crime alleged, and thereby caused the prosecution: *Hitson v. Sims*, 69 Ark. 439, 441, 64 S. W. 219.

According to these instructions given, probable cause is such a state of facts known to the prosecutor, or which he could have ascertained by reasonable diligence, as would induce a man of ordinary caution and prudence to believe, and did induce the prosecutor to believe, that the accused was guilty of the crime alleged. The defect in the instruction is that it makes all the facts that could have been ascertained by the exercise of reasonable diligence as a part of the probable cause, notwithstanding there was nothing known to the prosecutor which would put a reasonable and cautious man upon inquiry as to the existence of material facts unknown to him. This is not the law. It is true that, when the facts or circumstances known to the prosecutor are of such a nature <sup>361</sup> as would put a reasonable and cautious person upon inquiry, the prosecutor will be held to have knowledge of such facts as inquiry would have disclosed, and such facts should consequently be considered in determining whether a probable cause existed: 19 Am. & Eng. Ency. of Law, 2d ed., 661, and cases cited therein.

But the instructions given ignore this doctrine, and are therefore fatally defective.

It is implied in the seventh instruction given by the trial court that the prosecutor in the former case, before the federal court, could have ascertained additional facts, that is, facts going to show that the town marshal and his posse in their encounter with Evans and Battles at the bridge on the night of the 3d of July were acting in the performance of official and public duty in this, that they were endeavoring to arrest Evans for then and there carrying a pistol, and that Evans and his friend Battles were resisting the arrest. The instruction is manifestly given on the theory that by reasonable diligence the prosecutor in the contempt case could have ascertained these facts from the marshal and probably one Willis, a bystander. The marshal and those acting with him were alleged to have been in a conspiracy to maltreat Evans because he was in the employ of the prosecutor company, and in this way what one did the other did, in furtherance of the common purpose, and all were jointly responsible for the unlawful acts of each other. This being the state of the

case, it seems that it was not incumbent upon the prosecutor to go into the enemy's camp as a spy to either ascertain his defense or gain information for his own use in the contemplated prosecution: *Miller v. Chicago etc. Ry. Co.*, 41 Fed. 898.

There is nothing in the evidence to show that the prosecutor in the contempt case had any information as to what the man Willis, who appears to have been the only disinterested looker-on at the affair of the 3d of July, knew or would testify in that trial, and nothing that made it their duty to make further inquiries. In fact, Willis' presence on the occasion seems not to have been known to the prosecution until the trial. The prosecutors therefore were under no obligation to inquire of him.

The next question for our consideration is as to the rule which protects a prosecutor from a suit for malicious prosecution when he claims and shows that he has acted on the advice of counsel in the prosecution. There is scarcely a suggestion of difference of opinion among the authorities as to what is the true rule on this <sup>362</sup> subject, and we cannot do better than to reiterate the rule as defined by Judge Cooley, in his work on Torts, \*183, where he says: "It may perhaps turn out that the complainant, instead of relying upon his own judgment, has taken the advice of counsel learned in the law, and acted upon that. This should be safer and more reliable than his own judgment, not only because it is the advice of one who can view the facts calmly and dispassionately, but because he is capable of judging of the facts in their legal bearings. A prudent and cautious man is therefore expected to take such advice; and when he does so, and places all the facts before his counsel, and acts upon his opinion, proof of the fact makes out a case of probable cause, provided the disclosure appears to have been full and fair, and not to have withheld any of the material facts."

"That a prosecution was begun or a civil suit instituted under advice of counsel is frequently referred to as a complete defense to an action for malicious prosecution. This rule has been held to apply, although the facts stated to counsel did not warrant the advice given, or though the facts did not, in law, constitute a crime, or however mistaken or erroneous were the opinion expressed by the counsel and the course advised": 19 Am. & Eng. Ency. of Law, 2d ed., 685, 686.

This reasoning, we think, is sound, for in a suit for malicious prosecution the main inquiry is, Did the prosecutor in the former suit or prosecution have reasonable or probable cause to prosecute or sue? The right to sue to secure a right or redress a wrong



or to prosecute for the public good is not to be abridged unnecessarily, and it is only when one sues or prosecutes without reasonable cause that he can be held liable for any damage in the result of such suit or prosecution.

The evidence in this case is ample to establish the competency and standing of the counsel consulted in this matter, and, from all we can see, shows that he was furnished with all the facts in the possession of the prosecutors. The objection that he was interested as the attorney of the prosecutor, and therefore disqualified under the rule, is untenable, for any lawyer called upon to advise is the attorney for the party asking his advice.

The eighth instruction contains the objectionable feature we have disposed of in discussing the third instruction, but also contains a statement of the law which, in view of the apparent close relation between the two essential elements in the charge of malicious prosecution, malice and probable cause, should be made only **363** with something of an explanation; otherwise, it may mislead the jury. This part of that instruction is evidently based upon the decision of this court in *Lemay v. Williams*, 32 Ark. 166, and is to the effect that a prosecution on the advice of competent counsel, to whom a full, fair and honest statement of the facts in the case has been made by the prosecutor, "is evidence, but not conclusive, of a want of malice." That may be the law as to the question of malice, the less important of the two essential elements of malicious prosecution, but the rule is otherwise as to the other and more important ingredient, probable cause; for in the case of the latter such prosecution upon the advice of counsel under the circumstances supposed is conclusive of the existence of probable cause, and, this being shown, the defense is complete, and the plaintiff in the suit for malicious prosecution must lose in his suit, and this rule must not be qualified by anything said in *Lemay v. Williams*, 32 Ark. 166, as to the question of malice. This part of the instruction may be harmless of itself, for proof of malice is of little or no importance where the evidence shows probable cause. The danger is in confusing the jury by such instructions, unless proper explanation be made a part of the instruction, which would confine the instruction within its narrow scope. What we have here said is applicable also to the tenth instruction.

In the twelfth instruction the trial court said: "If you find for the plaintiff, he is entitled to recover such damages as you think, from the evidence, will compensate him for the peril occasioned him in regard to his life and liberty, for mental strain.

anxiety and injury to his feelings and his person, and for all expenses;<sup>364</sup> if any, to which he has necessarily been subjected." There is no proof of peril of life, nor is such a thing charged in the complaint as an element of damages. One's life is not necessarily imperiled because he is incarcerated in a jail.

For the several errors named the judgment is reversed, and the cause is remanded for a new trial to be had in accordance with this opinion.

Wood, J., concurs in the judgment.

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*Malicious Prosecution* of civil actions is the subject of a monographic note to McCormick Harvesting etc. Co. v. Willan, 93 Am. St. Rep. 454-474; and malicious prosecution of criminal actions is the subject of a monographic note to Ross v. Hixon, 26 Am. St. Rep. 127-164. A criminal prosecution, to give rise to an action for malicious prosecution, must have been instituted without probable cause, maliciously carried on, and damage must have ensued therefrom: Page v. Citizens' Banking Co., 111 Ga. 73, 78 Am. St. Rep. 144, 66 S. E. 418. Probable cause is a reasonable ground of suspicion, supported by circumstances in themselves sufficiently strong to warrant a man in believing that the person accused is guilty of the offense charged: Lunsford v. Dietrich, 93 Ala. 565, 30 Am. St. Rep. 79, 9 South. 308. One instituting a criminal prosecution upon the advice of an attorney to whom he makes a full disclosure of the facts known to him, cannot ordinarily be held guilty of malicious prosecution: Wenger v. Phillips, 195 Pa. St. 214, 78 Am. St. Rep. 810, 45 Atl. 927; Tryon v. Pingree, 112 Mich. 338, 67 Am. St. Rep. 398, 70 N. W. 905.

## GROBER v. CLEMENTS.

[71 Ark. 565, 76 S. W. 555.]

**DIVORCE—Constructive Service—Misnomer.**—A decree of divorce from a woman named Wilhelmina G., based upon constructive service by publication without actual notice, is void, if the name given in the complaint, warning order, and decree is Minnie G., a name by which she was never known. (p. 92.)

**TAX SALES—Redemption.**—If a son goes to a tax sale intending to pay the taxes on his father's land, but finding that the land is being offered for sale at the time of his arrival, he bids it in to protect his father's interests, the purchase by him amounts only to a redemption. (p. 92.)

**DOWER.—Statute of Limitations** does not run against the claim of the widow for dower so long as the heir is in possession by virtue of his inheritance. (pp. 92, 93.)

**DOWER—Adverse Possession by Heir.**—If an heir claims title to the estate and is in possession thereof by virtue of a tax deed acquired by him as agent for his father, the statute of limitations does not run against the widow's claim of dower. (p. 93.)

**DOWER—Misconduct of Wife.**—The fact that a married woman contracts a second and bigamous marriage does not bar her right of dower out of the estate of her first husband in the absence of a divorce on the ground of such bigamous marriage, under a statute providing that in case of divorce for the misconduct of the wife, she shall not be endowed. (p. 94.)

B. F. Dural, for the appellant.

T. B. Prior, J. S. Little, R. A. Rowe and W. M. Kinsey, for the appellee.

**568 RIDDICK, J.** This is an action by Wilhelmina Clements to recover dower in lands belonging to the estate of her former husband, John C. Grober, and also to enforce the provisions of a trust deed executed by him for her benefit. So far as the trust is concerned, it is now conceded by counsel for appellees that Grober had only a life estate in the land which he conveyed in trust, and that the decree of the court below so holding is correct. This disposes of her appeal, and we need only consider the points raised in the brief of counsel for defendants against the claim for dower by plaintiff.

First, as to the decree for divorce which the court declared to be void. Now, in considering this question, it must be remembered that no actual service was had on the defendant in that case, the decree being based on service by publication only. She had, therefore, no opportunity to appear and object to defects in the proceedings. In such cases the law is much more strict than in cases where the defendant has actual service of

notice, though the notice be defective on account of mistake or otherwise. The affidavit for the warning order did not follow the statute, and, to say the least, was very irregular; but we need not notice that point, for the reason that we are of the opinion that the decree for divorce was void on account of a mistake in the name of the defendant as given in the decree and the proceedings upon which it was founded. Her name at time was Wilhelmina Grober, though by members of her family and intimate friends she was generally called Mena, as an abbreviation of the name of Wilhelmina. But in the action for divorce of which we are speaking she was sued as Minnie Grober, and the decree was rendered against her by that name. Now, the name Minnie is not the same as Wilhelmina or Mena, nor to our minds does it have the same sound. It differs substantially both in the spelling and in sound from the name Mena. <sup>569</sup> We are therefore of the opinion that the decree for divorce, being based upon constructive service by publication only, of which the defendant in that action had no actual notice, and as the name of the defendant in the complaint, warning order and decree is given as Minnie Grober—a name by which she was never known—is for that reason void, and does not affect rights claimed in this action.

As to the tax title set up by the defendants, the evidence shows that at the time of the tax sale John C. Grober was nearly ninety years of age, and in a physical condition that did not permit him to leave home without great difficulty and inconvenience. Under these circumstances, it is very natural to suppose that his business affairs, such as paying taxes and the like, were attended to mostly by agents. Rhinehold, his son, who sets up the tax title, admitted that he had previously redeemed his father's land when it had been sold for taxes. He testified that on the day of the purchase he intended to pay the taxes, but that, as the land was being offered for sale when he arrived, he bid it in, and that he did this to protect the interest of his father and of all others interested in the land. We think this testimony of Rhinehold, his subsequent conduct, and the other evidence support the finding of the court that in making this purchase Rhinehold was acting as agent of his father, and that the purchase amounted in equity only to a redemption of the land, and gave him no title that he could set up against the claim of dower made by the plaintiff.

It is the duty of the heir to assign dower, and the statute does not usually run against the claim of the widow for dower so long

as the heir is in possession by virtue of his inheritance, and we think, under the facts of this case, that the court properly decided that the claim of plaintiff for dower was not barred: *Livingston v. Cochran*, 33 Ark. 294; *Webb v. Smith*, 40 Ark. 17.

We come next to the question whether plaintiff forfeited her right to dower by her marriage to Clements before the death of her former husband, Grober, in whose estate she now claims dower. Plaintiff is a German, and does not speak English well, and she does not make it quite plain whether she married Clements under the impression that her former husband was dead, or under the impression that he was divorced from her, but the difference is not material here. By an old English statute 570 it was enacted that, if a wife willingly leave her husband, and go away and continue with an adulterer, she shall be barred of her action to demand dower unless the husband willingly and without coercion of the church reconcile her and suffer her to dwell with him: Westminster 2 (13 Edward I), c. 34. And this is still the law in some of the states. But in this state, as in many others, the legislature has by statute so completely revised the law of dower that we must look to the statute alone to determine the circumstances under which and the means by which dower is barred: *Sandel & Hill's Digest*, sec. 2520 et seq.; *Lakin v. Lakin*, 2 Allen, 45; *Smith v. Woodworth*, 4 Dill. 584, Fed. Cas. No. 13,130.

Our statute provides that "a widow shall be endowed of a third part of all lands whereof her husband died seised of an estate of inheritance at any time during the marriage unless the same shall have been relinquished in legal form": *Sandel & Hill's Digest*, sec. 2520. It further provides that "in case of divorce dissolving the marriage contract for the misconduct of the wife she shall not be endowed": *Sandel & Hill's Digest*, sec. 2527. It will be noticed that under this statute, in order to bar dower on account of the misconduct of the wife, there must not only be misconduct on her part, but a divorce in consequence of such misconduct. In this respect our law seems to be an improvement on the English statute. Under that statute, if the husband sold land, or if his land was sold under execution during marriage, and if after his death the wife set up a claim to dower, the purchaser was permitted to defeat her claim if he could show that she had left her husband and had lived with an adulterer. In commenting on this phase of the statute, the supreme court of Massachusetts, in *Lakin v. Lakin*, 2 Allen, 45, said: "Lands in which women have a right of dower



so frequently pass into the hands of strangers to the family, either by sale or levy, that it would operate harshly to allow the proprietors who had bought the land subject to the encumbrance to set up such a defense and to bring to public investigation scandals which those most interested had preferred to bury or to pass unnoticed." For this and other reasons stated in the opinion in that case we concur in the statement there made that "it is well that our statute has made such inquiries immaterial and irrelevant."

We are therefore of the opinion that under our statute the marriage of the plaintiff to Clements before the death of Grober <sup>571</sup> does not affect her claim to dower in this case. Even if she contracted that marriage under the belief that Grober had procured a valid divorce from her, there is nothing in that act to estop her from asserting her rights on finding that no divorce was in fact procured, and that her marriage to Clements was for that reason invalid.

We have read with much interest the able and entertaining briefs filed by counsel for appellant, but we still think that the judgment appealed from is right, and it is therefore affirmed.

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*An Action to Recover Dower* is not, according to a recent Nebraska case, within the statute of limitations: Beall v. McNeeney, 63 Neb. 70, 93 Am. St. Rep. 427, 88 N. W. 134. That the statute does not run against a wife's right to dower until her husband's death, even though a title by adverse possession has ripened against him before his death, see Lucas v. White, 120 Iowa, 735, 98 Am. St. Rep. 380, 95 N. W. 209. Consult, also, Thompson v. McCorkle, 136 Ind. 484, 43 Am. St. Rep. 334, 34 N. E. 813, 36 N. E. 211. On adverse possession against heirs, see Ashford v. Ashford, 136 Ala. 631, 96 Am. St. Rep. 82, 34 South. 10; Dewitt v. Shea, 203 Ill. 393, 96 Am. St. Rep. 311, 67 N. E. 761.

*The Forfeiture of Dower* by adultery is considered in the note to *In re Ingram*, 12 Am. St. Rep. 91. It is held that dower is not barred by a wife's willful desertion of her husband without reasonable cause: Nye's Appeal, 126 Pa. St. 341, 12 Am. St. Rep. 873, 17 Atl. 618.

CASES  
IN THE  
SUPREME COURT  
OF  
CALIFORNIA.

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PEOPLE v. BRITTAİN.

[142 Cal. 8, 75 Pac. 314.]

**BURGLARY.—To Constitute a Burglarious Entry** it is not necessary that the act of entry be a trespass or without the consent of the owner, provided such entry was with intent to steal. (p. 96.)

**TRIAL, CRIMINAL—Conduct of Prosecuting Attorney.**—If after an objection to a question by the prosecuting attorney has been sustained, he remarks to defendant's attorney in an undertone, sufficiently loud to be heard by one of the jurors, "That is getting on dangerous ground, isn't it?" and the original question is immaterial and the remark uncalled for, no prejudice accrues to the defendant. (p. 97.)

**TRIAL, CRIMINAL—Error, When not Prejudicial.**—Though it appears that a statement made by the witness was hearsay, an error of the court in overruling a question showing it to be hearsay, is immaterial, if it clearly appears by the testimony of the same witness and that of several others that the matter testified to by the witness was not within his own knowledge. (p. 98.)

Prosecution and conviction for burglary. Defendant appealed.

Ross Campbell, for the appellants.

U. S. Webb, attorney general, J. C. Daly, deputy attorney general, and C. H. Pond, district attorney, for the respondent.

9 **CHIPMAN, C.** Information charging defendants with the crime of burglary and a prior conviction of petit larceny. They were tried together, and found guilty. They appealed from the judgment of conviction and from the order denying their motion for a new trial.

The attorney general makes the point that the appeal from the order cannot be considered, and that the only questions that can be reviewed arise on the appeal from the judgment as shown in the bill of exceptions.

1. We are disposed to treat the motion for a new trial as properly before us, and so will determine the principal point raised by the appeal. The point is, that the evidence does not sustain the charge of burglary, and this rests upon a statement taken from the dissenting opinion of *People v. Barry*, 94 Cal. 481, 29 Pac. 1026—namely, that “in order to constitute a burglarious entry, the act of entering must itself be a trespass—an entry without the consent of the owner.” The evidence was sufficient to warrant the jury in finding that both defendants entered a certain store in Santa Rosa in the night-time with intent to commit larceny. The entry was, however, during business hours and while the store was open to the public. The precise question arose in *People v. Barry*, 94 Cal. 481, 29 Pac. 1026, and was fully discussed in the majority opinion. The statute reads: “Every person who enters any house, room, store, . . . with intent to commit grand or petit larceny, or any felony, is guilty of burglary.” Commenting upon this statute the court said: “As to the acts which shall constitute the crime of burglary, that is a matter left entirely to the policy of the legislature within its constitutional powers; and when that body has said that every person who enters a store with the intent to commit larceny is guilty of a burglary, the language is so plain and simple that rules of statutory construction are not required to be consulted; the meaning is patent upon the face of the statute. No words are found in the statute qualifying the character, kind, time, or manner of the entry, save <sup>10</sup> that such entry must be accompanied with a certain intent; and it would be judicial legislation for this court to interpolate other conditions into the section of the code.”

We have not the Montana Criminal Practice Act at hand, but in *State v. Green*, 15 Mont. 424, 39 Pac. 322, sections 73 and 74 are referred to, and in the opinion it is said: “Burglary is defined in the statute to be the entering of any house, room, . . . store, . . . with intent to commit grand or petit larceny, or any felony.” In *State v. Carroll*, 13 Mont. 246, 33 Pac. 688, the court said: “To constitute burglary there must be the entry with the intent to commit grand or petit larceny or any felony”: Montana Criminal Practice Act, sec. 73. “The entering, and such intent, are two elements going to constitute

the offense of burglary": See the interpretation given of the Nevada statute by Beatty, J., in *State v. Watkins*, 11 Nev. 30.

These Montana and Nevada cases are cited in *American and English Encyclopedia of Law* (second edition, volume 5, page 48) as holding that a breaking is not essential.

Under the earlier statutes defining burglary, defendants' contention might have been upheld. But as the law now stands it cannot be without overruling *People v. Barry*, 94 Cal. 481, 29 Pac. 1026, which has governed the practice in this state since 1892, and has not been questioned, so far as we know, in any subsequent decision. Besides, in our opinion, that case was correctly decided, and ought not to be overruled.

It would be an impeachment of the common sense of mankind to say that a thief who enters a store with intent to steal does so with the owner's consent, or upon his invitation. It is true the thief must have clothes and food, and may enter a store to procure them. And if, after he enters, he changes his mind and concludes to steal and not purchase his supplies, it would be larceny. But if it is proven that he entered with intent to steal, the law will not, in the face of such proof, shield him from punishment as a burglar on the assumption that he has the consent and invitation of the proprietor to so enter. Our statute has swept away many of the technical requisites of burglary under the common law.

2. It is claimed that the conduct of the district attorney in his cross-examination of defendant Johnson, while a witness in his own behalf, was prejudicial. A question put by the district attorney was objected to and the objection was sustained. "Mr. Thompson (prosecuting attorney—in undertone addressed to Mr. Campbell [attorney for defendants], which was heard by one jurymen).—That's getting on dangerous ground, isn't it? Mr. Campbell.—We take an exception to the remarks of the district attorney. The Court.—The jury will pay no attention to the statements made by the attorneys; we are trying this case on the evidence and not on the statements of anyone else." The question objected to was whether the witness was with his codefendant Brittain at Stockton, where it is admitted both of them were convicted of larceny in the same court on the same day. The question was immaterial, and the remark of the district attorney uncalled for, but was not prejudicial.

3. The only remaining error complained of occurred while the witness Rosenberg, proprietor of the burglarized store, was being cross-examined by defendants' attorney. He had testified

that Johnson came into the store and said to witness' son that he wanted to look at an eight or ten dollar suit. He was asked: "Did you hear him say that?" and answered: "No, sir, I did not, but I saw him showing him the suits." Then follows the question to which an objection was sustained: "Then, as a matter of fact, what you testified to was what some one else told you?" He, however, immediately resumed his testimony and said: "I did not hear Johnson ask for the eight or ten dollar suit, but I saw the clothes he was looking at." Conceding that the objection should have been overruled, the defendants were not prejudiced by the ruling. The witness showed that the particular fact testified to by him was not within his own knowledge. Besides, the fact fully appeared in the testimony of other witnesses and substantially by the testimony of defendant Brittain also.

It is advised that the judgment and order should be affirmed.

Smith, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

Angellotti, J., Shaw, J., Van Dyke, J.

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*The Term "Breaking,"* as used in defining the crime of burglary, is generally held to imply force, and entering through an open door or window is not a breaking: See the monographic note to *People v. Richards*, 2 Am. St. Rep. 383, 385. But the breaking may be by any act of physical force, however slight, by which the obstruction to entering is removed. The lifting of a hook by which a door is fastened, and opening the door to enter a building, is a breaking, although the entry might have been effected without a breaking, as through an open door: *Ferguson v. State*, 52 Neb. 432, 66 Am. St. Rep. 512, 72 N. W. 590. See, too, *Grimes v. State*, 77 Ga. 762, 4 Am. St. Rep. 112; *Kent v. State*, 84 Ga. 438, 29 Am. St. Rep. 376, 11 S. E. 355; *Daniels v. State*, 78 Ga. 98, 6 Am. St. Rep. 238. As to entry by the insertion of an instrument, see *State v. Crawford*, 8 N. Dak. 539, 73 Am. St. Rep. 772, 80 N. W. 193.



## EAKLE v. INGRAM.

[142 Cal. 15, 75 Pac. 566.]

**TRUST, Dissolution of.**—Where all the beneficiaries in a trust so desire and are before the court, it may decree a dissolution of the trust and a conveyance to them by the trustee of the trust property, unless some reason is shown to the court why they should not be permitted to exercise this right. The trustee has no standing in court to resist the application where he is not interested except that, but for the decree, he might become entitled to compensation for his further services. (p. 100.)

Crawford & Crawford, for the appellant.

Thomas B. Bond and Charles W. Haycock, for the respondents.

**15** SMITH, C. The plaintiffs are the children and sole heirs of Mrs. E. A. Hammack, who died December 26, 1902, intestate. The plaintiff Eakle is the grantee and party of the second **16** part, and the plaintiff Henry Hammack the party of the third part, in a deed of conveyance executed by Mrs. Hammack, as party of the first part, June 26, 1899, conveying to the grantee "and to her successors in trust" the land described in the complaint, "to have and to hold" the same, etc., "and to pay the rents, issues, and profits thereof to the said party of the first part during her natural life; and after the decease of the said party of the first part to pay the rents, issues, and profits thereof to the said party of the third part during his natural life." The deed also contains a clause authorizing the parties of the second and third parts to sell the premises upon certain contingencies specified, but this is omitted from our statement as immaterial. The defendant is a trustee appointed by the court January 27, 1903, upon the resignation of Mrs. Eakle. This suit was brought for the dissolution of the trust and the discharge of the trustee. A general demurrer to the complaint was interposed and overruled, and judgment entered for the plaintiff. The defendant appeals from the judgment.

The judgment, we think, is right. The plaintiffs are the only persons beneficially interested in the property (Civ. Code, sec. 866; *Morffew v. San Francisco etc. R. R. Co.*, 107 Cal. 595, 40 Pac. 810; 1 *Perry on Trusts*, sec. 320; *Young v. Bradley*, 101 U. S. 787), and in such cases the rule is as stated by Mr. Underhill: "If there is only one beneficiary, or if there are several and they are all of one mind, and he or they are not

under any disability, the specific performance of the trust may be arrested, and the trust modified or extinguished": Underhill on Trusts and Trustees, 13, 370-375, and cases cited. See, also, 2 Perry on Trusts, sec. 920; 1 Perry on Trusts, sec. 104; Civ. Code, secs. 2252, 2258; Lewin on Trusts, 684, 685; Hill on Trusts, 278; Tiffany & Bullard on Law of Trusts and Trustees, 815, 816. The court below was therefore empowered to decree a dissolution of the trust, and a release of the trust property by the trustees, which is the effect of the judgment. There are indeed cases (as is said in the note to the case first cited), where though "all the beneficiaries consent, [yet] the court may for good equitable reasons, refuse to discharge a trust"—as, for example, in the case of "infants, lunatics, and married persons restrained from anticipation"<sup>17</sup> (Underhill on Uses of Trusts, 370-375), and perhaps in the cases provided for in the Civil Code (sec. 867) and others. But the case here is not of the kind to come within any exception to the rule. Here the plaintiffs are of age, and no reason appears why they should not be permitted to exercise the right of disposing of their property. Nor has the defendant any standing in court to dispute their application. He was a mere bare trustee, without interest, except that he might but for the decree have become entitled to compensation for services as trustee; but this furnishes no reason for the continuance of the trust: Slater v. Hurlbert, 146 Mass. 314, 15 N. E. 790. Nor, as he has failed to answer, or otherwise set up any right to compensation for the brief period in which he was trustee, can he complain that no compensation was allowed him by the judgment.

It may be added that, in addition to the facts stated in the opinion, others are alleged which, it is claimed, show that the execution of the trust as designed has become impracticable, and that its continuance would result, if not in the total loss of the trust property, at least in the unnecessary sacrifice of a great part of its value. But under the view we have taken of the case it will be unnecessary to consider the effect of these allegations.

We advise that the judgment be affirmed.

Haynes, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed.

Shaw, J., Angellotti, J., Van Dyke, J.

## THE TERMINATION OF TRUSTS AND OF THE TRUSTEE'S TITLE.

### I. Classification of the Subject.

### II. Cases in Which no Action on the Part of the Court is Necessary.

#### a. By Merger.

#### b. By the Execution of the Trust or Other Accomplishment of Its Purposes.

#### c. By Revocation.

### III. Judicial Action for the Purpose of Terminating a Trust.

#### I. Classification of the Subject.

The termination of trusts and trust estates may be considered, first, with reference to those cases in which it takes place so fully that no further action is required on the part of any person or court, and second, to those cases in which, because the purposes of the trust have been accomplished and no further reason for its continuance exists, or because all the persons interested in it no longer desire its continuance and there is no reason why their desire should not be respected, the courts may be asked to take steps necessary to its termination, or the persons interested may, by their voluntary acts, render any resort to the courts for such purpose unnecessary.

### II. Cases in Which No Action on the Part of the Court is Necessary.

a. **By Merger.**—Among the cases of the first class are those recently pointed out in the note to *Forthman v. Deters*, 99 Am. St. Rep. 145, in which the merger of the legal and equitable estates has been brought about by their union in the same person or persons, as where the trustee conveys his estate to the beneficiaries of the trust or they surrender all their rights to him, there being nothing in the nature or purposes of the trust in either case to forbid such union or to require the continuance of the trust after it has taken place: *Gibson v. Gains*, 16 Ky. Law Rep. 475, 28 S. W. 781; *Ormsby v. Dumesnil*, 91 Ky. 601, 16 S. W. 459; *Warner v. Sprigg*, 62 Md. 14; *Healey v. Alston*, 25 Miss. 190; *Cooper v. Cooper*, 5 N. J. Eq. 9; *Peacock v. Stott*, 101 N. C. 149, 7 S. E. 885; *Hunter v. Marlboro*, 2 Wood. & M. 168, Fed. Cas. No. 6908; *Obermiller v. Wylie*, 36 Fed. 641. For further consideration of the application to trusts of the rule of merger we refer to the note just cited. In this connection it must be remembered, as already suggested, that merger cannot take place where it would thwart the purposes of the trust. Generally, a conveyance by a trustee, if in contravention of the purposes of the trust as declared in the instrument creating it, must be regarded as void: *Saunders v. Richard*, 35 Fla. 28, 16 South. 679; *Nelson v. Ratliff*, 72 Miss. 656, 18 South. 487; *Diefendorf v. Spraker*, 10 N. Y. 246; *Douglas v. Cruger*, 80 N. Y. 15; *McEachern v. Stewart*, 114 N. C. 370, 19 S. E. 702. A conveyance from the beneficiary to the trustee is less likely to be in contravention of the trust, than one from the trustee to the beneficiary, but if it in fact be so, it cannot prejudice persons

not joining therein, though they are not then in being: *Isham v. Delaware etc. R. Co.*, 11 N. J. Eq. 227. It is equally manifest that in such case no merger or termination of the trust can take place where its nature or purpose is such as to require its continuance notwithstanding any release or surrender on the part of the beneficiary.

**b. By the Execution of the Trust or Other Accomplishment of Its Purposes.**—The union resulting from the merger to which we have just referred is usually, if not always, brought about by a conveyance or other transfer of an estate in the property by a voluntary act of the party whose interest is to be divested or by the transmission by devise or descent. Something of the same character takes place when the title of the trustee terminates, because, in pursuance of an authority vested in him, he conveys both the legal and the equitable title to a third person, in which case the trust is executed as well as terminated. Trusts without being executed in the sense to which we have referred and also without any merger of the title by a transfer, voluntary or involuntary, from the trustee to the beneficiary or from the beneficiary to the trustee may be terminated upon various other contingencies under which it is clear from the instrument creating the trust that no further action on the part of the trustee is necessary or proper and that some person is entitled to hold the property discharged of the trust, as where such instrument contains some express provision directly limiting the time when and the circumstances in which the trustee shall hold his estate, or when a like limitation impliedly results from the declaration of the purposes of the trust and it appears that these purposes had been attained, or that attainment had become impossible, and there is no longer any reason why the trust should continue or even the legal title remain vested in the trustee. Perhaps the authorities are not entirely agreed whether in such circumstances the estate of the trustee is necessarily so completely divested that he can no longer maintain any action dependent on the legal title, or whether, on the other hand, he does not retain such title until the parties interested call for its surrender or conveyance to them, and the question is settled in some of the states by statutes bearing on the subject and undertaking to declare what shall be the duration of the trust and of the trustee's estate. In the absence of any statutory provision, the decided weight of authority supports the proposition that the trust and the estate of the trustee continue so long only as necessary for the purposes of the trust. If these purposes are accomplished by the trustee's executing some power conferred upon him for the disposition of the property, as where, pursuant to the terms of a trust, he sells it for the payment of debts, or to raise funds for some other purpose, or conveys it on the happening of some contingency provided for in the instrument creating the trust, there is, of course no doubt of the termination of the trust: *Thatcher v. St. Andrew's Church*, 37 Mich. 264. The trustee may, however, make no sale or other disposition of the property which

is subject to the trust and yet the trust may have terminated. He may have been authorized to hold it for a specified time which has expired, or for the accomplishment of some object which has been realized, or its realization been rendered or found to be impossible, or for the benefit of some person who has ceased to exist, or to protect it against the acts of a husband in order that it may be more surely enjoyed by his wife, and the husband may have died, and there may be many other contingencies conceived in which it is clear that there is no longer any further reason for the continuance of the trust and that the trustee cannot rightfully do any further act under it, unless it be that of executing some transfer to the person equitably entitled thereto. No such transfer, however, seems to be necessary. In truth, if executed, it would seem to be of no effect unless as evidence of the contingency putting an end to the trust, where that fact is recited in the conveyance, for the reason that before the transfer could have been executed, his title had ceased by the happening of the contingency terminating the trust. At all events, on the occurrence of such contingencies his title must be regarded as at an end and the whole title, both legal and equitable, as vested in the person for whose benefit the property has been held in trust, or as having returned to the creator of the trust or his heirs or other successor in interest: *Comby v. McMichael*, 19 Ala. 747; *Powell v. Glenn*, 21 Ala. 458; *McBrayer v. Cariker*, 64 Ala. 50; *Cherry v. Richardson*, 120 Ala. 242, 24 South. 570; *Smith v. Dunwoody*, 19 Ga. 237; *Coughlin v. Seago*, 53 Ga. 250; *Parrott v. Dyer*, 105 Ga. 93, 31 S. E. 417; *Hersey v. Purington*, 96 Me. 166, 51 Atl. 865; *Stevens v. Finch*, 25 Mich. 40; *Mitchell v. Mitchell*, 35 Miss. 108; *Selden v. Vermilya*, 3 N. Y. 525; *Miller v. Wright*, 109 N. Y. 194, 16 N. E. 205; *Alexander v. Springs*, 5 Ired. 475; *United States etc. Co. v. Marquam*, 41 Or. 391, 69 Pac. 37, 41; *Westcott v. Edmunds*, 68 Pa. St. 34; *Appeal of Coover*, 74 Pa. St. 143; *Warland v. Colwell*, 10 R. I. 369; *Smith v. Metcalf*, 1 Head, 64; *Temple v. Ferguson*, 110 Tenn. 84, post p. 791, 72 S. W. 455. Therefore any conveyance subsequently made by the trustee assuming to transfer the title is void even at law: *Note to Tyler v. Herring*, 19 Am. St. Rep. 273; *McBrayer v. Cariker*, 64 Ala. 50; *Parrott v. Dyer*, 105 Ga. 93, 31 S. E. 417; *Young v. Bradley*, 101 U. S. 782; and any action brought by him to recover the property must fail: *Cherry v. Richardson*, 120 Ala. 242, 24 South. 570; *Warland v. Colwell*, 10 R. I. 369; *Smith v. Metcalf*, 1 Head, 64; *Temple v. Ferguson*, 110 Tenn. 84, post, p. 791, 72 S. W. 455. No conveyance from him is necessary to vest the legal title in the persons entitled thereto: *Stevens v. Finch*, 25 Mich. 40; *Mitchell v. Mitchell*, 35 Miss. 108; *Alexander v. Springs*, 5 Ired. 475; *Westcott v. Edmunds*, 68 Pa. St. 34. A few cases we are unable to reconcile with the rules thus stated. They appear to be restricted to personal property: *Denton v. Denton*, 17 Md. 403; or to circumstances where, in the opinion of the court, it was the design of the creator of the trust that the es-



tate of the trustee should continue, though the whole title, both legal and equitable, had become vested in a single person: *Harlow v. Cowdrey*, 109 Mass. 183; *Slevin v. Brown*, 32 Mo. 176; *Vaughn v. Tealey* (Tenn. Ch. App.), 58 S. W. 487. Sometimes the question of the necessity of a conveyance from the trustee is avoided by presuming that such conveyance has been executed by him: *Combs v. Brown*, 29 N. J. L. 36; *Aikin v. Smith*, 1 Sneed, 304; *Marr's Heirs v. Gilleam*, 1 Cold. 488. This presumption, however, will not be indulged, though the beneficiary is found in possession and a conveyance to him by the trustee is inconsistent with the latter's authority: *Brewster v. Striker*, 2 N. Y. 19, 1 E. D. Smith, 321; and when presumed, the presumption is not conclusive, but subject to rebuttal by any evidence tending to prove that the trustee has not in fact conveyed: *Lincoln v. French*, 105 U. S. 614.

**c. By Revocation.**—There is no doubt that the instrument creating the trust may reserve to the trustor the power of revocation: *Mize v. Bates County Nat. Bank*, 60 Mo. App. 358. Where the mode of revocation is specified in such instrument, it must be substantially pursued: *Carpenter v. Cook*, 128 Cal. 1, 60 Pac. 471; *Lippincott v. Williams*, 63 N. J. Eq. 136, 51 Atl. 467; but when not so specified, the power may be exercised in any manner which sufficiently manifests the intention of the trustor that the trust shall no longer exist. Where the trust relates to real property, there must, we apprehend, be some writing to terminate it and the title of the trustee, executed with the formalities required to transfer the title to real property, but it need not declare in express terms the purpose of revocation. It is sufficient that it be inconsistent with the purposes of the trust, or, at least, that it be in writing which cannot be given full effect if the trust is to continue. It may therefore be evidenced by the exercise of the right to elect to take under a will: *Mayo v. Mayo*, 4 Md. Ch. 193; or by executing a mortgage: *Gaither v. Williams*, 57 Md. 625; or conveyance, or by devise: *Kelly v. Johnson*, 34 Mo. 400; of the subject of the trust. No delivery of the instrument revoking the trust need be shown. In the absence of some provision of statute or of the instrument creating the trust "pointing out the way in which it is to be revoked, that result is accomplished by the execution of any instrument intended for that purpose and which sufficiently expresses the intention of the party executing the same": *Barlow v. Loomis*, 149 N. Y. 249, 35 N. E. 439. The power of revocation terminates with the life of the trustor or other person in whose favor it was reserved: *Barlow v. Loomis*, 19 Fed. 677.

If no power of revocation is reserved under the instrument creating the trust, it must be implied, and neither the trustor nor his successors in interest nor any other person has any power to terminate it by execution: *Hollings v. McWilliams*, 79 Cal. 449, 11 Pac. 659; *Nichols v. Hooley*, 199 Cal. 323, 59 App. 81, Rep. 43, 41 Pac. 1989; *Waterman v. Morgan*, 114 Cal. 237, 16 N. E. 599; *Ewing v. Buckner*, 76 Iowa, 467,

41 N. W. 164; *Hill v. Cornwall & Bros.' Assignee*, 95 Ky. 512, 26 S. W. 540; *Boston & A. R. R. v. Mercantile T. & D. Co.*, 82 Md. 535, 34 Atl. 778; *Lovett v. Farnham*, 169 Mass. 1, 47 N. E. 246; *Keyes v. Charlton*, 141 Mass. 45, 55 Am. Rep. 446, 6 N. E. 524; *Nelson v. Raliff*, 72 Miss. 656, 18 South. 487; *Ewing v. Shanahan*, 113 Mo. 188, 20 S. W. 1066; *Minot v. Tilton*, 64 N. H. 371, 10 Atl. 682; *Garnsey v. Mundy*, 24 N. J. Eq. 243; *Mabie v. Bailey*, 95 N. Y. 206; *Wallace v. Berdell*, 97 N. Y. 13; *Stockett v. Ryan*, 176 Pa. St. 71, 34 Atl. 973; *Chestnut St. Nat. Bank v. Fidelity etc. D. Co.*, 186 Pa. St. 333, 65 Am. St. Rep. 860, 40 Atl. 486; *Monday v. Vance*, 92 Tex. 428, 49 S. W. 516; *Skeen v. Marriott*, 22 Utah, 73, 61 Pac. 296. This topic has, we think, been hereinbefore sufficiently considered in the note to *Bristor v. Tasker*, 135 Pa. St. 110, 20 Am. St. Rep. 853, 19 Atl. 851. That a trust is voluntary does not give rise to any well-recognized exception to the rule except that it may sometimes, if improvidently made, be deemed to have resulted from mistake and relieved against in equity on that ground: *Kerr v. Couper*, 5 Del. Ch. 507; *Garnsey v. Mundy*, 24 N. J. Eq. 243; *Russell's Appeal*, 75 Pa. St. 269; *Rick's Appeal*, 105 Pa. St. 528; *Aylsworth v. Whitcomb*, 12 R. I. 298; note to *Williamson v. Yager*, 34 Am. St. Rep. 217. If a trust is both voluntary and testamentary in character and no immediate interest vests thereunder in any beneficiary, it so far resembles a will that it may be revoked by the grantor at any time prior to his decease: *Bristor v. Tasker*, 135 Pa. St. 110, 20 Am. St. Rep. 853, 19 Atl. 851; *Chestnut St. Nat. Bank v. Fidelity etc. Co.*, 186 Pa. St. 333, 65 Am. St. Rep. 860, 40 Atl. 486; note to *Williamson v. Yager*, 34 Am. St. Rep. 215, 218.

### III. Judicial Action for the Purpose of Terminating a Trust.

In all actions where a trust after existing has terminated, or, though not completely terminated, there is no longer reason for its continuance, it is desirable, if not indispensable, to procure some judicial action, in the one case to establish such termination, and in the other, as in the principal case, to procure some decree which will dissolve the trust and free the trust property of all claims and pretensions on the part of the trustee. Where the instrument creating the trust is void on its face, as where it attempts to create a perpetuity or trust which, under the laws of the state or country, cannot exist, probably no suit can be maintained to have it pronounced void or to remove it as a cloud upon the complainant's title, for the reason that its invalidity appears on the face of the instrument, and it therefore cannot constitute such cloud: *Levy v. Hart*, 54 Barb. 248. Under the statutes in force in many of the states authorizing the maintenance of suits to determine conflicting claims of title, doubtless a person named as a trustee can be made a party defendant and his claim of title can be adjudicated and declared to be of no effect. We have referred to many cases in which the termination of the trust operates ipso facto, to divest the trustee's title. If such determination is apparent from

an inspection of the instrument creating the trust, as where the trust is by it restricted in point of time and that time has expired, there is no necessity for any proceeding to establish this fact, and if such a proceeding were instituted, it would probably fail, on the ground that no cloud existed on the complainant's title, nor any other reason for a resort to equity for relief. Where, on the other hand, the termination of the trust depends on some fact which may not have happened, and the happening of which must be proved whenever the question becomes material, there seems ample reason why the parties in interest should be permitted to resort to equity for the purpose of obtaining a decree declaring the existence of such fact, or directing a conveyance from the trustee, or, at least, the execution of some writing which will sufficiently establish against him and all persons subsequently claiming under him that a contingency has occurred putting an end to his authority and his title: *Coryell v. Klehm*, 157 Ill. 462, 41 N. E. 864; *Smith v. Harrington*, 4 Allen, 566.

The legal title may be conceded to remain in the trustee and the trust itself to be still existing, so as to authorize him to do further acts under it for the benefit of the cestuis que trust, and they, nevertheless, may be entitled to have the trust terminated on the ground that they are the only persons beneficially interested and desire to act for themselves and are in all respects competent to do so, and the union in them of both the legal and the equitable title discharged of the trust will not defeat any purpose contemplated in its creation, nor render the accomplishment of any such purpose more difficult or doubtful. The trustee has no beneficial interest in the title to the property nor in the office which he holds by his selection or appointment as trustee and no right to insist that his title or office continue, and a court of equity will, at the instance of the cestuis que trust, decree that the trust be dissolved or terminated, and the title to the property, both legal and equitable, vested in them: *Bowditch v. Andrew*, 8 Allen, 339; *Inches v. Hill*, 106 Mass. 575; *In re Stone*, 138 Mass. 476; *Scars v. Choate*, 146 Mass. 395, 4 Am. St. Rep. 320, 15 N. E. 786; *Thom v. Thom*, 95 Va. 413, 28 S. E. 583; *Armistead v. Hartt*, 97 Va. 316, 23 S. E. 616. We shall not here undertake to consider and designate the circumstances in which courts must refuse applications to dissolve or terminate trusts, but content ourselves with the general statement that they must be careful not to defeat any object of the trustor appointment, or this declaration of the purposes of the trust. To this end courts must decline to act when there are, or may be, persons interested in the trust who are not before the court, or, if before it, not competent to act for themselves: *In re Thurston*, 154 Mass. 596, 26 Am. St. Rep. 181, 15 N. E. 33; *Newton v. Rebenack*, 90 Mo. App. 659; *Harris v. Harris*, 205 Pa. St. 460, 55 Atl. 30; *Sumner v. Newton*, 64 Wis. 211, 25 N. W. 30; or where the trust remains an active trust: *Smith v. Smith*, 70 Mo. App. 448; *Appeal of Watson*, 125 Pa. St. 340, 17 Atl. 394; *Appeal of McClelland*, 130 Pa. St. 451, 18 Atl. 638; or

where, though all the parties are *sui juris* and consent, it yet is evidence that the intention of the trustor, or some legislative policy, may be thwarted if the trust is not continued: *Lent v. Howard*, 89 N. Y. 169; *Carney v. Kain*, 40 W. Va. 758, 23 S. E. 650.

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## UKIAH v. UKIAH WATER AND IMPROVEMENT COMPANY.

[142 Cal. 173, 75 Pac. 773.]

**MUNICIPAL CORPORATIONS—Liability of for Failure to Supply Water to Extinguish Fires.**—If a municipal corporation establishes or acquires its own waterworks, and undertakes to provide an adequate supply, it is not liable to its citizens whose property is destroyed by fire for its failure to provide such a supply. (p. 110.)

**WATER COMPANY—Liability of for Property Destroyed by Failure to Furnish an Adequate Supply of Water.**—If a municipal corporation contracts with a company to furnish water to be used to extinguish fires, the company is not liable at the suit of a taxpayer whose property was destroyed by fire by reason of the company's failure to supply sufficient water to the municipality for that purpose. (p. 111.)

**MUNICIPAL CORPORATIONS—Right of to Recover for Loss of Their Own Property Through Failure of a Water Company to Furnish an Adequate Supply of Water.**—Where a municipal corporation enters into a contract with a company to supply water for the extinguishment of fires through hydrants connected with its mains, such contract being entered into for general purposes and for the benefit of all its inhabitants, no protection to any specified property being contemplated, the relation of the water company is not different, as to the property of the municipality from the relation of any of its citizens to such company, and it cannot recover for the loss of its property from the failure of the water company to furnish an adequate supply of water as provided for in such contract. (pp. 113, 114.)

Seawell & Pemberton and J. C. Ruddock, for the appellant.

McGarvey & Bledsoe, for the respondent.

**174 HENSHAW, J.** This action was instituted by the town of Ukiah City to recover damages against the defendant water company for the destruction of plaintiff's property by fire, the liability of defendant being predicated upon its negligence, and upon the breach of its contract with the plaintiff for supplying water in its supply pipes and fire hydrants under sufficient pressure for effective use. A general demurrer was interposed to the complaint and overruled. The defendant answered, and trial was had resulting in a verdict of the jury, under the instructions of the court, in favor of the plaintiff.

The defendant moved for a new trial, which motion was granted, and plaintiff appeals from this order.

The learned judge of the trial court expressed his views upon granting the motion for a new trial, in the following language:

"The case presents the novel question as to the extent of liability on the part of one engaged in the business of furnishing water appropriated for sale, rental, and distribution to a municipality to which it has undertaken for a consideration to furnish water for extinguishment of fires within the municipal limits, the property of which has been destroyed by fire by reason of the failure of such person to furnish water under a sufficient pressure at the time of the breaking out of the fire, such failure being due to negligence on the part of such person.

"It cannot be seriously disputed that the evidence adduced on the trial of this case warranted the jury in finding the facts to be as embodied in the above proposition, at least as to a portion of the property destroyed by fire.

"It appears that defendant corporation was at the time of the fire, July 16, 1899, and for more than six years immediately preceding that time, engaged in the town of Ukiah City in the carrying on of the business or employment for which it was incorporated, viz., the maintenance and operating of waterworks in said town and the furnishing to said town and its inhabitants of pure fresh water for all purposes.

"It further appeared that at the time the defendant commenced business hydrants for fire purposes were connected with its mains and pipes at various places in the streets of said town, in such a manner that there was no way to shut water out of the hydrants except by shutting off the main.

"That these hydrants, which, according to the testimony of witness Smith, were owned by plaintiff, have ever since been maintained and used by the town almost solely for the extinguishment of fires, and that in each of the ordinances passed from year to year by the trustees of plaintiff fixing the rates to be paid for water furnished the town and its inhabitants, a charge was made for fire hydrants, the ordinance in force July 1, 1899, providing among other charges against the town for water for municipal purposes, 'For fire hydrants each per month, \$1.00.'

"That for the whole time defendant has at regular intervals presented its bills against plaintiff for water furnished and has always included in said bills a charge for the hydrants, connected with its pipes, at the rate fixed by the ordinance in force,



the bill rendered for the period covering the fire charging for thirty-six hydrants, from June 1st to September 1st, at one dollar per month, and that all of these bills have been paid by plaintiff.

“The foregoing is substantially the only evidence as to a contract.

“In ruling upon the demurrer to the complaint, I stated that I had not been referred to, nor did I know of, any statute or rule of law that would, independent of contract, make the defendant liable on the facts stated in the complaint; in other words, that the mere fact that a corporation was engaged in the business of furnishing water appropriated for sale, rental, and distribution would not place upon it the obligation of <sup>176</sup> having constantly on hand a sufficient quantity of water available for use by the town for the extinguishment of fires, for the failure to observe which it would be liable to the municipality for the value of municipal property destroyed by reason of such failure.

“Further thought has satisfied me that there can be no question as to the correctness of these views; that something additional is essential to the creation of such a liability; and that if there be any such liability here, it must arise from contract.

“A contract for the furnishing water to the plaintiff town by defendant for the purpose of extinguishing fires in said town is, however, alleged in the complaint.

“I am unable to concur in the views of learned counsel for defendant that no contractual relation is shown by the evidence.

“It is true that no written contract covering the time of the fire is shown, but no particular form is prescribed by the statute for such contracts, and the evidence forces the conclusion that, at the time of the fire, the same relations existed between the town and the defendant as to the furnishing of water for general fire purposes, as ordinarily exist between the private consumer and the water company, as to water for domestic purposes.

“Where a private property owner demands of a water company that it connect its system with his residence, and tenders the rate prescribed by the town ordinance for the water to be supplied, and the company complies with his demand, as it is required by law to do, it can hardly be denied that a contractual relation is established between the parties, the company, on its part, undertaking to furnish water to the consumer so long as he may desire it and pays the established rates therefor, or at

least to use all reasonable efforts to furnish it, for I hardly think that the company would be held bound, in the absence of an express undertaking, to do more than to exercise ordinary care in the management of its business.

"Doubtless, too, a water company is required, upon proper demand by the municipality, to furnish water to the municipality for the extinguishment of fires that may arise therein, at the established rates and when, in pursuance of such requirement, <sup>177</sup> it undertakes the service, a contractual relation is established, and the company is bound to continue the service it has undertaken.

"No formal written contract seems to be required by our statute to establish this relationship between the municipality and the company.

"That the plaintiff town, through its board of trustees, required this service for general fire purposes on the part of defendant, and that defendant undertook the same, and was actually employed therein at the time of the fire, is, in my judgment, fully shown by the evidence.

"If this be so, it was incumbent on the defendant, in order to fully perform its undertaking, to use ordinary care to have a supply of water adequate for the extinguishment of fires that might arise in the town constantly available at the various hydrants.

"Whether or not such obligation on the part of the company would carry with it any liability for the value of municipal property destroyed by fire, by reason of its failure to perform the service required of it, is another question; and this precise question does not appear to have ever been decided.

"The evidence clearly shows that whatever the relationship between plaintiff and defendant was, so far as the furnishing of water for fire purposes is concerned, it was entered into by the town in the execution of the power conferred upon it to provide protection against fire for the benefit of all the inhabitants of the town. There is nothing to indicate that the protection of any particular person or property was contemplated.

"If, in the exercise of this power, a water company, as a municipality exercises the same character of functions that it does when it provides fire-engines and other apparatus for the extinguishment of fires, or when it employs policemen or watchmen for the protection of its inhabitants against crime.

"When, in the exercise of this power, it establishes or acquires its own system of waterworks, and undertakes to itself

provide an adequate supply, it is settled beyond controversy that the city is not liable to its citizens whose property is destroyed by fire for failure to provide an adequate supply, the power vested in the city being in its nature legislative and governmental, requiring the exercise of judgment <sup>178</sup> and discretion: *Patch v. Covington*, 17 B. Mon. 722, 66 Am. Dec. 186; *Van Horne v. Des Moines*, 63 Iowa, 447, 50 Am. Rep. 750, 19 N. W. 293; *Tainter v. Worcester*, 123 Mass. 311, 25 Am. Rep. 90; *Springfield etc. Ins. Co. v. Keeseville*, 148 N. Y. 46, 51 Am. St. Rep. 667, 42 N. E. 405, 30 L. R. A. 660; *Mendell v. Wheeling*, 28 W. Va. 233, 57 Am. Rep. 665; *Wheeler v. Cincinnati*, 19 Ohio St. 19, 2 Am. Rep. 368; *Brinkmeyer v. Evansville*, 29 Ind. 187; *Black v. Columbia*, 19 S. C. 412, 45 Am. Rep. 785; *Foster v. Lookout Water Co.*, 3 Lea, 42. See, also, *Sievers v. San Francisco*, 115 Cal. 654, 56 Am. St. Rep. 153, 47 Pac. 687.

"Where, instead of acquiring its own system and attempting to itself provide the water for such purpose, it contracts with a water company to furnish such service, thus making such company practically the agent or employé of the city, the many decisions of the appellate courts of other states are practically unanimous in holding, upon apparently the soundest reasoning, that the water company is not liable at the suit of a third person whose property was destroyed by fire, by reason of its failure to supply sufficient water to the town for such purpose: *Becker v. Water Works*, 79 Iowa, 419, 18 Am. St. Rep. 377, 44 N. W. 694; *Davis v. Water Works*, 54 Iowa, 59, 37 Am. Rep. 185, 6 N. W. 126; *Britton v. Water Co.*, 81 Wis. 48, 29 Am. St. Rep. 856, 51 N. W. 84; *Ferris v. Water Co.*, 16 Nev. 44, 40 Am. Rep. 485; *Beck v. Kittanning Water Co. (Pa.)*, 11 Atl. 300; *Nickerson v. Bridgeport etc. Co.*, 46 Conn. 24, 33 Am. Rep. 1; *Fowler v. Water Works*, 83 Ga. 219, 20 Am. St. Rep. 313, 9 S. E. 673; *Atkinson v. Newcastle*, 2 Ex. Div. 441; *Foster v. Lookout Water Co.*, 3 Lea, 42; *Eaton v. Water Works*, 37 Neb. 546, 40 Am. St. Rep. 510, 56 N. W. 201, 21 L. R. A. 653; *Fitch v. Water Co.*, 130 Ind. 214, 47 Am. St. Rep. 258, 37 N. E. 982; *Mott v. Water Co.*, 48 Kan. 12, 30 Am. St. Rep. 267, 28 Pac. 989, 15 L. R. A. 275; *Housman v. Water Co.*, 119 Mo. 304, 41 Am. St. Rep. 654, 24 S. W. 784, 7 L. R. A. 77.

"The rulings in these cases are generally to the effect that there is no privity of contract between the water company and a citizen which will support the action and that the contracting company cannot be charged with a greater liability than the city itself.

"Only two appellate courts have held otherwise, those of Kentucky and North Carolina.

179 "The North Carolina ruling (*Gorrell v. Water Supply Co.*, 124 N. C. 328, 70 Am. St. Rep. 598, 32 S. E. 720, 46 L. R. A. 513) was based on the opinion of the Kentucky court in *Paducah Lumber Co. v. Paducah Water Supply Co.*, 89 Ky. 340, 25 Am. St. Rep. 535, 12 S. W. 554, 13 S. W. 249, 7 L. R. A. 77, and as there was in that case a private contract between the plaintiff and the water company, the opinion consists principally of dicta.

"It is true that the question does not appear to have been presented to our supreme court, but I can see no reason to doubt the correctness of the rule approved by the great weight of authority.

"If such be the true rule, and if the defendant be liable here, the only property in the town specifically protected by such a contract for water for general fire purposes, and the only property for loss of which a recovery could be had in an action for damages based on a breach of such contract, is the property of the municipality itself.

"Doubtless a water company may so bind itself by contract with a person to furnish him water for the extinguishment of fires as to render itself liable for the value of property of such person destroyed by fire, by reason of its failure to furnish him a sufficient supply of water: See *New Orleans etc. R. R. Co. v. Meridian Waterworks Co.*, 72 Fed. 227; *Middlesex Water Co. v. Knappmann Whiting Co.*, 64 N. J. L. 240, 81 Am. St. Rep. 467, 45 Atl. 692, 49 L. R. A. 572; *Paducah Lumber Co. v. Paducah Water Supply Co.*, 89 Ky. 340, 25 Am. St. Rep. 536, 12 S. W. 554, 13 S. W. 249, 7 L. R. A. 77.

"It may be assumed here that it is within the power of a municipality, as a property owner, to enter into such a contract with a water company for the protection of the property which it owns as a legal individual, but it certainly needs something more than evidence showing an accepted service for general fire purposes to establish such a contract, and the evidence here shows nothing more.

"The distinction between the powers conferred on municipal corporations for public purposes and for the general public good and those conferred for private corporate purposes is clearly marked by the decisions: See *Springfield etc. Ins. Co. v. Keeseville*, 118 N. Y. 46, 51 Am. St. Rep. 667, 42 N. E. 504, 30 L. R. A. 660.



"In proving protection against fire to its inhabitants, the municipality exercises a power conferred solely for the general public good, and from the exercise of which the <sup>180</sup> municipality, as a property owner, derives the same incidental benefit that every other property owner does—no more, no less.

"Yet in each there is a contractual relation.

"The bar to such a recovery in each case is, that the contract was not for the protection of any particular property or person, but was for general benefit of all the property and persons within the municipal limits, and was entered into by the town as a public agency, solely for that purpose, and in the exercise of its power to furnish such general protection.

"I cannot escape the conclusion that the relations between plaintiff and defendant, as shown by the evidence, are susceptible of no other construction; that the defendant assumed no obligation regarding plaintiff's property different from that assumed by it regarding all of the other property within the town; and that the plaintiff, as a property owner, is without right of action."

These views and the conclusions expressed are hereby adopted as the views and conclusions of this court. A consideration of the cases presented by appellant to this court, which cases were not before the learned judge of the trial court, do not in any wise serve to shake the soundness of the conclusions which he there expressed. *Paducah Lumber Co. v. Paducah Water Supply Co.*, 89 Ky. 340, 25 Am. St. Rep. 536, 12 S. W. 551, 13 S. W. 249, 7 L. R. A. 77, charged upon an express contract, whereby, for the granting of a franchise for forty years, the water company agreed, with other things, for the benefit of the inhabitants of the town and their property, to maintain "two pumping-engines each having capacity to force into the stand-pipe two million gallons of water every twenty-four hours, and to keep a head of water sufficient to throw from any eight of the hydrants simultaneously and for five consecutive hours at any one period of time, streams through fifty feet of hose one hundred feet high." A recovery was sought for the breach of the express terms of this contract. *Gorrell v. Water Supply Co.*, 124 N. C. 328, 70 Am. St. Rep. 598, 32 S. E. 720, 46 L. R. A. 513, was in principle identical with the *Paducah* case, which it cites with approval. There, too, it was alleged that the defendant company "contracted to furnish said city with pure and <sup>181</sup> wholesome water for the use of its citizens and of force at all times sufficient to protect the inhabitants of the city against



loss by fire. And further to erect and maintain reservoirs, water-towers, pump-houses, and other appurtenances and attachments necessary or expedient for the proper conducting and carrying on said waterworks so as to supply at all times the greatest protection against fire." And to maintain "a pressure of water for fire purposes sufficient to throw six streams of water from six hydrants to a vertical height of one hundred feet in still air, each stream being taken from one hydrant and with one hundred feet of hose and with a one-inch ring nozzle, and the said companies shall constantly, day and night, except from unavoidable accidents, keep all the said hydrants supplied with water for fire purposes and shall keep them in good order for such service." In *Planter's Oil Mill v. Monroe Waterworks etc. Co.*, 52 La. Ann. 1243, 27 South. 684, a franchise and grant for thirty years had been made by the city with the defendant company under this express contract: "To supply and have ready at all times for use in pipes and hydrants erected on the premises by plaintiff as a protection against fire, water in sufficient quantities and with a specified force of pressure sufficient to serve the purpose of the extinguishment of fires." The supreme court, dealing with the facts of the case, declared that the municipality is not liable in damages where it has a contract with a private company which fails adequately to meet its obligations, but that it is not so clear that the private company making such contract and failing to meet its duties thereunder may not be held answerable to the citizen for loss he sustains in consequence of such failure. In each of these cases it will be observed that the court was dealing with contracts whereby the water companies for valuable concessions and exclusive privileges had agreed to do and to maintain certain specific things by way of protection from fire, and the gravamen of the charge against each and all of the companies was, that they had violated their contract in failing to do the particular things for the doing of which they had expressly contracted. The broad distinction between those cases and the one at bar is, as pointed out in the opinion of the trial judge, that there is no express covenant in the contract between this plaintiff and this defendant, and the security to citizens in 1842-1843 was only the same security which in the exercise of its governmental functions the plaintiff had obtained from the whole town.

The only other cases cited by appellant are Kentucky cases following the decision in the *Paducah* case, above cited, and the case of *Watson v. Inhabitants of Needham*, 161 Mass. 404, 30

N. E. 204, 24 L. R. A. 287. In this last case an action by a citizen against the town, which itself was supplying the water, was upheld; but that was under a doctrine at variance with the established rule in this state, which denies a right of action against a municipality for damages occasioned by the negligence of its officials or employés: Huffman v. San Joaquin Co., 21 Cal. 426; Chope v. City of Eureka, 78 Cal. 591, 12 Am. St. Rep. 113, 21 Pac. 364, 4 L. R. A. 325; Sievers v. San Francisco, 115 Cal. 655, 56 Am. St. Rep. 153, 47 Pac. 687.

The order appealed from is therefore affirmed.

McFarland, J., and Lorigan, J., concurred.

Hearing in Bank denied.

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*Under a Contract Between a City and a Water Company*, by which the latter agrees to furnish the former water sufficient for fire purposes, a private citizen cannot, by the weight of authority, maintain an action against the water company for injury to, or destruction of, his property caused by the failure of such company to fulfill its contract with the city. A different rule, however, seems to prevail in some jurisdictions: Bush v. Artesian etc. Water Co., 4 Idaho, 618, 95 Am. St. Rep. 161, 43 Pac. 69; monographic note to Baxter v. Camp, 71 Am. St. Rep. 196, 197.

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## MILLER & LUX v. ENTERPRISE CANAL AND LAND COMPANY.

[142 Cal. 208, 75 Pac. 770.]

**WATERS AND WATERCOURSES**—**Navigable Streams, What are.**—A stream on which boats and barges pass up and down at certain seasons of the year is navigable. (p. 119.)

**MAXIMS of Law and Equity, When Will not be Applied.**—The maxims that “No one acquires a right of action from his own wrong,” “Out of a base transaction no cause of action arises,” and “He who comes into equity must come with clean hands,” cannot ordinarily be invoked when the objectionable act in no way affects equitable relations existing between the parties. (p. 119.)

**WATERS AND WATERCOURSES**—**Water Obtained by Unlawful Obstruction of a Navigable Stream.**—One who acquires and appropriates water by unauthorized, and, therefore, unlawful, damming and obstructing of a navigable stream is, nevertheless, entitled to relief in equity against a third person who, by another unauthorized obstruction of the same stream, diverted such waters, where the original obstruction has never been objected to or complained of by the state or any other person or authority authorized by law to object thereto. (pp. 120, 121.)

**CONSTITUTIONAL LAW**—**Authority to Settle Bill of Exceptions.**—A statute authorizing a judge, after his official term has expired, to settle and sign bills of exceptions in cases tried by him during such term, has been so long acquiesced in and recognized as valid that its constitutionality cannot be assailed on the ground that it attempts to confer judicial powers on one who is not a judicial officer. (p. 121.)

George A. Rankin, Houghton & Houghton and Frank H. Short, for the appellant.

W. C. Graves, N. C. Coldwell, Archie Borland, Caldwell & Borland, Octave G. Du Puy and Isaac Frohman, for the respondents.

**209** McFARLAND, J. This is an action to restrain the defendants from diverting water from the San Joaquin river by means of a certain dam and ditch. The plaintiff, Miller & Lux, and the intervener, Mowry, assert rights as riparian owners on the river below defendants' dam. The plaintiff the San Joaquin and Kings River Canal and Irrigation Company asserts rights as the owner of a ditch constructed long prior to that of defendants, and also as a riparian owner on the said river. The court below rendered judgment as prayed for against defendants in favor of Miller & Lux and the intervener, and there is no appeal from such judgment; but the court found that there was no evidence introduced as to the ownership or riparian character of any land of the other **210** plaintiff, and that "for purposes of the issues in this case only" its allegations as to its ownership of lands are not proved. The court also refused to give any judgment in favor of said plaintiff, and rendered, as part of the judgment, the following: "It is further ordered, adjudged and decreed that the plaintiff the San Joaquin and Kings River Canal and Irrigation Company take nothing as against the defendants, the Enterprise Canal and Land Company and Jefferson G. James, or either of them"; and from this part of the judgment the said last-named plaintiff appeals. As the defendants are parties under the other defendant, the questions involved on this appeal may be considered as being solely between the appellant and the Enterprise Canal and Land Company, respondent.

The facts of the case were averred in the complaint and found by the court: The appellant, the San Joaquin and Kings River Canal and Irrigation Company, was organized as a corporation, with the purpose and objects, among others, of constructing canals from the San Joaquin and Kings rivers and streams for the irrigation of

agricultural lands, and supplying the inhabitants of cities and towns with pure and fresh water. The San Joaquin river is a natural watercourse arising in the Sierra Nevada mountains and flowing through the San Joaquin valley. The appellant "is now, and for upward of twenty-five years before the commencement of this action has been, the owner and in the possession of a water ditch or canal known as the San Joaquin and Kings River canal with the lateral branches thereof," and appellant "for more than twenty-five years before the commencement of this action has appropriated, taken out of, and diverted from said San Joaquin river, through said canal, six hundred cubic feet per second of the waters of said river, and said water has, when so appropriated, taken out, and diverted, been used by said plaintiffs, or furnished to others to be used for domestic, agricultural, stock, mechanical, manufacturing, and for other useful and beneficial purposes." The length of the main canal is "upward of seventy-four miles," and the appellant has constructed and now uses and maintains "lateral and parallel canals in connection with said main canal, of upward of one hundred and twenty miles in length, which are in actual use for taking water from the said main canal <sup>211</sup> which is used for the purpose of irrigating many thousand acres of agricultural land, whereon cereals and other crops are raised, and whereon a large number of sheep and other domestic animals are pastured." The appellant also "is, and for more than three years before the commencement of this action has been, the owner and in possession of the water ditch or canal known as the 'Outside' canal of the San Joaquin and Kings River canal, with the lateral branches thereof"; and for more than three years before the commencement of this action appellant, by means of this last-named canal, has appropriated and diverted from the said San Joaquin river three hundred cubic feet of water per second, and has used the same for the useful and beneficial purposes above mentioned. This "Outside" canal is in length "upward of thirty-four miles," and its lateral branches are "upward of forty miles in length." At the commencement of this action the land that is irrigated by appellant's canals "were occupied and cultivated by a large number of persons who were owners or tenants of said lands," who had on said lands "many thousand acres of growing crops," and were using also "a large number of acres of said lands for pasture for cattle, sheep and other domestic animals, which animals were of great value." These canals, "except in unusually wet

weather," cannot be supplied with water from any source other than the San Joaquin river.

During the year 1898—the year before the commencement of this action, which was commenced March 8, 1899—the respondent The Enterprise Canal and Land Company “wrongfully dug away and removed a part of the bank of said San Joaquin river at a point . . . above the said lands of plaintiff and above the said canals of plaintiff, and constructed a large canal or ditch running away from said river at that point and known as the Enterprise Canal and Land Company canal.” That on or about the first day of March, 1899, the respondents “wrongfully and without right, by means of dams, levees, sticks, earth and other obstructions by them wrongfully placed in the bed and channel of said San Joaquin river, obstructed the flow of said river and of the water to which plaintiffs were and are entitled as aforesaid, flowing down the plaintiffs’ canals, and to the plaintiffs’ lands,” and caused the same to flow through respondents’ **212** said canal. At the time of this diversion by respondents there was flowing in said river “not to exceed six hundred and fifty cubic feet of water per second.” The court also finds that “the defendants, the Enterprise Canal and Land Company, and Jefferson G. James, or their agents, servants or employés, are not entitled to take or divert any of the waters flowing in said San Joaquin river.”

If there were no facts in the case other than those above stated, there would seem to be no plausible reason for denying appellant any relief. Upon these facts the respondents would be simply naked trespassers, taking from the appellant property of immense value which it had owned and possessed for a great many years, and in which respondents had no rights whatever. We learn, however, from counsel that the refusal of the court below to grant appellant any relief was based upon two other findings, to wit: 1. That the San Joaquin river at the point where appellant’s canal taps the same is a “navigable stream”; and 2. That the dam by which appellant diverts the water into its canals obstructs the navigation of said stream. And it is contended that for those reasons the appellant, notwithstanding its long ownership and possession of this valuable and useful property, is without any legal means to protect it against trespassers, and that there are many and a large number of persons the value of whose lands is dependent upon the water furnished by said canals, and that the property of anyone who without any right whatsoever appropriates or prevents such water from flowing into said



canals, and thus practically destroy the entire property of appellant therein.

It is contended by appellant that the two findings last above referred to are not sustained by the evidence; but we do not think that this contention can be maintained. There was no evidence that the stream in question was navigable for several years before the commencement of this action; but there was evidence that a great many years ago boats and barges did at times, at certain seasons of the year, pass up and down it, and as there was no evidence that the condition had changed, it must be held that for the purposes of this appeal the stream is in a legal and technical sense "navigable." There is, however, no evidence that there are any persons desirous of navigating the stream, or that this navigability is of any value. <sup>213</sup> And while the evidence of the effect of appellant's dam on the navigability of the stream is not very conclusive, still it is sufficient to warrant the court below in finding that it would, to some extent, obstruct such navigability, although it does not appear that anyone who desired and attempted to navigate it was ever prevented from doing so by the said dam.

The position of respondents is, that the obstruction of a navigable stream is unlawful and a public nuisance, and that because appellant's dam, by which it diverts water into its canal, obstructs the navigability of the San Joaquin river, it cannot have the aid of a court of equity to protect its property against even a mere trespasser. The respondents themselves professedly have no right in the premises; they do not claim that, as persons desirous of navigating the stream, they have sustained any special damage, or any damage at all; they do not assert any right to navigation, but show that they themselves are trying to obstruct navigation by an act which they assert to be unlawful. They stand upon the bald proposition that, although under the general law the appellant has clearly property rights with which they are interfering, appellant is helpless to assert those rights or to stop respondents' trespasses.

The contention of respondents rests on certain maxims, as that "No one acquires a right of action from his own wrong"; "Out of a base transaction a cause of action does not arise"; "He who comes into equity must come with clean hands," etc. But these maxims have their limitations, and will not be allowed to work a great injustice and wrong when the alleged unlawful act is entirely unconnected with any transaction between the parties to the suit. Usually these maxims cannot be

successfully invoked where the objectionable act in no way affects the equitable relations existing between the parties. Pomeroy, speaking of the maxim that "He who comes into equity must come with clean hands," after declaring that the principle "must be taken with reasonable limitations," says: "The maxim, considered as a general rule controlling the administration of equitable relief in particular controversies, is confined to misconduct in regard to, or at all events connected with, the matter in litigation, so that it has in some measure affected the equitable relations subsisting between the two parties and arising out of the transaction; it does not extend <sup>244</sup> to any misconduct, however gross, which is unconnected with the matter in litigation, and with which the opposite party has no concern." The same rule is declared in *Langdon v. Templeton*, 66 Vt. 173, 182, 28 Atl. 866; and in *Meyer v. Yesser*, 32 Ind. 294, it was held—in line with the general principle—that fraud without injury is never available as a defense in equity. The same principle was declared in *Ely v. Supervisors*, 36 N. Y. 297, where it was held that in an action for the destruction of property by a mob the fact that the houses destroyed were used for illegal purposes was no defense, and in *Lawrence v. Metropolitan Elevated Ry. Co.*, 126 N. Y. 483, 27 N. E. 765, 13 L. R. A. 102, where it was held that in an action for damages to premises by the maintenance of an elevated railroad, it was no defense that a house on the premises was kept as a house of prostitution. In the case at bar it does not appear that the maintenance of appellant's dam—whether unlawful or not—in any way affected the equitable relations existing between appellant and respondents; it had nothing to do with any contract or transaction whatever between said parties. Respondents do not represent the state or any person who suffered special damage from the alleged public nuisance. The state has allowed the maintenance of the dam for a long period of time; and it may never conclude to interfere to inquire into its lawfulness in the interest of a mere potential navigability which is apparently of little consequence, when such interference might destroy what, in this instance at least, seems to be a much more valuable public use of the water of the stream for irrigation. At all events, the state should be heard on this question; and in this private suit the decision should be in accordance with the rights of the individual parties as against each other, leaving the state or the federal government to determine whether or not it will initiate proper proceedings to inquire into the alleged public nuisance. Under the

general law governing the acquisition of property in the use of water, as determined by the decisions of the courts, the appellant has, as against respondents, a complete right to have the water of the stream in question flow into its canals as it has flowed therein for many years, and to a decree restraining respondent from preventing such flow. The issue here is simply between the appellant and the respondents, not between the former and the state. In accordance with these <sup>215</sup> views the part of the judgment appealed from—which refuses any relief to the appellant—is erroneous, and should be reversed. (In their brief respondents argue that appellant also interfered with navigation by taking water out of the river, thus diminishing its current; but there is no averment of that kind in their answer, and, moreover, the effect of that kind of obstruction, so far as this action is concerned, is covered by the views above expressed.)

There is a bill of exceptions in the record which was settled by the judge of the superior court before whom the case was tried, after his term of office had expired; and it is contended by respondents that this bill cannot be considered because the part of section 653 of the Code of Civil Procedure which provides that a judge “may settle and sign a bill of exceptions after as well as before he ceases to be such judge” is unconstitutional, as attempting to confer the power to do a judicial act upon one who is not a judicial officer. This power, however, has been continuously recognized and declared by this court for too long a period of time to be now questioned: *Cummings v. Conlan*, 66 Cal. 403, 5 Pac. 903; *Leach v. Aitken*, 91 Cal. 484, 28 Pac. 577; *Turner v. Hearst*, 115 Cal. 394, 47 Pac. 129. The bar has, no doubt, generally considered the power as valid and acted upon it; and numerous cases are probably here, or on their way to this court, in which the bills of exceptions and statements have been settled as in the case at bar, and great injustice would be done if former rulings on the matter were not adhered to. And although the point of the unconstitutionality of the section may not heretofore have been expressly raised and decided, still we think the principle of the rule of *stare decisis* should apply, and the settlement of the bill be held to be valid.

We see no necessity for another trial of this case. The findings show that appellant’s main canal carries six hundred cubic feet of water per second from said stream, and that the “Outside” canal carries three hundred cubic feet per second “of the water of said San Joaquin river,” and upon the findings the

appellant is entitled to a judgment against respondents restraining them from any diversion of water from the said river which will interfere with the flowing of said amounts of water respectively into said two canals of the appellant.

**216** The part of the judgment appealed from is reversed, and the superior court is directed to render judgment in favor of the plaintiff and appellant, the San Joaquin and Kings River Canal and Irrigation Company, and against the defendants and respondents, the Enterprise Canal and Land Company, and Jefferson G. James, enjoining and restraining them from any diversion of the water of the San Joaquin river through the Enterprise Canal and Land Company canal, or by any means whatever at any point on said river above the heads of appellant's two canals, which will obstruct or interfere with the flow of six hundred cubic feet per second of the water of said river into appellant's main canal, known as the San Joaquin and Kings River canal, or which will obstruct or interfere with the flow of three hundred cubic feet per second of the water of said river, into the canal of appellant known as the "Outside" canal.

Henshaw, J., Shaw, J., Van Dyke, J., Angellotti, J., Lorigan, J., and Beatty, C. J., concurred.

Rehearing denied.

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*The Navigability of a Stream* is a question of fact for the jury. A river which is in fact navigable at certain seasons of the year to light draught boats is a navigable stream, whether it has been so declared by the legislature or not: *Griffith v. Holman*, 23 Wash. 347, 83 Am. St. Rep. 821, 63 Pac. 239; *Railroad v. Ferguson*, 105 Tenn. 552, 59 S. W. 343, 80 Am. St. Rep. 908, and cases cited in the cross-reference note thereto. But it has been held that fresh-water streams which have the requisite volume of water only occasionally and for brief periods, as the result of freshets, are unnavigable and private property: *Bayzer v. McMillan Mill Co.*, 105 Ala. 395, 53 Am. St. Rep. 144, 16 S. W. 923. Compare *Murray v. Preston*, 106 Ky. 561, 90 Am. St. Rep. 127, 5 S. W. 1095.

*The Maxim that* "he who comes into equity must come with clean hands" is applicable only to willful misconduct in respect to the matter in dispute, and not to some other illegal transaction, although it may be indirectly connected with the subject matter of the suit: *Northfolk S. Co. v. Wilcox*, 64 Conn. 101, 42 Am. St. Rep. 159, 29 Atl. 303. The maxim does not apply to misconduct not affecting the equitable relations between the parties, and not arising out of the transaction in respect to which relief is sought: *Foster v. Winchester*, 95 Va. 347, 68 Off. St. Rep. 160; *Mossler v. Jacobs*, 66 Ill. App. 571; *Lee Allen v. Thompson*, 66 Vt. 173, 28 Atl. 866.



## FOLEY v. MARTIN.

[142 Cal. 256, 75 Pac. 842.]

**PROCESS, Civil, Service of.**—A sheriff has No Authority to Break into a Dwelling-house to serve process in a civil action, and entry through a window is a breaking into a house within the meaning of this rule when the outside door is shut. (p. 125.)

**DAMAGES, EXEMPLARY, When may not be Awarded.**—Nothing beyond compensatory damages can be recovered, unless the malice or oppression characterizing the injury has been authorized or ratified by the defendant. (p. 126.)

**DAMAGES, EXEMPLARY, as Against Officer for Act of His Deputy.**—An officer is not answerable in exemplary damages for the acts of his deputies, except under circumstances in which a master would be answerable in such damages for the acts of his servant. (pp. 126, 127.)

**A SHERIFF is not Answerable in Exemplary Damages** for the oppressive misconduct of his deputy which he neither authorized nor ratified. (p. 127.)

**RATIFICATION of Misconduct of Deputy Sheriff, Evidence of.**—The fact that a deputy sheriff is not discharged, but, on the other hand, is continued in office after his principal is informed of his oppressive misconduct in the service of a writ is evidence of his ratification of such conduct. (p. 128.)

**SHERIFF AND DEPUTY—Pendente Ratification of Deputy's Wrongful Act.**—If a deputy sheriff is guilty of oppressive misconduct in the service of a writ, of which his principal has no knowledge other than that given by the service of the summons and complaint in an action brought to recover for such wrong, the failure to at once discharge such deputy is not a ratification of the wrongful act. If the plaintiff desires to charge the principal with vindictive damages on the ground of ratification, he must make his cause of action complete before commencing suit by informing the principal of the facts and giving him an opportunity to redress the wrong before being forced to defend it. (p. 129.)

Edgar D. Peixotto, for the appellants.

Mastick, Van Fleet & Mastick and Edward F. Treadwell, for the respondent.

**258 BEATTY, C. J.** A rehearing of this case was ordered after affirmance of the judgment and order appealed from, based upon the following opinion rendered in Department:

“Action to recover damages for a trespass committed by the sheriff by reason of the abuse of his authority in serving process upon the plaintiff. The action was tried by the court **259** without a jury. Judgment was rendered in favor of the plaintiff for the sum of five hundred dollars, from which and from an order denying a new trial the defendants have appealed.



"In an action against the plaintiff pending in the justice's court for San Francisco the summons was delivered to the defendant Martin, who was the sheriff of the city and county, for service upon the plaintiff. The deputy to whom he gave the papers for service, accompanied by another deputy, went to the residence of the plaintiff, and not being able to obtain entrance at the front door, went to the rear of the house and up a staircase to a porch on the second story of the building. Upon reaching this porch, and finding the door leading from it into the house locked or bolted one of the deputies opened a door leading into a closet which had been built upon the porch, and in which there was a window six feet above the floor, with a swinging sash about fourteen by sixteen inches in size opening into a pantry, within the house. One of the deputies, with the aid of the other, and by means of a stepladder, climbed through this window into the pantry, and from that went into the kitchen and unlocked the outer door opening upon the porch, and the two then went through the house in search of the plaintiff. The plaintiff was at that time, and had been for several months, an invalid, confined to his bed by reason of paralysis of his right side, and susceptible to great suffering in case of any unusual excitement. Before making this attempt to enter the house the deputies had been informed that he was sick, but stated that if they were not let into the house they would break in. When they came to the room in which the plaintiff lay, they found it locked, and tried to force an entrance by means of a chisel placed in the jamb of the door. Failing to open the door by this means, one of them kicked against the door several times, and then the two, pressing against it and pushing with their shoulders, forced it open, and in doing so broke the lock and knob of the door, and also broke the woodwork of the door into several pieces. One of them gave the papers to the defendant as he lay in bed. The court found upon the evidence that the plaintiff had been unlawfully entered the house of the plaintiff, and that the defendant was guilty of gross and willful oppression and 260 abuse of his authority as an officer in the service of the justice's court against the plaintiff.

"The proposition is elementary that a sheriff has no authority to break into a dwelling-house for the service of process. *People v. Smith*; *State v. Smith's Case*, 5 Coke, 91; 1 *Smith's Leading Cases*, \*183; *Crocker on Sheriffs*, sees. 313-317, 350; *Snyder v. State*, 10 Cal. 514; 357, 59 Am. Dec. 551; *State v. Beckner*, 127 Ind. 611, 42 Am. St. Rep. 257; *Curtis v. Hubbard*, 1

Hill, 336, affirmed, 4 Hill, 437, 40 Am. Dec. 292. Mr. Crocker says in reference to the service of summons (Crocker on Sheriffs, sec. 350): 'In making the service the officer has no more power than any individual. He may enter the defendant's house in the day or night-time to make the service peaceably, if he can, but he has no right to enter forcibly, or against the owner's wishes.' In Freeman on Executions, section 256, the author says: 'It is not necessary in order to entitle the defendant to protect his dwelling from intrusion that the door be either shut or locked, if he being present shows a desire to exclude the officer by closing the door against him.' The evidence before the court fully shows that the officer violated these rules and sustains the above finding of the court. Entry through the window was itself a breaking into the house. 'The outer door was shut. That was itself a prohibition': *Curtis v. Hubbard*, 1 Hill, 336, 4 Hill, 437, 40 Am. Dec. 292.

"The act of the deputy was the act of the sheriff. The deputy is not the agent or servant of the sheriff, but is his representative, and the sheriff is liable for his acts the same as if they had been done by himself. 'The act constituting the cause of action is that of the defendant, and, though done through a deputy, is considered in law as done directly and personally by him': *Hirsch v. Rand*, 39 Cal. 315.

"The plaintiff was not limited in his recovery to a judgment for merely the actual damage done to his property. The finding of the court that the sheriff was guilty of gross and willful oppression in committing the trespass is fully sustained by the evidence, and in such a case the court is authorized to give exemplary damages: Civ. Code, sec. 3294. The facts justifying exemplary damages are set forth in the complaint, and the allegations were sustained by the evidence. <sup>261</sup> There was also evidence of substantial actual damage to property—the broken door and the broken lock and knob were exhibited at the trial—from which the court was authorized to find that the plaintiff was entitled to more than nominal damages. Under the evidence in the case it cannot be said that the amount awarded is excessive. Neither was it necessary for the court any more than it would have been for a jury, if the case had been tried before a jury, to segregate in its findings the amount of actual damage from the amount given as exemplary damages, unless requested so to do.

"The demurrer to the complaint was properly overruled. The complaint distinctly set forth the amount claimed for actual

damages and the amount claimed as exemplary damages. The only claim for actual damages was that caused to the property of the plaintiff.

"The judgment and order are affirmed."

This opinion was and is entirely satisfactory to the court, except as to one proposition, and as qualified herein, and with that exception, is readopted.

The damages recovered by respondent were in a large part punitive, or vindictive—such damages, that is to say, as are recoverable only under section 3294 of the Civil Code for fraud, oppression, or malice accompanying a tort, and one of the questions presented by the case was whether a sheriff is liable in punitive damages for the oppressive acts of his deputy in attempting service of process in an unlawful manner. It was held by the Department that he was liable for the act of his deputy to the same extent as if he had performed the act in person. This conclusion was directly opposed to the decision in *Nixon v. Rauer* (Cal.), 66 Pac. 221, in which the same rule was held to apply in favor of an officer when sued for the tort of his deputy that has become the settled law of this state in actions against a principal or master for the tort of his agent or servant. That rule is, that nothing beyond compensatory damages can be recovered, unless the malice or oppression characterizing the injury has been authorized or ratified by the defendant: See *Nixon v. Rauer* (Cal.), 66 Pac. 221, and cases therein cited. We are aware that the reason that case does not appear in our reports is, that there was no argument against the proposition decided, and this because the <sup>262</sup> controversy had been settled by the parties prior to our decision. We do not therefore cite the case as authority, but merely refer to it for the purpose of indicating the principal reason for ordering this rehearing.

It is contended by counsel for respondent that the rule as to the liability of an officer for the malicious acts of his deputy is different from the rule measuring the liability of master or principal, but we cannot discover in any of the cases cited in support of this contention that any such distinction is made or that any reason is suggested for making it. It is true that in one case (*Hazard v. Israel*, 1 Binn. 240, 2 Am. Dec. 438) it was expressly held that, irrespective of authorization or ratification, a sheriff is liable in punitive damages for the oppressive misconduct of his deputy in serving civil process. Several other cases are cited which are perhaps indirectly to the same effect, but

they are all, so far as we can discover, decided upon a ground which equally embraces an action against master or principal, and it is certain that none of them suggests a distinction, or any reason for a distinction, which would call for the application of one rule in one case and a different rule in the other case. In fact, there are many more cases in which the strict rule has been applied in actions against principals than in actions against sheriffs. For a reference to these cases see *Goddard v. Grand Trunk Ry. Co.*, 57 Me. 225, 2 Am. Rep. 39, and the note to 2 *Redfield on Railways*, therein cited. In short, it seems that the strict rule, where it obtained, was applied indiscriminately against all principals, whether private or official, and it would seem to follow that where the more liberal rule obtains it should be applied with equal impartiality. If an innocent master incurs no penalty for the malice of his servant, upon the same principle an innocent officer should not be punished for the malice of his deputy. It is enough that he, the same as any other principal in like case, should be held to make full compensation for the injury actually sustained by the plaintiff.

There is nothing inconsistent with this view in the case cited in the Department opinion: *Hirsch v. Rand*, 39 Cal. 315. All that was there decided was a point of practice, which required no consideration of the rule of damages. The court merely held that in an action for false imprisonment <sup>263</sup> caused by the act of a deputy marshal the facts could be proved under a general allegation that it was caused by the defendant, without alleging specially the official character of the defendant, and the fact that the arrest and imprisonment were caused by his deputy. The principle of the decision was the familiar one, *Qui facit per alium, facit per se*, which applies to all persons, private as well as official, who act through the agency of others. We conclude that the case of *Nixon v. Rauer*, although not argued by respondent, and for that reason not reported, was correctly decided.

This appeal is not, however, disposed of by holding that a sheriff is exempt from the penalty of vindictive damages where he has not authorized or ratified the oppressive misconduct of his deputy, for here the court has found that the defendant Martin did ratify the acts of his deputies; and the question remains whether this finding is sustained by the evidence.

The defendant testified that he had no personal knowledge whatever of the transaction upon which the suit is founded until served with summons, and there was no evidence to the contrary. But he did not, when sued, discharge his deputies,



and they were still serving when the action was tried. There is no doubt that the retention or promotion of an offending agent after knowledge of his misconduct is evidence of ratification, which may be very conclusive or very slight and insufficient, according to circumstances. If the facts are promptly called to the attention of the principal, and if, with the means of verifying the truth of the charge, he neglects to make due inquiry, and afterward retains the guilty agent in his employment or promotes him to a better position, he makes himself particeps criminis, and lays the foundation of an action against himself for punitive damages. But we have been referred to no case which holds him to that measure of liability when his first and only notice of his agent's misconduct was the service of summons in the action.

If such had been the decision in *Bass v. Chicago etc. Ry. Co.*, 42 Wis. 651, 24 Am. Rep. 437, that case would have stood alone upon the proposition, so far as we have discovered. But even in that case the decision was not rested upon the ground that the <sup>264</sup> defendant had notice by the commencement of the action. The case was one of very gross outrage by a brakeman upon an inoffensive passenger. The conductor of the train was immediately informed of the circumstances by the plaintiff and by other passengers, and complaint was promptly made to the company, whose attorney, as intimated by the court, instead of trying to ascertain the truth of the transaction limited his efforts to screening the guilty conductor and brakeman. It was after all this that the action was commenced, and the fact that the guilty agents were retained in their employment after suit was merely mentioned as one circumstance along with others tending to prove ratification, the court holding expressly that notice to the conductor in charge of the train was notice to the corporation of the misconduct of the brakeman.

The present case is very different. The sheriff here had no notice except by the service of summons. He was furnished with a writ, and had no means of informing himself, except by means of his deputies; and what he learned from them was, that they had done nothing except what they had been specifically directed to do by an order of the justice's court—an invalid order, it is true, but still a direction upon which they seem to have acted in good faith, and without any wanton or unnecessary violence. Under these circumstances, we think that the mere failure of the sheriff to at once discharge his duties in advance of an investigation of their conduct, in the mode invited



by the plaintiff, ought not to be held a ratification of their unauthorized acts. We think, indeed, that it is a safe and just rule to lay down, that if a plaintiff in such a case as this desires to charge a principal with vindictive damages upon the ground of ratification, he should make his cause of action complete before commencing it, by informing the principal of the facts and giving him an opportunity of redressing the wrong before being forced to defend it. Such was the course pursued in *Avakian v. Noble*, 121 Cal. 216, 53 Pac. 559.

The judgment and order appealed from are reversed.

Van Dyke, J., Angellotti, J., McFarland, J., and Lorigan, J., concurred.

Rehearing denied.

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*Exemplary Damages* cannot be recovered, according to *Johnson v. Williams*, 111 Ky. 289, 98 Am. St. Rep. 416, 63 S. W. 759, in an action on the bond of a public officer. But where a statute declares that a justice of the peace shall, with his sureties, be liable on his official bond for any misconduct of a person appointed by him as special constable, and that any official selling exempt property shall forfeit to the judgment debtor double its value, the sureties, as well as the justice himself, are held liable for double the value of exempt property sold by such special constable: *State v. Allen*, 48 W. Va. 154, 86 Am. St. Rep. 29, 35 S. E. 990. That vindictive damages may be awarded for the abuse of process, see the monographic note to *Bradshaw v. Frazier*, 86 Am. St. Rep. 410. See, generally, on exemplary damages, the monographic note to *Spellman v. Richmond etc. R. R. Co.*, 28 Am. St. Rep. 870-883; and on the acts for which sureties on official bond are liable, see the monographic note to *Feller v. Gates*, 91 Am. St. Rep. 497-579.

*An Officer must not Break Open* outer doors and windows of a dwelling-house to effect the service of civil process: See the monographic note to *Hawkins v. Commonwealth*, 61 Am. Dec. 155, 156; *State v. Beckner*, 132 Ind. 371, 32 Am. St. Rep. 257, 31 N. E. 950; *Kelley v. Schuyler*, 20 R. I. 432, 78 Am. St. Rep. 887, 39 Atl. 893.

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## BANK OF CALIFORNIA v. SAN FRANCISCO.

[142 Cal. 276, 75 Pac. 832.]

**FRANCHISE, CORPORATE, What is.**—Whenever a corporation is legally formed, the right to be and exist as such and as a corporation to do the business specified in its articles is a grant by the sovereign of a valuable right, which is usually known as the corporate franchise. (p. 132.)

**FRANCHISE, CORPORATE, Property in.**—A corporate franchise is considered as property separate and distinct from the so-called franchises which the corporation may acquire subsequent to its incorporation. (p. 133.)

**TAXATION OF CORPORATE FRANCHISE.**—The Manner and Method of Taxing a corporate franchise are entirely within the control of the state, so long as no constitutional right is impaired. (p. 135.)

**TAXATION OF CORPORATE FRANCHISE.**—A State may Provide for the Taxation of the Franchise of a Banking Corporation as the property of such corporation. (p. 137.)

**TAXATION OF THE FRANCHISE to be a Corporation—Value.**—The value of the franchise of a corporation is not limited to the cost of obtaining it. In determining such value for the purposes of taxation, the assessor is at liberty to consider the difference between the aggregate market value of the stock of the corporation and the value of its tangible property. (p. 141.)

**CONSTITUTIONAL LAW—Taxation of the Franchise to be a Banking Corporation.**—The fourteenth amendment to the constitution of the United States does not forbid the taxation of the franchise to be a banking corporation, though the business which it authorizes the corporation to carry on is a common business which every private person has the right to engage in. (p. 142.)

James M. Allen and John Garber, for the appellant.

Franklin K. Lane, city attorney, and W. I. Brobeck, assistant city attorney, for the respondent.

**277 ANGELLOTTI, J.** This action was brought by plaintiff corporation to have an assessment of its franchise for the fiscal year ending June 30, 1901, declared illegal and void, and to recover from defendant \$12,187.76, paid by it under protest, *et al.*

Defendant had judgment in the court below, and plaintiff *et al.* were reversed on the judgment-roll.

The claim of the plaintiff is, that it has never owned or possessed any franchise whatever, and that the only franchise in any way connected with it is the corporate franchise, or the franchise of being a corporation, which, it is claimed, is the property of its stockholders, and is not assessable or taxable to

said corporation. The assessor of defendant, in addition to assessing the assessable tangible property of the plaintiff, situate in said city and county, consisting of land, improvements, furniture, library, typewriter, and money at \$2,311,774, assessed its "franchise" at \$750,000, and the board <sup>278</sup> of equalization of the city and county refused to lower said assessment or "give plaintiff any relief whatever." The tax on said \$750,000 so assessed on the franchise amounted to \$12,187.76, which was paid under protest.

It appears from the findings of the trial court that the plaintiff was incorporated in the year 1864, under the provisions of the act providing for the formation of corporations for certain purposes, approved April 14, 1853, and all acts amendatory thereof and supplementary thereto, for the purpose of carrying on the business of banking, and has ever since conducted such business under its articles of incorporation, and that it has never owned, possessed, claimed, or controlled any other rights, powers, privileges, or franchises than such as were acquired or conferred upon it by said articles of incorporation.

It further appears that the assessor found that the aggregate value of the tangible property of plaintiff, including nonassessable bonds and property not assessable in San Francisco, and all property assessable therein, was \$5,156,903.08; that the aggregate market value of all the shares of capital stock issued by plaintiff was \$8,100,000; and that the difference between the aggregate market value of said stock and the value of all tangible property of the corporation—to wit, \$2,943,096.92—was by him ascertained and determined to be the value of the so-called franchise of plaintiff, which he thereupon assessed and valued for purposes of assessment and taxation, at the sum of \$750,000.

The only franchise acquired under the articles of incorporation—and the findings in this case establish the fact that the corporation has no other franchise—was the right to be and exist as a corporation, with all the powers given by law to corporations, and the right to enjoy the privilege and immunities of a corporation in the conduct of the business of banking.

Admittedly, the mere right to do a banking business is not a franchise, in any sense of the word. It belongs to citizens generally, and is a common right, in the same sense that the right to do a grocery or drygoods business is available to all citizens, and no grant from the sovereign is essential to its ex-

istence. Any individual, or any number of individuals, may, under such regulations as the state in the exercise of its **279** police powers may legally make, engage therein, without any grant from the state.

While, however, the right to engage in the business of banking is a common right, available to all citizens, such right can be exercised through the agency of a corporation only by express permission of the state. Corporations, being purely creatures of the law, may be formed only when the state so authorizes, and then only for such purposes as may be authorized by the state. It is universally recognized that the power of creating corporations is one appertaining to sovereignty, and can only be exercised by that branch of the government in which it is legally vested, and that whatever method may be adopted for their formation, and with whatever liberality the privilege of forming them may be conferred, every corporation is dependent for its existence upon the permission of the state in which it is created.

While our law provides that private corporations may be formed by any five or more persons, a majority of whom are residents of the state, for any purpose for which individuals may lawfully associate themselves, each corporation so created derives its right to exist as a corporation, with all the incidents thereof, for the purpose of doing the business specified in its articles of incorporation, directly from the sovereign power, precisely the same as the corporation that formerly existed in England under special grant from the king, and later under special act of parliament, or the corporation that in this country exists under special act of the legislative department of any of our states.

Whenever a corporation is legally formed, the right to be and exist as such, and as a corporation to do the business specified in its articles, whether it be a banking business, grocery business, or the operation of a railroad, or any other business in which individuals may engage without grant from the state, is a grant by the sovereign power, a valuable right which is generally known as the corporate franchise: **2** Morawetz on Corporations, sec. 922; *Spring Valley Water Works v. Schorler*, 63 Cal. 69, 106; *Horn S. M. Co. v. New York*, 143 U. S. 395, 12 Sup. Ct. Rep. 403; *Central Pac. R. R. Co. v. California*, 162 U. S. 91, 17 Sup. Ct. Rep. 35; *Southern Gum Co. v. Laylin*, 66 Ohio St. 578, 64 N. E. 561, 566; *State v. Anderson*, 90 Wis. 550, 63 N. W. 746; *Home Ins. Co. v. New York*

134 U. S. 594, 599, 10 Sup. Ct. Rep. 593; State R. R. Tax Cases, 92 U. S. 575. <sup>280</sup> In the case of *Horn S. M. Co. v. New York*, 143 U. S. 305, 12 Sup. Ct. Rep. 403, the supreme court of the United States, speaking of this kind of franchise, said: "Its [the corporation's] creation is the investing of two or more persons with the capacity to act as a single individual, with a common name, and the privilege of succession in its members without dissolution and with a limited individual liability. The right and privileges, or the franchise, as it may be termed, of being a corporation, is of great value to its members, and is considered as property separate and distinct from the property which the corporation itself may acquire. According to the law of most states, this franchise or privilege of being a corporation is deemed personal property, and is subject to separate taxation."

This corporate franchise—viz., the franchise to be and exist as a corporation for the purposes specified in the articles of incorporation—appertains to every corporation, for whatever purpose it may be formed and there is no distinction in this regard between the banking or grocery corporation, and the railroad, water, or gas corporation. The right to engage in every such business is open to all citizens, independent of any grant from the sovereign, but it is available to no one to conduct any such business through the agency of a corporation without such grant.

Certain occupations are, however, of such a nature that various privileges conferrable only by the sovereign power are convenient, and in most cases absolutely essential, to the successful maintenance of the business to be carried on, whether it be carried on by a corporation or by an individual—such, for instance, as the right to use public highways. Such rights and privileges are also known as franchises, but they constitute a class entirely distinct from and independent of the corporate franchise. Such rights and privileges are of course the property of the corporation or individual by whom they have been acquired, and are taxable as such.

As already shown, the corporate franchise is considered as property separate and distinct from the so-called franchises which the corporation may acquire subsequent to its incorporation.

The plaintiff claims that because it has acquired and is exercising no such rights it has no franchise. The basis of this claim is the contention that this corporate franchise is not a



**281** franchise of the corporation, but vests in and belongs to the members of the corporation. In a certain sense it is true that such a franchise is the property of the members of the corporation. It has been often said that a corporation is itself a franchise belonging to the members of the corporation, and a corporation may hold other franchises as rights or franchises of the corporation. Expressions of this character have been used for the purpose of distinguishing the rights and privileges which the corporation, as a legal being, subsequently acquires and controls, and which, when transferable, may be transferred by the corporation itself, from the franchise of being and existing as a corporation, which is incapable of assignment, and which survives "in the mere fact of corporate existence" after all property capable of assignment has been transferred to others by the corporation.

The corporation is, however, nothing other than its stockholders or members, transformed into and existing as one legal being by permission of the state. The incorporators and their associates and successors are the "body politic or corporate by the name stated in the certificate" (Civ. Code, sec. 296), and, as such body politic or corporate, they hold the right to exist and transact the business specified in the articles. They hold the right in their collective capacity as a corporation, and not severally as persons. They have no rights in regard to the corporate franchise that they can exercise, except through the corporation. It is the corporation, the "body politic or corporate," the legal creature comprised of the incorporators, their associates, and successors, that is invested by the state with life and the power to do.

It was said by the supreme court of the United States, in *Society for Savings v. Coite*, 6 Wall. 594, 606: "Corporate franchises are legal entities vested in the corporation itself as soon as it is in esse. They are not mere naked powers granted to the corporation, but powers coupled with an interest which vest in the corporation, upon the possession of its franchises, and whatever may be thought of the corporators, it cannot be denied that the corporation itself has a legal interest in such franchises."

If this corporate franchise is assessable as property, then, that it must be assessed to the corporation instead of the member or stockholders is clearly settled in this state by the decision **282** in *People v. Badlam*, 57 Cal. 594, where it was held that a stockholder could not be assessed upon his certificate of

stock, inasmuch as his shares were simply an interest in the very property held by the corporation, and the assessment of all the property of the corporation covered everything represented by the certificate: See, also, Pol. Code, sec. 3608.

It is not claimed that a corporate franchise may not be taxed by a state, but it is urged that such tax has always been an excise tax, and not a tax on property. An examination of the authorities will disclose the fact that in many cases it has been directly taxed as property. The manner and method, however, are entirely within the control of the state, which is supreme in such matters, so long as no constitutional right is impaired. As already shown, such a franchise is property. Mr. Justice Field, speaking for the supreme court of the United States, in *Horn S. M. Co. v. New York*, 143 U. S. 325, 12 Sup. Ct. Rep. 403, after saying that such a franchise is property and is subject to separate taxation, said: "The right of the state to thus tax it has been recognized by this court and the state courts in instances without number, . . . and the manner in which its value shall be assessed and the rate . . . are mere matters of legislative discretion, except as controlled by the organic law of the state." The same court said in *Hamilton Co. v. Massachusetts*, 6 Wall. 632, 638, that: "Corporate franchises . . . are legal estates, and not mere naked powers granted to the corporation, but powers coupled with an interest which vest in the corporation, by virtue of their charter, and the rule is equally well settled that the privileges and franchises of a private corporation, unless exempted in terms which amount to a contract, are as much the legitimate subjects of taxation as any other property of the citizens within the sovereignty of the state": See, also, *Society for Savings v. Coite*, 6 Wall. 594, 606.

In *Central Pac. R. R. Co. v. California*, 162 U. S. 91, 125, 17 Sup. Ct. Rep. 35, the supreme court of the United States, speaking of a tax on the state franchise of a railroad corporation, said that if the corporation procured any rights or privileges, otherwise called franchises, from the state, they were taxable, and the extent of their value was to be determined by the board of equalization. The court, after saying that under the laws of California the plaintiff obtained from the state the right and <sup>283</sup> privilege of corporate capacity and other rights, said that it is not to be denied that such rights and privileges have value and constitute taxable property.

In *State v. Anderson*, 90 Wis. 550, 560, 63 N. W. 746, the supreme court of Wisconsin, after saying that the franchises of the Milwaukee Street Railway Company, whether of existence or for the operation of its track, are beyond dispute the property of the corporation, and assessable as such, said the method of taxation in that state being upon the valuation of property taxed, and the state not providing for a certain specific tax on franchises like an excise rate, that they should be regarded as personal estate for purposes of taxation in the district in which the corporation had its principal place of business, and that the proper officers should fix the value: See cases cited in opinion in that case. Mr. Cooley says in his work on Taxation (third edition, page 686): "In some states all taxation, as far as possible, is brought to an *ad valorem* standard. Franchises are property, and in such states may be taxed by a valuation, being estimated for the purpose either separately or as a part of the aggregate corporate capacity."

The Ohio, Indiana, and Kentucky methods of taxation upheld by the court (see *State v. Jones*, 51 Ohio St. 492, 37 N. E. 945; *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 194, 17 Sup. Ct. Rep. 305, 166 U. S. 185, 17 Sup. Ct. Rep. 604; *Adams Exp. Co. v. Kentucky*, 166 U. S. 171, 17 Sup. Ct. Rep. 527; *Adams Exp. Co. v. Indiana*, 165 U. S. 255, 17 Sup. Ct. Rep. 991), while contemplating the assessment of all the property of certain kinds of corporations tangible and intangible, as an entirety, necessarily involved therein the inclusion of the corporate franchise as a part of the property of the corporation: See, also, *State R. R. Co. Tax Cases*, 92 U. S. 575; *Ottawa Glass Co. v. McCaleb*, 81 Ill. 556. The case of *Louisville Tobacco Warehouse Co. v. Commissioners*, 106 Ky. 165, 49 S. W. 1069, 57 L. R. A. 33, relied on by plaintiff, was decided by a bare majority of the supreme court of Kentucky upon a statute specifically naming many kinds of corporations, including banking corporations as liable to a property tax on the corporate franchise, and declaring "every other like corporation" liable to the same tax, and also every corporation, company, or association having or exercising any special or exclusive privilege or franchise; and it was simply held that a mere private business corporation of a kind not specifically named, and having no special or exclusive <sup>284</sup> privilege or franchise not allowed by law to natural persons, was not intended to be included by the statute.

In several cases where it was said that the tax upon a corporate franchise could be sustained only upon the ground that it was an excise tax, the tax would have been invalid as a property tax solely for the reason that it was in effect levied on property exempt from state taxation under the laws of the United States: See *Home Ins. Co. v. New York*, 134 U. S. 594, 597 et seq., 10 Sup. Ct. Rep. 593.

The power of a state to impose a tax on the franchise of a corporation, in the nature of an excise or duty, does not, however, exclude the taxation, in a proper case, by a valuation made by the assessor: *Spring Valley Water Works v. Schotler*, 62 Cal. 69, 112.

Under the authorities, there can be no question that a state may provide for the taxation of a corporate franchise as property of the corporation.

It is further contended that a corporate franchise is not a franchise within the meaning of the provisions of our state constitution relating to taxation, and that this state has made no provision authorizing an assessment thereof.

The question thus presented can hardly be said to be a debatable one, in view of certain decisions of this court rendered shortly after our present state constitution went into effect, determining the effect of the provisions of such constitution in the matter of the taxation of property of corporations.

The constitution adopted in 1879, after providing that all property in the state not exempt under the laws of the United States shall be taxed in proportion to its value, declares that the word "property" as used in this connection includes "moneys, credits, bonds, stocks, dues, franchises, and all other matters, and things, real, personal, and mixed, capable of private ownership": Const., art. 13, sec. 1. The legislature thereupon repealed section 3640 of the Political Code, providing for the assessment of shares of stock to the owners thereof, the assessable value thereof to be determined by deducting from the market value of the entire capital stock the value of all property assessed to it and dividing the remainder by the entire number of shares, and added a new section to that code (section 3608), in which they declared that <sup>285</sup> shares of stock in corporations possess no intrinsic value over and above the actual value of the property of the corporation which they represent, that the assessment and taxation of such shares and also of the corporate property would be double taxation, that all property belonging to corporations shall be assessed and taxed, but that no assess-



ment shall be made of shares of stock: Amendments to Codes, 1881, pp. 56, 59. Immediately after the enactment of this legislation, the question of the liability of shares of stock in corporations to assessment to the holders thereof came before this court. It was held that the language of the constitution clearly forbade double taxation; that the legislature had the right thereunder to say that all the property of the corporation should be assessed to the corporation, and the same property should not again be assessed for the same tax; that the "property" of the corporation included its franchise and everything else evidenced by the certificates of stock; that while the share of each stockholder was undoubtedly property, it was an interest in the very property held by the corporation, and nothing more; and that when all the property of the corporation, including its franchise, was assessed, which it was to be presumed would be done by the assessor in obedience to the requirements of the law, any further assessment of the shares to the individual stockholders would be double taxation: *People v. Badlam*, 57 Cal. 594. This case necessarily involved the question as to the constitutionality of section 3608 of the Political Code, prohibiting the assessment of shares of stock to the holders thereof. Such shares being undoubtedly property, unless they were otherwise assessed, the section was clearly unconstitutional, in view of the provision of the constitution requiring all property to be taxed. According to the decision of the court they were under the law to be otherwise assessed—i. e., everything represented by the certificates was to be assessed to the corporation: See, also, *San Francisco v. Mackey*, 21 Fed. 539, 3 West Coast Rep. 697.

In the later case of *Spring Valley Water Works v. Schottler*, 62 Cal. 69, 117, this court, speaking of the repeal of section 3640 of the Political Code, and the enactment of section 3608 of the Political Code, already noticed, after stating that under the scheme provided by section 3640 the whole property of the corporation, including franchise, would have <sup>286</sup> been taxed by the taxation of the shares to the owner in the manner indicated therein, said that by the repeal of such section and the enactment of section 3608 it was without doubt the intention of the legislature that everything entering into and giving value to the shares should be taxed as property of the corporation.

This case involved the question as to the validity of the action of the board of supervisors of San Francisco, sitting as a board of equalization, raising the assessment of the franchise



of the plaintiff from five thousand dollars to five million dollars. It appeared from the record in the case that the supervisors held the difference between the value of the tangible property of the corporation and the aggregate market value of the shares of stock in the company to be the value of the franchise. Practically every objection made to the assessment here involved was made in that case by eminent attorneys representing various corporations, including this plaintiff. The opinion of the court, signed by all of the six justices who participated in the case, overruling each of the objections, has been, so far as the records of this court show, accepted up to this time as a correct exposition of the law of California relative to the taxation of franchises of corporations.

While the plaintiff in that case possessed the right to lay down pipes in the streets, alleys, and ways of a city, and to collect rates for water furnished, which were said to be franchises, it was in terms declared by the court that its existence and right to employ its corporate powers is a franchise, and the court said in regard thereto: "We have no doubt that it was the intention of those who framed and ratified the constitution to place such franchises in the category of property to be taxed. . . . To hold that a private corporation does not own its franchise right, power, and privileges would be both novel and untenable. . . . The franchise of a corporation is and can be well defined to be the right of the corporation to exist and exercise the powers and privileges vested in it by its charter. . . . From the foregoing cases, it would seem that there can be no doubt of the power of a state to tax the franchise at its assessed value." Commenting on the decision in *People v. Badlam*, 57 Cal. 594, the court said that in that case it was held that the franchise of a <sup>287</sup> corporation of the character of those named in the petition therein, which included a banking company, a gaslight company, a smelting and lead company, and a water company, is taxable property of the corporation. It was further declared that the tax must be according to the valuation made by the officer appointed for that purpose, subject to equalization by the board of equalization. The method of determining the value of the franchises there employed was declared by the court to have been held to be within the powers of the assessor in *San Jose Gas Co. v. January*, 57 Cal. 614, and impliedly approved as a correct mode in *People v. Badlam*, 57 Cal. 594. See, also, *Spring Valley Water Works v. Barber*, 99 Cal. 36,

33 Pac. 735, 21 L. R. A. 416; *San Jose Gas Co. v. January*, 57 Cal. 614; *London etc. Bank v. Block*, 117 Fed. 900.

It is sought to distinguish the case at bar from those of *Spring Valley Water Works v. Schottler*, 62 Cal. 69, 112, *Spring Valley Water Works v. Barber*, 99 Cal. 36, 33 Pac. 735, 21 L. R. A. 416, and *San Jose Gas Co. v. January*, 57 Cal. 614, upon the ground that in each of the cases cited other franchises were possessed by the corporations, the waterworks having and exercising the right to lay pipes in the streets, ways, and alleys of the city, and to collect rates for water furnished, and the gas company having and exercising the right to use the streets and lay pipes therein for supplying a city with gas.

The distinction is in no way material to the controversy here. As already shown, it was definitely determined in *Spring Valley Water Works v. Schottler*, 62 Cal. 69, 112, that whatever other franchises the water corporation possessed, its existence and right to employ its corporate powers was a franchise, constituting taxable property. Aside from this, however, the other rights possessed by the waterworks and gas company were rights granted by express provisions of the constitution to every individual in the state and to every company incorporated under the laws of the state for the purpose of supplying any municipality and its inhabitants with water or artificial light: Const., arts. 11 (sec. 19), 14. While the generality of the grant does not deprive such right of the character of franchises, they have value only so far as the exercise thereof contributes to the value of the capital of the corporation, and are precisely the same in this respect as the exercise of the corporate franchise. As was aptly said of such <sup>288</sup> other rights or franchises by counsel in *Spring Valley Water Works v. Schottler*, 62 Cal. 69, 112, no one can sell them, for everybody has them, and no person can gain by the accession of such rights of others.

It is urged that the assessment on the corporate franchise is in this case grossly unjust as to amount, that the assessor's method of arriving at such valuation is improper and unjust, and that it includes such elements as dividends or profits, earning power, and goodwill. The assessed value of the franchise, it will be observed, is a fraction over twenty-five per cent of the total value of the intangible property of the corporation, ascertained by a deduction of the value of the tangible property from the market value of the shares of stock.

The value of the franchises of a corporation is not limited by the cost of obtaining them. If it were so limited, such franchises as the right to use the public streets for water-pipes or gas-pipes, for the purpose of supplying a municipality and its inhabitants with water or gas, would be valueless and unassessable, for everybody possesses such rights under the terms of our constitution. It is the exercise of the right that gives the value that our laws require to be taxed. As was said in *San Jose Gas Co. v. January*, 57 Cal. 614, 616: "In a pecuniary sense, the value of franchises may be as various as the objects for which they exist and the methods by which they are employed, and may change with every moment of time; but that franchises are property, and are to be taxed in some method in proportion to value is a part of the paramount law of this state." In the same case, it was said by the court, speaking of the method employed by the assessor in arriving at the valuation of certain mains: "The duty of making the valuation was cast upon the assessor. The method of arriving at the valuation, the process by which this mind reached the conclusion [in case where, as here, it is not pretended that he acted fraudulently or dishonestly], is matter committed to his determination. . . . If he erred in his judgment, the remedy was by application to the board of equalization, and the courts will not revise the judgment of these officers upon such questions." This appears to be determinative of the contention here made. While the complaint herein alleged fraudulent motives on the part of the <sup>289</sup> assessor, the allegation was denied, and no finding was made therein—and no point is made as to the failure of the court to make such finding. Whether or not the whole difference between the aggregate market value of the shares of stock and the value of the tangible property—viz., \$2,943,096.92—was the value of the franchise, the assessor certainly had the right to take the value of the shares into consideration in determining the value of the franchise; and were we at liberty to review the judgment of the assessor and of the board of equalization upon those matters, we could not say that an assessment of \$750,000 thereon is unjust, or that it includes such elements as dividend or profit earning power, or goodwill, which, it is claimed, should not be taken into consideration in determining the value of the property of the corporation. In this connection, it will be observed that these elements, so far as they may enter into the value of shares of stock, would be included in an assessment of such shares to

the stockholders, a method of assessment which the estate is at liberty to adopt—in fact bound to adopt—unless such shares are otherwise covered by the assessment of the property of the corporation.

It is clear that if the laws of this state properly express the intention that everything that gives value to the shares of a corporation shall be assessed as property of the corporation, the true value of those shares is a most important element in determining the value of such property.

Finally, it is urged that the assessment is in violation of the fourteenth amendment of the constitution of the United States, in that a corporation is thereby compelled to pay a tax of \$12,187.76 for carrying on a "common business, banking, that everyone has a right to carry on," while any person or partnership may carry on the same business without paying any tax.

If this contention be well founded, it of course follows that no tax whatever can be imposed by any state on the corporate franchise of any corporation which is engaged in a business open to all who choose to engage therein. In view of the many decisions of the United States supreme court already cited, upholding the taxation by states of corporate franchises, it would appear unnecessary to further discuss this claim. As <sup>290</sup> was said by the learned circuit judge in *London etc. Bank v. Block*, 117 Fed. 900, in upholding an assessment on such a corporate franchise: "The assessment is not . . . upon the business or occupation of a banker, but upon the property of complainant embraced in the unity of the franchise of the corporation to have perpetual succession, to have a common seal, and to act in all its business transactions of a general banking-house with those special advantages which are incident to corporate existence." A person or partnership engaged in the same business has no such property.

The judgment of the superior court is affirmed.

Shaw, J., Van Dyke, J., and Lorigan, J., concurred.

McFARLAND, J., dissenting. I dissent, and at some future time if other duties permit, will express my views on the question here involved more fully. At present I will say only this: the only assessment actually made was of appellant's "franchise." This attempted assessment was under any view void for want of description. If there be any particular property embraced under the general category "franchise" which is assessable, such particular property must be described in some



manner sufficient to identify it. The mere word "franchise" is no more descriptive of any particular property than would be the words "an easement" or "a piece of land." 2. It appears, however, that the only franchise of appellant intended to be assessed was its mere franchise to be a corporation. But such a franchise, assuming it to belong to the corporation, and not to the stockholders, is not assessable, because it has no ascertainable value under the rule prescribed by the state constitution and the statute for determining assessable value: Const., art. 13, sec. 1; Pol. Code, sec. 3617. It cannot be transferred by the owner, nor seized and sold under execution or other process of law, and is not in any way vendible. In this respect it cannot be distinguished from a "seat" in a stock board, which was held in *Lowenberg v. Greenebaum*, 99 Cal. 162, 37 Am. St. Rep. 42, 33 Pac. 794, 21 L. R. A. 399, not to be property in the sense that it could be seized and sold. 3. The assessor reached the conclusion that this franchise was of the value of \$750,000, at which amount he assessed it, by the process of <sup>291</sup> deducting the total value at which all the tangible property of the appellant had been assessed from the value of all the shares of its capital stock as shown by sales thereof in the market. This was not fixing the value of the only franchise attempted to be assessed—to wit, the right to be a corporation; it was merely an attempt to assess the goodwill of the appellant as a business concern, and was an unlawful discrimination against the appellant and in favor of partnerships, individuals, and all other "persons," whose tangible property alone is assessed, and not the goodwill of their established business. The value of the franchise to be a corporation is not affected by the fact that the corporation afterward does a successful or unsuccessful business.

BEATTY, C. J., dissenting. I agree with Justice McFarland that the mere franchise to be a banking corporation is not susceptible of valuation according to the criterion of value established by the statute: Pol. Code, sec. 3617, subd. 5. It is not transferable or vendible any more than a broker's seat in the stock and exchange board; and unless we are prepared to overrule the decision in *San Francisco v. Anderson*, 103 Cal. 70, 42 Am. St. Rep. 98, 36 Pac. 1034, and at the same time to pronounce the code definition of value unconstitutional, I cannot see how the judgment in this case can be affirmed. The invalidity of the assessment of appellant's franchise is to my mind



much clearer than that of the broker's seat, for it was made to appear in the case cited that the privileges attaching to a seat in the stock board were of considerable pecuniary value to the member, whereas there is nothing to show that the right to conduct the banking business is of any greater value to a corporation than to be a copartnership, and in case of a partnership it is not regarded as having any value whatever. The truth is, that when, as in this case, a valuation of a franchise of a banking or trading corporation is made by taking the whole or a part of the difference between the market value of its shares and the value of its tangible assets, such valuation necessarily includes, and is mainly, if not wholly, composed of, the value of the goodwill of the business, and the franchise has little or nothing to do with it. Whether the goodwill of a business is subject to taxation or not is a question <sup>292</sup> never decided by this court; but conceding it to be property liable to taxation, I am clear that it should be assessed *eo nomine*, and assessed equally to all persons natural and artificial. If it be true, as contended by appellant, that goodwill is never assessed to natural persons, it is an unjust discrimination to assess it to corporations merely because the market price of their shares affords a means of estimating its value. Upon the grounds thus briefly indicated, I dissent from the judgment.

Rehearing denied.

Beatty, C. J., McFarland, J., and Henshaw, J., dissented from the order denying a rehearing.

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*A Franchise*, as property, is liable to taxation, according to its value, for the support of government: *Mayor etc. of Baltimore v. Baltimore etc. R. R. Co.*, 6 Gill, 288, 48 Am. Dec. 531; *State v. Bank of Smyrna*, 2 Houst. 99, 73 Am. Dec. 699. As to how the value of a franchise is ascertained, see *Sullivan v. Lear*, 23 Fla. 463, 11 Am. St. Rep. 588, 2 South. 846.

## SUMMERVILLE v. MARCH.

[142 Cal. 554, 76 Pac. 388.]

**MORTGAGES—Rights of Purchasers of Parcels in the Event of Subsequent Foreclosure.**—The fact that a purchaser of part of the mortgaged premises does not appear in a suit to foreclose and there seek to obtain relief by having the parcels other than that sold to him first offered for sale, does not destroy his right. The only effect of such failure is that the right is transferred to any surplus that may arise on the foreclosure sale, and his interest in such surplus may be presented and determined upon the sheriff's return of the sale. (pp. 147, 148.)

**JUDICIAL SALE.—Inadequacy of Price Alone** is not a sufficient ground for setting aside a foreclosure sale. (p. 148.)

**JUDICIAL SALE in Parcels When the Decree Directs a Sale as a Whole.**—Though a decree of foreclosure directs the property to be sold in one parcel and as a whole, a sale thereof in parcels is not void and works no prejudice to parties claiming under the mortgagor, when the parcel not sold is one which, as between them and a prior grantee of the mortgagor, they have no right to insist upon the sale of. (p. 148.)

**JUDICIAL SALE, When will not be Set Aside for Irregularity.**—A court will not entertain proceedings to set aside a foreclosure sale for irregularity in offering the property for sale in a mode different from that provided in the decree, the price realized being adequate, on the ground that if offered for sale in a different manner, the property might by some fortuitous circumstance have brought more than its value. (p. 148.)

**JUDICIAL SALE, Irregularity, Burden of Proof, Prejudice from.**—One who seeks to set aside a judicial sale for irregularity in the mode of offering the property for sale must assume the burden of proving that injury resulted to him therefrom. (p. 149.)

**JUDICIAL SALE, Irregularity will not Alone Justify Setting Aside of.**—An irregular foreclosure sale will not be set aside unless it is shown, either from the nature of the irregularity itself or by extrinsic evidence, that injury was caused thereby. (p. 149.)

**LIS PENDENS.**—Where a Foreclosure Sale is Valid, it is immaterial what rights have been acquired by the mortgagor during the pendency of the action. Such rights are all subject to the decree of foreclosure and are extinguished by a sale thereunder and a conveyance executed pursuant thereto. (p. 149.)

**COSTS OF ACTION to Quiet Title.**—Where persons by their cross-complaint filed in an action to quiet title make it necessary for another party to such action to continue his appearance in court, he may recover whatever costs he is thus compelled to incur from the parties who unjustly bring or keep him in court. (pp. 149, 150.)

C. H. Fairall, Joshua B. Webster and J. F. Range, for the appellants.

Nicoll, Orr & Nutter, Alexander D. Keyes and Jacobs & Flack, for the respondents.

**555** SHAW, J. The plaintiff and the defendants Graf and Benjamin respectively and separately appeal from the judgment in favor of defendants Stevinson and Humboldt Savings and Loan Society, the appeal being based upon the judgment-roll alone. The complaint is in the ordinary form of an action to determine and quiet title to certain lands embracing about five hundred acres. The defendant Stevinson answered, claiming title in himself and asking a decree accordingly. The defendants Benjamin and Graf each separately filed a cross-complaint setting up certain interests in the land, and asking that their respective titles thereto be quieted. Numerous questions **556** are discussed in the briefs, but in view of the conclusion we have reached upon the principal question, which is determinative of the case, we do not deem it necessary to discuss the others.

The court below gave judgment that defendant Stevinson was the owner of the land in fee simple, and that he and the defendant Humboldt Savings and Loan Society recover their costs of the appellants herein. Stevinson's claim is based on a sheriff's sale made on a decree of foreclosure in an action brought by the Humboldt Savings and Loan Society against Elizabeth Ann March and others in the superior court of San Joaquin county. That action was begun on October 7, 1893, against the mortgagors alone, and a notice of the pendency of the action was filed in the recorder's office of said county on the same day. On the 11th of October, 1893, the mortgagors, who were then the owners of the land, subject to the foreclosure proceeding, executed a deed conveying to one George B. Sperry, a defendant herein, a certain parcel of the mortgaged land containing about one hundred acres. This deed was recorded on October 12, 1893, and Sperry immediately took possession of the land so conveyed to him, and continued to occupy and possess the same until the time of the foreclosure sale. The appellants each claim rights in the land based on execution sales upon judgments rendered against one or more of the mortgagors subsequently to the execution of the deed to Sperry and prior to the foreclosure sale. The plaintiff in his complaint does not mention this foreclosure sale. The cross-complaints of the defendants Graf and Benjamin are bills in equity, seeking to set aside the sale upon the sole ground that the same was not conducted in the manner directed in the decree of foreclosure. The mortgage upon which the decree was based provided that, in the event of foreclosure, the premises, at the option of the mortgagee, might be sold in several parcels, or as a whole in one parcel. The decree of fore-

closure, which was entered upon December 13, 1894, directed that the premises be sold "in one parcel as a whole and as one farm." The sale did not take place until November 27, 1899. The plaintiff in the foreclosure suit and several of the mortgagors, and also said Sperry, were present at the sale. Sperry and the mortgagors present requested the sheriff to offer the land in separate <sup>557</sup> parcels, first offering the portion of the property not conveyed to Sperry by the deed above mentioned. The plaintiff consented to this, and thereupon, in pursuance of this agreement, the sheriff first offered the property remaining to the mortgagors after the conveyance to Sperry, whereupon Sperry bid therefor the sum of sixteen thousand seven hundred and twenty-two dollars, which was eighty dollars and fifty cents in excess of the amount necessary to pay the mortgage debt, interest, and costs. The court finds that the sum bid by Sperry was a fair and reasonable price for the premises sold to him, and that the premises so sold to him were not then of any greater value than the sum bid. Thereafter the sheriff's deed was made in pursuance of the sale to Sperry, and the defendant Stevinson has since acquired all the interest of Sperry under the foreclosure sale, and also his title to the one hundred acres previously purchased by him from the mortgagors. It is not claimed by the appellants that there was any fraudulent or unfair practices in connection with the foreclosure sale. The sole objection to the validity of the sale is, that the sheriff disobeyed the directions contained in the decree that the premises be sold as a whole and as one farm. It is contended that the appellants, having succeeded to the interests of some of the mortgagors, had a right to have the sale made in strict accordance with the directions in the decree, and that they were prejudiced by the sale as made, because, if the whole of the property had been sold, there would have been a larger surplus to divide among those interested therein, in which case they claim that they would have been entitled to a larger sum of money than they will receive under the sale as made.

This contention is based chiefly on the theory that they would have been entitled to some portion of the proceeds of the land sold to Sperry in case that tract had been included in the foreclosure sale. This, however, is a misconception of their rights in the premises. Under section 2899 of the Civil Code the rule is, that where a mortgagor has sold a portion of the mortgaged land, the mortgage must be enforced first against the unsold portion of the mortgaged premises before resort can be had to

the portion sold. Sperry, it is true, did not appear in the foreclosure suit and ask that the decree preserve his rights in this respect. This right of the purchaser of a portion of the mortgaged premises is, however, not entirely <sup>558</sup> lost to him by his failure to seek or obtain the relief in the action in which the mortgage is foreclosed. The only effect of such failure is, that the right is transferred to any surplus that may arise upon the foreclosure sale. Therefore, if the entire mortgage premises had been sold at the foreclosure sale, in the division of the surplus Sperry would have been entitled to the whole of it if the same had been necessary to make up his proportion of the purchase price. Upon the coming in of the sheriff's return of the foreclosure sale he could have appeared and had his right determined. The appellants here would have no right whatever to such portion of the surplus as Sperry's land represented in the purchase price. The sale of the whole of the premises in one parcel would therefore not increase the amount of the surplus to which they would be entitled, and they are in no respect damaged by the failure to sell Sperry's land with the other tract.

The only ground upon which they could claim that they were prejudiced would be upon the theory that, if the whole tract had been sold together, it would have brought more as a whole than it did upon the parcels being sold separately and that the surplus to which they would have been entitled would have been somewhat increased. It is well settled that inadequacy of price alone is not a sufficient ground for setting aside a foreclosure sale: *Central Pacific R. R. Co. v. Creed*, 70 Cal. 501, 11 Pac. 772; *Smith v. Randall*, 6 Cal. 47, 65 Am. Dec. 475; *Connick v. Hill*, 127 Cal. 165, 59 Pac. 832; *Humboldt etc. Society v. March*, 136 Cal. 321, 68 Pac. 968; *Anglo-California Bank v. Cerf*, 142 Cal. 303, 75 Pac. 902; *Freeman on Executions*, secs. 308-315; *Kleber on Void Judicial Sales*, secs. 355-357. But even this ground is taken away by the finding of the court that the property sold to Sperry by the sheriff was not worth, at the time, more than he bid therefor, and the further finding that the entire mortgaged premises were not at that time worth more than twenty-two thousand dollars. A court will not entertain proceedings to set aside a foreclosure sale, although irregular, upon the sole ground, not that the price is inadequate, but that possibly, if it had been sold in a different manner, it might by some fortuitous circumstances have brought more than its actual value. There is no claim made that there was any peculiarity in



the situation <sup>559</sup> of the two parcels, with respect to each other, of such character that their value, when taken together, would exceed the sum of the values of each as a separate farm. The circumstances indicate the contrary, and the court finds that the manner of selling the premises in two parcels did not cause it to sell for less than it otherwise would have brought. If there was anything that would make the premises as a whole more valuable than when separated into two parcels, it was incumbent on the appellants to allege and prove it. An irregular sale will not be set aside unless it is shown either from the nature of the irregularity itself or from extrinsic facts that injury was caused thereby: *Humboldt etc. Society v. March*, 136 Cal. 321, 68 Pac. 968. If a sale had been made of the whole tract, and its full value, as found by the court, realized, the difference between the value of this tract, as found by the court, and the value of the whole tract would have belonged to Sperry, and not to these appellants. Sperry, having been the first purchaser, had the first right, and, if he had allowed his land to be sold with the other, he would have been entitled upon a division of the surplus to the entire amount which the court should find represented the proceeds of his part of the property. The court did not err in refusing to set aside the sale. The sale being valid, it is immaterial what rights the appellants may have acquired from the mortgagors. They were all subject to the decree of foreclosure and to the rights of Sperry, and were extinguished by the foreclosure sale and the deed subsequently executed thereunder.

There was no error in rendering judgment in favor of Stevinson and Humboldt Savings and Loan Society against the appellants for costs. Humboldt Savings and Loan Society disclaimed any interest in the premises, and filed its disclaimer before the cross-complaints of the appealing defendants were filed. So far as the plaintiff is concerned, its disclaimer prevented the plaintiff from recovering costs against it. Its costs against the plaintiff could not exceed the amount necessary to enable it to file its disclaimer. Conceding this to be error, it would be for a sum too trifling to justify this court in modifying the judgment. As to the other appellants, by their cross-complaints they made it necessary for the corporation defendant to continue its appearance in court, and, whatever costs it was thus compelled to incur, it is clearly <sup>560</sup> entitled to recover against the parties who unjustly brought it into court. It will not be seriously contended

that Stevinson was not entitled to his costs against all the parties.

The judgment is affirmed.

Angellotti, J., and Van Dyke, J., concurred.

Hearing in Bank denied.

*More Inadequacy of Price*, unless it is such as to evidence fraud or unfairness, does not ordinarily authorize the setting aside of a judicial sale: *Clark v. Glos*, 180 Ill. 556, 72 Am. St. Rep. 223, 54 N. E. 631; *McDonnell v. De Soto Sav. etc. Assn.*, 175 Mo. 250, 97 Am. St. Rep. 592, 75 S. W. 438; *Koch v. West*, 118 Iowa, 468, 96 Am. St. Rep. 394, 92 N. W. 663; *Stroup v. Raymond*, 183 Pa. St. 279, 63 Am. St. Rep. 758, 38 Atl. 626; *Griffith v. Milwaukee Harvester Co.*, 92 Iowa, 634, 54 Am. St. Rep. 573, 61 N. W. 243. Compare *Rogers etc. Hardware Co. v. Cleveland Bldg. Co.*, 132 Mo. 442, 53 Am. St. Rep. 494, 34 S. W. 57; *Johnson v. Avery*, 60 Minn. 262, 51 Am. St. Rep. 529, 62 N. W. 283.

*A Sale of Property en Masse* under execution will not be set aside, unless it is shown that a larger sum would have been realized from the sale if the property had been sold in parcels, or that a sale of less than the whole tract would have brought sufficient to satisfy the execution: *Hodepohl v. Liberty Hill Water etc. Co.*, 94 Cal. 588, 28 Am. St. Rep. 149, 29 Pac. 1025. But see *Hawes v. Detroit Fire etc. Ins. Co.*, 109 Mich. 324, 63 Am. St. Rep. 581, 62 N. W. 329; *Anniston Pipe Works v. Williams*, 106 Ala. 324, 54 Am. St. Rep. 51, 18 South. 111; *Conley v. Redwine*, 109 Ga. 640, 77 Am. St. Rep. 398, 35 S. E. 92; *Brook v. Berry*, 132 Ala. 95, 90 Am. St. Rep. 896, 31 South. 517.

*The Law of Lis Pendens* is the subject of a monographic note to *Stout v. Philippi Mfg. etc. Co.*, 56 Am. St. Rep. 853-878.

## PENRYN FRUIT COMPANY v. SHERMAN-WORRELL FRUIT COMPANY.

[142 Cal. 643, 76 Pac. 484.]

**TRUSTEES' SALE**, Effect of by Relation.—Under a sale authorized by a trust deed made to secure the payment of a debt and a conveyance made pursuant thereto, the title of the purchaser takes effect by relation as of the date of the trust deed. (p. 152.)

**TRUSTEES' SALE of Real Property** Effect upon the Title to Growing Crops.—A purchaser under a trustee's sale, on taking possession, becomes the owner of fruit growing on trees on the property, and his title is not affected by a mortgage covering such fruit made after the execution and recording of the trust deed. (pp. 152, 153.)

**GROWING CROPS** Effect of a Chattel Mortgage as a Severance Thereof as Against the Holder of a Trust Deed.—The execution of a chattel mortgage on growing crops of fruit after the giving of a trust deed by the mortgagor cannot operate as a severance of such

crop from the land, nor otherwise prejudice the rights of the holder of such deed or a purchaser thereunder who obtains title and takes possession while such fruit remains on the trees. (p. 153.)

E. P. Tuttle and Charles Tuttle, for the appellant.

Devlin & Devlin, for the respondent.

**643** CHIPMAN, C. The Sherman-Worrell Fruit Company (hereafter called the Sherman company) did not appear in **644** the action. Defendant Farmers' and Mechanics' Savings Bank (hereafter called the bank) demurred to the complaint; the demurrer was sustained, and plaintiff declining to amend, defendant the bank had judgment dismissing the action from which this appeal is taken.

It appears from the complaint that on December 8, 1897, R. B. and Dan T. Sherman, predecessors in interest of the Sherman company, were owners of certain land planted to fruit trees in Placer county; on that day they executed to the bank their promissory note for four thousand five hundred dollars, and to secure payment of same, executed also on that day their trust deed conveying the property to certain trustees named in the deed, with power to sell and execute a deed to the purchaser; under this power the trustees sold the property, and on June 15, 1901, a deed of said property was executed and delivered to the bank as purchaser; the bank went into immediate possession of the land and the fruit crop growing thereon. It further appears that the Sherman company executed to plaintiff a chattel mortgage on the fruit crop growing on a portion of the land, to secure a loan of three hundred dollars, made to the Sherman company by plaintiff, and also future advances, which plaintiff alleges was in fact executed and delivered March 11, 1901, but which, by mutual mistake, read March 11, 1900, and it is sought, among other things, to correct this mistake, but it is not alleged that the bank had any knowledge of this mistake; that the sum of one hundred and twenty-five dollars was advanced to the Sherman company by plaintiff under the terms of the chattel mortgage prior to said trustees' sale; that the Sherman company continued in possession of the land until the bank took possession under its trustees' deed; that the Sherman company has failed to pay said sums, or any part thereof, and refuses to deliver said fruit to plaintiff, and is insolvent; that the bank is in possession of said fruit crop, and refuses to permit the Sherman company or plaintiff to harvest the same, and claims possession and title thereto

as against plaintiff; that plaintiff would have derived a profit of one thousand dollars from said fruit if it had been permitted to harvest it; that by the acts of the bank plaintiff has been further damaged in the sum of four hundred and twenty-five dollars, with interest from March 11, 1901, at nine per cent. The prayer is that the alleged mistake in the chattel mortgage be corrected and that plaintiff have judgment against the bank for fifteen hundred and twenty-five dollars and costs of suit.

Defendant the bank interposed a general demurrer to the complaint; also, that two causes of action are improperly united—namely, a cause of action to reform a written instrument, and an action for damages for conversion of personal property; also, that the facts stated are not sufficient to justify a court of equity to reform a written instrument by reason of the mistake averred.

Waiving the points of objection to the sufficiency of the complaint in certain other particulars set forth in respondent's brief, the principal question argued by appellant may be thus stated: After sale by trustees under deed of trust and delivery of deed to the purchaser, who has gone into possession of the land, may a mortgagee of the growing crop, whose mortgage was issued subsequently to the deed of trust, enter upon the premises against the will of the purchaser and harvest and remove the crop?

The deed of trust is not wholly set forth, but we understand that it was the ordinary form of the trust deed commonly used in this state. Under such deeds of trust there is no redemption after sale pursuant to its provisions. A deed at once passes to the purchaser, as was the fact here, and he becomes entitled to immediate possession, which in this case was at once taken. The crop in question was then growing on the trees, and was part of the realty, and the purchaser's title by relation took the date of the trust deed. The purchaser was at least in as good a position as, and had rights equal to those of, a purchaser at foreclosure sale holding a deed and having possession after the period of redemption had expired. Treating the sale here as a foreclosure where there is no right of redemption, and in view of the entry into possession under the sale by the purchaser, it is quite clear that neither the mortgagor—the grantor in the trust deed—nor his grantees under a crop mortgage executed subsequently to the trust deed would have the right to crops not severed at the time of the purchaser's

deed and entry. In *Simpson v. Ferguson*, 112 Cal. 180, 53 Am. St. Rep. 201, 44 Pac. 485, the court quoted approvingly from *Jones on Mortgages* (section 670) as follows: "It is only after ~~646~~ sale under the decree, except where the statute provides otherwise, that the mortgagor is wholly divested of title, and, consequently, of right of possession."

Appellant concedes that if there has been no severance of the growing crop at the time of the foreclosure of the mortgage or the enforcement of a deed of trust, the purchaser at the sale would take the growing crop, yet, it is claimed, "as the mortgagor or trustor is entitled to the right to the crop, the chattel grown intermediate the giving of the mortgage or trust deed, he may sell or hypothecate his interest in the same, and such sale or hypothecation would prevail over the prior mortgage or trust deed." It is contended that "such sale or hypothecation operates in law as a severance of the crop from the land, and also operates as a delivering of the crop."

We find no warrant for such statement of the law in *Simpson v. Ferguson*, 112 Cal. 180, 53 Am. St. Rep. 201, 44 Pac. 485, or any other of the cases cited in appellant's brief. As we read the opinions in *Huerstal v. Muir*, 64 Cal. 450, 2 Pac. 33, and *Dacey v. Harris*, 65 Cal. 357, 4 Pac. 204, cited by appellant, the growing crops unsevered are part of the realty, and while such crops are for some purposes treated as personal property, they remain part of the realty so long as unsevered. As between the mortgagor and mortgagee of a chattel mortgage, all that appellant claims may be true, but the giving of such chattel mortgage has not the effect claimed when the rights of a purchaser under foreclosure sale are brought in question. Plaintiff took its mortgage with knowledge of the deed of trust and that under it the bank had the right to enforce its sale of the premises and that a purchaser at such sale would take an absolute title to the land as of the date of the trust deed—a date prior to plaintiff's chattel mortgage, and that such deed would be free from any encumbrance subsequently placed upon the land.

In our opinion the demurrer was rightly sustained; and it is advised that the judgment be affirmed.

Cooper, C., and Harrison, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed. Shaw, J., Angellotti, J., Van Dyke, J.



*A Crop of Grain standing on mortgaged land at the time of its sale under a decree of foreclosure has been held to belong to the purchaser, notwithstanding a previous chattel mortgage on the crop: Jones v. Adams, 37 Or. 473, 82 Am. St. Rep. 766, 59 Pac. 811, 62 Pac. 16. It is decided in a recent Nebraska case, however, that growing crops do not pass to a purchaser of the land at judicial sale so as to defeat the rights of one holding a chattel mortgage on them: Aldrich v. Bank of Ohiowa, 64 Neb. 276, 89 N. W. 772, 97 Am. St. Rep. 643, and see the cases cited in the cross-reference note thereto.*

### RAHMEL v. LEHNDORFF.

[142 Cal. 681, 76 Pac. 659.]

**MASTER AND SERVANT—Tort of Servant, Liability for.**—A master is not liable for the malicious torts of his servants committed outside the scope of their employment, as where a servant is guilty of assault and battery, and his employment does not contemplate that he shall commit any acts of this character. (p. 155.)

**AN INNKEEPER is not Liable for an Assault Committed by One of His Waiters upon a Guest.**—Innkeepers do not owe to their guests the absolute duty of protection against servants and other employés, and are not answerable to guests for the misconduct of employés, in the absence of negligence in selecting or retaining employés of known violent or dangerous propensities. (p. 157.)

Charles H. Mattingly, for the appellant.

George L. Keefer and Warren E. Lloyd, for the respondent.

**682 BEATTY, C. J.** This is an action by a guest against an innkeeper, to recover damages for an assault and battery by a servant of defendant. The cause was tried in the superior court without a jury, and plaintiff had judgment. Defendant appeals from the judgment and from a subsequent order denying his motion for the entry of a different judgment on the findings.

Respondent objects to any consideration of the appeal from the order upon the ground that it was not excepted to. But if it is an appealable order it is deemed excepted to (Code Civ. Proc., sec. 617), and since it is a special order made after final judgment, it is appealable: Code Civ. Proc., sec. 963. It is however of no consequence whether the order is **683** reviewable or not, for the appeal from the judgment presents the same questions on the same record (the judgment-roll), and we could on that appeal, if the facts found and admitted justified such an order, not only reverse the judgment, but remand the cause

with directions to the superior court to enter judgment for the defendant: *Warder v. Enslen*, 73 Cal. 291, 14 Pac. 874.

The facts found and admitted are few and simple: The plaintiff was a guest in the defendant's hotel, and while seated at the dinner-table was assaulted and beaten by a dining-room waiter; damage two hundred dollars. The question is whether, upon these facts, the defendant was liable for compensatory damages.

The respondent's contention is, that he was so liable upon either of two grounds: 1. Under the general rule that a master is liable for the torts of his servant committed in the course of his employment, and within the real or supposed scope of his duties; and 2. Upon the ground that an innkeeper is bound to protect his guests from acts of violence on the part of his servants just as a common carrier is bound to protect his passengers while in transit from molestation by its servants.

We think it clear that the defendant incurred no liability on the first ground.

By the general law of master and servant, the master is not liable for the malicious torts of the servant committed outside the scope of his employment. The wrongful act must be one which the servant is empowered under some circumstances to do. It must be something which his employment contemplated, as, for instance, the ejection of a passenger or intruder from a railroad car. Conductors and brakemen have authority to eject disorderly passengers, or persons who refuse to pay their fare, and it is left to their discretion when such authority shall be exercised. In a proper case they may eject a passenger without incurring any liability themselves or imposing any liability upon their employer, but if they eject him wrongfully and maliciously the carrier is liable upon the general ground that the act is one which if lawfully done could be in the employer's name, and justified by his authorization. The law on this point is very clearly <sup>684</sup> stated in *Cooley on Torts* (star pages 535 et seq.), and in none of the decisions of this court has a stricter rule been enforced than as above stated. Under that rule, the defendant cannot be held liable, because there is no finding and no reason to presume that defendant ever authorized his servants to assault his guests, or any other person, under any circumstances.

Neither do we think he was liable on the second ground. The law seems to be pretty well settled that a common carrier of passengers, whether a ship owner or a railway company, owes to a passenger while in transit the duty of protection, absolute

as against its servants in charge of ship or train, and equally as against fellow-passengers when on account of intoxication or acts of violence they should not have been admitted, or when they have been allowed to remain after such misbehavior as justifies their expulsion.

But the industry of counsel and our own researches have not resulted in the discovery of more than a single case in which this rule of liability has been extended to innkeepers. In *Rommel v. Schambacher*, 120 Pa. St. 579, decided in 1887 by the court of common pleas of Philadelphia, it was said to be a plain matter of common law that: "Where one enters a saloon or tavern open for the entertainment of the public the proprietor is bound to see that he is properly protected from assaults or insults, as well of those who are in his employ as of the drunken and vicious men whom he may choose to harbor." To sustain this conclusion but one case was cited in the opinion of the court, and that a case of carrier and passengers. So that in fact there was a complete begging of the question presented here—viz., whether there is a rule as to protection of guests of an innkeeper equally stringent with the rule affecting common carriers. The fact that no case was then cited or can now be found in which an English or American court has sustained the conclusion stated in the Philadelphia case warrants more than a doubt of the correctness of that conclusion. But in truth the language above quoted, when construed and qualified by reference to the facts of the case, does not mean all that it seems broadly to assert. The facts of that case were, that the defendant, the proprietor of a saloon, had himself supplied two or three young men with drinks at his bar by which they were made <sup>685</sup> intoxicated. While in that condition one of them, in plain view of the defendant, pinned a paper to the clothes of another (the plaintiff) and set fire to it. The fire was communicated to plaintiff's clothes and he was severely burned. The gist of the decision holding the defendant liable for the injury is contained in these words at the close of the opinion: "If, then, a railroad company is liable for the conduct of drunken men who may chance to board its cars much more the tavern-keeper who not only permits drunken men about his premises, but furnishes liquor to make them drunk, and who is instrumental in fitting them for the accomplishment of just such an insane and brutal trick as that disclosed by the evidence of the case in hand." This, considering the facts, is in reality the whole of the decision. The proprietor was held liable for

a tort in which he was personally a participant, and what else was said, so far as it may seem to apply to a malicious assault by a servant, wholly unauthorized and unobserved by the master, may be regarded as dictum. An innkeeper is no doubt guilty of negligence if he admits to his hotel or permits to remain there, whether as guest or servant, a person of known violent and disorderly propensities who will probably assault or otherwise maltreat his guests, and for the consequence of such negligence he may be liable in damages. But the plain ground of his liability in such case would be his negligence in harboring persons dangerous to the peace and comfort of those for whose comfort he is bound to provide. And if, as in the Philadelphia case, he stands by while a guest is exposed to the violence of a person who has been made dangerous by his fault, and sees an injury inflicted without any effort to prevent it, he may be regarded as *particeps criminis*. This case, however, presents no such features; there is neither allegation nor finding that the defendant was negligent in employing or retaining the waiter who committed the assault. So that there is no ground upon which this judgment can be sustained, unless we are prepared to hold that to the same extent that a common carrier is an insurer of his passengers an innkeeper is an insurer of his guests against the torts of his servants. We cannot discover any safe ground for such a conclusion. No statute of California imposes such a rule, and no evidence is to be found in the reports of decided cases that such was the rule at common law. <sup>686</sup> Indeed, it was said in *Calve's Case*, decided in the king's bench in 26 Elizabeth (Coke, pt. 8, \*33), that "if the guest be beaten in the inn, the innkeeper shall not answer for it"—he being liable as such only for damages to the guest's goods and chattels. Since that time no other rule seems to have existed in England or in this country, unless the Philadelphia case is an instance to the contrary. We do not regard it as a case strictly in point, but one resting upon grounds peculiar to itself and sufficient to sustain the conclusion of the court without reference to the proposition to which it has been cited here.

The judgment and order of the superior court are reversed.

Angellotti, J., Lorigan, J., McFarland, J., and Henshaw, J., concurred.

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*The Rule as to the Liability of a Master* for the acts of his servant is, that if the act is done without the authority of the master and not for the purpose of executing his orders or doing his work, then he is

not responsible; but if it is done in the execution of the authority given by the master and for the purpose of performing what he has directed, then he is responsible, whether the act is negligent or willful: *McCarthy v. Timmins*, 178 Mass. 378, 86 Am. St. Rep. 490, 59 N. E. 1038; *Brown v. Boston Ice Co.*, 178 Mass. 108, 86 Am. St. Rep. 469, 59 N. E. 644; *Guille v. Campbell*, 200 Pa. St. 119, 96 Am. St. Rep. 705, 49 Atl. 938; *Haller v. Ross*, 68 N. J. L. 324, 53 Atl. 472; monographic note to *Goodloe v. Memphis etc. R. R. Co.*, 54 Am. St. Rep. 71-93.

*The Liability of a Keeper of a Public Place* for assaults upon his guests or patrons, committed by employés or third persons, is considered in *Dickson v. Waldron*, 135 Ind. 507, 41 Am. St. Rep. 440, 34 N. E. 506, 35 N. E. 1; *Healey v. Lothrop*, 178 Mass. 151, 86 Am. St. Rep. 471, 59 N. E. 653; *Curran v. Olson*, 88 Minn. 307, 97 Am. St. Rep. 517, 92 N. W. 1124; *Rommel v. Schambacher*, 120 Pa. St. 579, 6 Am. St. Rep. 732, 11 Atl. 779. A common carrier is liable to passengers for the willful and malicious acts of its employés outside the scope of their employment: *Birmingham Ry. etc. Co. v. Baird*, 130 Ala. 334, 89 Am. St. Rep. 43, 30 South. 456.



CASES  
IN THE  
SUPREME COURT  
OF  
GEORGIA.

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SWEENEY v. SWEENEY.

[119 Ga. 76, 46 S. E. 76.]

**JUDGMENT—Judge's Signature.**—If a judgment in a suit upon an unconditional contract in writing where no issuable defense was filed on oath, appears to have been rendered "by the court," and was entered on the minutes, the presumption is that the court did its duty by signing the minutes. (p. 162.)

**EXECUTION—When Presumed Lost.**—Unavailing Searches for an execution, made by the proper officers in the sheriff's and the clerk's offices, as well as by the plaintiff, raise the presumption of its loss or destruction. (p. 162.)

**EXECUTION, LOSS OF—Proof of Title.**—If a Sheriff's Deed is accompanied by an exemplification of a valid judgment and proof of the loss of the execution, it is admissible as evidence of title and not merely as color of title. (p. 163.)

**EVIDENCE OF TITLE.**—The Declarations of an Agent, in possession of real estate merely to manage and care for it, are not admissible against the principal to disparage his title. (p. 163.)

**IF EVIDENCE is Objected to as a Whole, When Some Parts of** it are admissible, it is not error to overrule the objection. (p. 165.)

**RES JUDICATA.**—A Judgment Abating an Action because the plaintiff has not paid the costs of a previous suit involving the same property and against the same defendant, which had been begun and dismissed by him, does not bar a third suit for the same cause of action against the same defendant, if, before instituting it, the plaintiff pays the costs of the two prior suits. (p. 165.)

M. W. Harris and J. R. Cooper, for the plaintiff.

W. J. Grace and J. L. Anderson, for the defendant.

77 FISH, P. J. Miles Sweeney brought ejectment, to the April term, 1901, of Bibb superior court, against Mary Maloy, for certain realty in the city of Macon. As ancillary to this ac-

tion, he brought to the same term and against the same defendant an equitable petition for injunction and receiver, in which he set forth the title upon which he relied for a recovery. Pending the suits the defendant died, and Kate I. Sweeney, administratrix on her estate, was made party defendant. On the trial the two actions were consolidated and tried as one. The plaintiff introduced the following documentary evidence: 1. An exemplification of the minutes of Bibb superior court, showing the following judgment: "Patrick Fleming v. John & Mary Maloy. Complaint. No issuable plea under oath having been filed in this case, it is ordered that plaintiff have judgment against defendants, John Mulloy and Mary Mulloy, for the sum of three hundred dollars principal, with interest from August 22, 1867, and costs of suit. By the Court, June 14, 1869. Whittle & Gustin, plaintiff's attys." 2. An exemplification of the execution docket of such court, showing an entry thereon of the execution issued upon such judgment and its delivery to Martin, sheriff, on August 7, 1869. 3. A sheriff's deed, dated May 7, 1873, and duly recorded, executed by George F. Cherry, sheriff of Bibb county, to Miles Sweeney, to the premises in dispute, consideration two hundred and fifty dollars. This deed recited that James Martin, late sheriff of Bibb county, on August 9, 1869, levied the execution above referred to upon the land in dispute, and that George F. Cherry, sheriff, sold it in pursuance of such levy. The deed also contained the recitals usual in sheriff's deeds. 4. A warranty deed from Miles J. Sweeney to Patrick Sweeney, dated and recorded May 9, 1885, to the premises in dispute, consideration two hundred and fifty-six dollars. 5. A warranty deed from Patrick Sweeney to Miles J. Sweeney to the premises in dispute, dated June 26, 1888, and duly recorded, consideration five hundred dollars. The plaintiff testified that he had the execution referred to in his possession some six or seven years prior to the trial; that he did not know what had become of it; that he had made frequent and thorough searches for it, but had failed to find it. Sheriff Wescott and Deputy Sheriff Menard testified that they had made several searches in the sheriff's office for the execution, but it could not be found. Deputy Clerk Holt testified that it could not be found in the clerk's office after <sup>78</sup> careful search. The plaintiff's contentions were, in brief, that he purchased the property in good faith, at sheriff's sale, and paid two hundred and fifty dollars for it; that he went into actual possession under the sheriff's deed and so remained, holding

the property adversely, until 1885, when he conveyed the property to his brother Patrick Sweeney, with the verbal understanding between them that Patrick should hold the title until the plaintiff should return from Ireland, where he then contemplated going for a few years; that upon his return from Ireland Patrick reconveyed the property to him, in 1888; that he remained in possession of it till 1893 or 1894, when Mary Maloy having gone into possession of part of it he sued out a warrant to dispossess her. The defendant's contentions, in substance, were, that Mary Maloy had been in the actual adverse possession of the property for more than thirty years; that plaintiff had never been in possession; that Mary Maloy furnished plaintiff with sufficient money to pay for her the claim of Patrick Fleming, and she believed he had done so; that he fraudulently had the property sold by the sheriff and took the sheriff's deed to the same, and she had no knowledge until recently that any such sale had ever been made, or that plaintiff claimed to own any interest in the property. Evidence was submitted by both parties, tending to sustain their respective contentions. There was a verdict in favor of the defendant. The plaintiff moved for a trial, which being refused, he excepted.

1. The court charged the jury that, inasmuch as the execution in favor of Fleming against John and Mary Maloy had not been put in evidence, the deed from Cherry, sheriff, to Miles Sweeney could be considered by them only as color of title, and that to make out a *prima facie* case plaintiff would have to show seven years' adverse possession under such deed. In the motion for a new trial error was assigned upon this charge, and we think the exception well taken. A sale regularly made by virtue of a judicial process, issuing from a court of competent jurisdiction, conveys the title as effectually as if the sale were made by the person against whom the process issued (Civ. Code, sec. 5446), and, in all controversies in the courts of this state, the purchaser at such a sale shall not be required to show title deeds back of his purchase, unless it be necessary for his case to show good title in the person whose interest he purchased: Civ. Code, sec. 5447. As we have seen, <sup>79</sup> the suit was brought against the defendant in execution by the purchaser at sheriff's sale, and the sheriff's deed exhibited in evidence by the plaintiff was accompanied by exemplification showing a judgment against the defendant, the entry on the execution docket of the execution issued on the judgment, and delivery of the execution to the former sheriff, and by proof of loss of the execution. While the judg-

ment was rendered in a suit upon an unconditional contract in writing where no issuable defense was filed on oath, yet it appears to have been rendered "by the court," and was entered on the minutes, and the presumption is, nothing to the contrary appearing, that the court did its duty by signing the minutes. The judgment was, therefore, valid: *American Mortgage Co. v. Hill*, 92 Ga. 305, 18 S. E. 425, and cases cited. Proof that the fi. fa. was entered on the execution docket and that the docket showed a delivery of the execution to the former sheriff was sufficient to show that the fi. fa. had existed, and the unavailing searches made for it by the sheriff, the deputy sheriff, and the clerk, as well as by the plaintiff, were sufficient to authorize the presumption that it was lost or destroyed, proof sufficient to raise a reasonable presumption of its loss or destruction being all that was necessary: *Vaughn v. Biggers*, 6 Ga. 188 (2); *Harper v. Scott*, 12 Ga. 125 (4). In *Fretwell v. Morrow*, 7 Ga. 264, where it appears that a constable levied a justice's court fi. fa. on land and delivered the execution to the sheriff, who duly sold the land, but failed to execute a deed to the purchaser, and that his successor in office subsequently executed such deed, it was held that upon proof of loss of the fi. fa. the deed was admissible in evidence. It is true that it was not expressly said that the deed was admissible as title, but such was evidently the extent of the ruling, as the deed would have been admissible as color, unaccompanied by the fi. fa., though the latter had not been lost. It has been several times held that "the sheriff's deed alone, unaccompanied by either the judgment or the fi. fa., was sufficient to constitute color of title": *Beverly v. Burke*, 9 Ga. 440, 54 Am. Dec. 351; *Hester v. Coats*, 22 Ga. 58; *Hammond v. Crosby*, 68 Ga. 767. In *Watson v. Tindal*, 24 Ga. 494, 74 Am. Dec. 142, it was held: "A sheriff's deed must be accompanied by the execution under which the land was sold, or the judgment upon which it issued." In *Boatright v. Heirs of Porter*, 32 Ga. 430, the following ruling was made: "A sheriff's deed being offered <sup>80</sup> in evidence, without the production of the execution under which the sale was made, or of any exemplification of the judgment, but it appearing that great diligence had been shown to procure both: Held, that the deed was properly admitted in evidence, under the circumstances, upon the faith of its own recitals." Of course, in view of the previous rulings in *Beverly v. Burke*, 9 Ga. 440, 54 Am. Dec. 351, and *Hester v. Coats*, 22 Ga. 58, this decision meant that the sheriff's deed was admissible as title,

and not merely as color. It was held in *Irby v. Gardner*, 56 Ga. 643, that: "A sheriff's deed, duly recorded, should be admitted in evidence, without the justice court fi. fa. under which the land was sold, the sale having been made in 1855, and the fi. fa. lost." And it was early held by this court (*Ellis v. Smith*, 10 Ga. 253 (2), citing *Vaughn v. Biggers*, 6 Ga. 188) that the recitals in a sheriff's deed of the fi. fa. and seizure and sale of the property under it are, when the fi. fa. is lost, prima facie proof at least of the facts contained in the deed. While it may not have been expressly held that a sheriff's deed, when accompanied by the judgment only, is admissible as title, and not merely as color, there is certainly a strong intimation in several of the cases which we have cited above that such is the true rule. Be this as it may, however, there can be no doubt that where, as in this case, the sheriff's deed is accompanied by an exemplification of a valid judgment and proof of the loss of the execution, the deed is admissible as evidence of title, and not merely as color of title.

2. Complaint was made in the motion for a new trial, of the admission in evidence, over plaintiff's objection, of a letter written January 29, 1891, by E. J. Burke for Patrick Sweeney to Mary Maloy, the contents of which, the defendants claimed, amounted to an admission by Patrick Sweeney that the land in dispute was the property of Mary Maloy at the time the letter was written. The court erred in admitting this letter in evidence. According to the testimony of Miles Sweeney, his brother, Patrick, reconveyed this property to him in 1888, after he returned from Ireland. Miles subsequently went to Ireland again, and, as he testified, left Patrick in possession of the property, as his agent, to manage and care for it while he was away, and he had not returned when the letter above referred to was written. The declarations of an agent, in the possession of property simply for the purpose of managing it and caring for it for his principal are not <sup>81</sup> admissible to show title to the property out of his principal. An essential condition upon which the admissions of an agent are admissible against his principal is that they be made in pursuance of the agent's power—within the scope of his authority (Civ. Code, sec. 5192); for if they have reference to acts which the agent had no power to perform, or to any matter foreign to the agency, they stand on the same level as the statements of strangers, and are clearly inadmissible: 1 Greenleaf on Evidence, sec. 113. "A letter is inadmissible to bind a third person, in the absence of proof of



authority from him to the writer to make the statements and admissions therein contained": *McMath v. Teel*, 64 Ga. 595. "The admissions of an agent only bind his principal when made in the scope of his business as agent; and if either party relies upon such admissions, he must show they were made in the scope of his business": *Wilcox v. Hall*, 53 Ga. 635. The only power or authority, under the evidence, that Patrick Sweeney had in reference to the property in dispute, at the time the letter in question was written, was to manage and take care of it—rent it, collect the rents, keep it insured and in repair. So he manifestly had no power to impair or discredit his principal's title to the property, if he had any, by making statements in disparagement thereof. An agent cannot dispute his principal's title: *Civ. Code*, sec. 3012. In *Clafin v. Continental Works*, 85 Ga. 27 (3), 11 S. E. 721, it was held that "while . . . [an agent] was intrusted with the possession and management of the business [of the principal], he could use the goods so as to realize some profit to his principal, but could not pay even matured claims in goods discounted twenty-four per cent from the cost price marked upon them by the principal." In the opinion (page 40 of 85 Ga., and page 722, 11 S. E.), it was said: "There can be no doubt that the agent violated his duty in admitting, upon an ex parte representation, that his principal had committed such wholesale fraud, especially when he knew so little of the latter's concerns as to be totally surprised on hearing of the outstanding indebtedness, and when he professed to have the intention of continuing the business. An agent cannot deny his principal's title." So it has been held that "the declarations of an agent of a vendee, whose agency is limited to the care and custody of goods after they have passed to the possession of the vendee, are not admissible in evidence to show that the purchase of the vendee was fraudulent": *Hutchings v. Castle*, 82 48 Cal. 152. On the same line is *Winchester Mfg. Co. v. Creary*, 116 U. S. 161, 6 Sup. Ct. Rep. 369. Counsel for the defendant in error contended that the letter was admissible as a declaration of a person in possession of property in disparagement of his own title. Under the evidence, Patrick Sweeney had possession of the property merely as the agent of Miles Sweeney, and his agency was limited to managing and caring for it. The letter contained nothing in disparagement of the title of Patrick, because he had no title when the letter was written, nor did he claim any. While the declarations of one in possession against his interest are admis-

sible against him and those claiming under him, the rule, as we have shown, does not apply to this case, because Patrick had no interest in the property except as agent for Miles, and the latter did not claim under the former.

3. Error was assigned upon the admission, over plaintiff's objection, of several letters from Miles Sweeney to Patrick Sweeney. These letters, as appears from the motion for a new trial, were objected to as a whole. Some of them, or at least portions of some of them, were clearly admissible, and therefore it was not erroneous to overrule such objection.

4. It appears from a cross-bill of exception sued out by the defendant in error that she filed a plea of *res adjudicata* to the present action, in which it was set forth that Miles Sweeney brought an action against Mary Maloy, returnable to the November term, 1894, of Bibb superior court, to recover the property which is the subject matter of the present suit, in which former action, as the petition therein showed, he relied for a recovery upon the same muniments of title as in the present case; that on January 25, 1897, the former action was dismissed on motion of counsel for the plaintiff therein; that in February, 1897, Miles Sweeney brought another action for the same property against Mary Maloy returnable to the April term, 1897, of Bibb superior court, in which he again relied for a recovery upon the same muniments of title as in the present suit, the petition reciting that plaintiff had voluntarily dismissed his first petition; that to the second suit Mary Maloy filed a plea of abatement, setting up the voluntary dismissal by plaintiff of his first action, and that he had subsequently brought the second suit, involving the same subject matter and between the same parties, without having paid the costs and expenses <sup>83</sup> that had accrued in the first suit; that upon this plea of abatement there was a verdict sustaining the same and a judgment entered thereon abating the second suit, and that such judgment was reviewed by the supreme court and was affirmed. By consent of parties the issue raised by the plea of *res adjudicata* was submitted to the court for decision, without the intervention of a jury. Upon proof of the facts set up in this plea, the court found against it. Error was assigned upon this judgment of the court in the cross-bill of exceptions. We see no error in the court's ruling. The judgment abating the second suit did not bar the plaintiff from subsequently bringing the present action, after paying all the costs in the first and second suits, as the court found he had done.

Judgment reversed on main bill of exceptions, and affirmed on cross-bill.

All the justices concur.

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*Lost Instruments* and actions thereon are discussed in the monographic note to *Matthews v. Matthews*, 94 Am. St. Rep. 465-480. On proceedings to establish lost or destroyed executions, see 1 *Freeman on Executions*, 3d ed., sec. 56a.

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### JOHNSON v. McKAY.

[119 Ga. 196, 45 S. E. 992.]

**MORTGAGE.**—A Description in a Mortgage of a tract of land in a named county as the “Zachariah Emerson place, part of lots No. 125 in the 11th district, one part number not known,” and containing a certain number of acres, is not so uncertain and indefinite as to render the mortgage void. Extrinsic evidence may be resorted to to show what land was intended. (p. 167.)

**MORTGAGE.**—The Description in a Mortgage of a tract of land as the “Thomas Bazemore place,” containing a specified number of acres, and joining the lands of certain named persons, is not so uncertain and indefinite as to render the mortgage void. Parol evidence may be resorted to to show what land was intended. (p. 167.)

**MORTGAGE.**—In the Description of Mortgages, that is certain which is susceptible of being made certain, and a description is sufficient if it affords means of identifying and ascertaining the land conveyed. (p. 167.)

**MORTGAGE.**—When the General Description in a mortgage is sufficient, a particular description repugnant thereto is treated as surplusage. (p. 167.)

**MORTGAGE.**—A Mere Error in the Number of a Lot in a mortgage does not vitiate the instrument, when there is a general description therein from which the property can be identified. (p. 168.)

**MORTGAGE.**—If Extrinsic Evidence is Necessary to Identify land described in a mortgage which has been foreclosed, and a claim is interposed to the levy of the mortgage execution, the plaintiff in execution carries the burden of identifying the property with reasonable certainty. (p. 170.)

Hardeman & Moore and R. N. Hardeman, for the plaintiff.

Johnson & Johnson, for the defendant.

197 COBB, J. On October 1, 1895, Mrs. Julia McKay executed to J. C. Johnson a mortgage upon land described as follows: “All that tract of land in Jones county, Georgia, containing one hundred and fifty-three (153) acres, known as the Zachariah Emerson place, part of lots No. one hundred and twenty-

five (125) in the eleventh (11) district, one part No. not known." Also: "The Thomas Bazemore place, containing one hundred and ninety-six (196) acres, more or less, joining the lands of Sarah Emerson, Elisha Owens, Madison T. Bazemore, and H. D. McKay." The mortgage was foreclosed and the execution was levied. The execution followed the description in the mortgage. H. A. McKay, as executor of the will of George W. F. McKay, interposed a claim to the property, and at the trial the property was found subject. The presiding judge, Honorable F. C. Foster, granted a motion for a new trial, filed by the claimant. At the second trial the property was again found subject, and another new trial was granted the claimant by Honorable H. G. Lewis, who presided at the trial, upon a motion which contained the grounds that the verdict was contrary to law and the evidence, and also certain special grounds. At both trials the claimant introduced in evidence the record of a suit for land, and of the decree therein, brought by Mrs. Julia McKay against George W. F. McKay, in which title to certain land was decreed to be in the defendant in the suit. It is claimed that this decree covered the land now in controversy. The order of Judge Lewis granting a new trial was as follows: "It is ordered <sup>198</sup> by the court that the verdict and judgment complained about be set aside and a new trial granted, because the evidence shows that the land claimed is covered and embraced by and in the decree rendered in case of Julia McKay v. G. W. F. McKay, which was used in evidence; and because the lands claimed were not properly specified and described in the mortgage so as to make them capable of identification, and uncontradicted evidence showing that no part of lot 125 described in the mortgage was included therein." To the granting of this order the plaintiff in execution excepted.

1-3. We are constrained to differ with his honor of the trial court in his opinion that the description of the two tracts of land in the mortgage was so uncertain and indefinite as to render the mortgage void. The description standing alone, unaided by extrinsic evidence, is unquestionably insufficient. But the rule applicable in such cases is, that is certain which is capable of being made certain; and the description will be sufficient if it affords means of identifying and ascertaining the land intended to be conveyed: See Martindale on Conveyancing, sec. 87; Andrews v. Murphy, 12 Ga. 431; 2 Devlin on Deeds, 2d ed., sec. 1012. A general description, such as the Emerson place, or the Thomas Bazemore place, is sufficient: McAfee v. Arline, 83 Ga. 645 (a),

10 S. E. 441; Polhill v. Brown, 84 Ga. 338 (2), 10 S. E. 921; 2 Devlin on Deeds, 2d ed., secs. 1012, 1013. In such a case parol evidence may be resorted to to show what land was intended to be conveyed: See Broach v. O'Neal, 94 Ga. 474, 20 S. E. 113 (3); Derrick v. Sams, 98 Ga. 397 (1), 58 Am. St. Rep. 309, 25 S. E. 509; 3 Washburn on Real Property, 6th ed., sec. 2320; Martindale on Conveyancing, 2d ed., sec. 88. It is true, as stated in the judge's order granting a new trial, that the uncontradicted evidence shows that the Emerson place did not embrace any part of lot No. 125. But this does not vitiate the mortgage. The general description of the property as the Emerson place was sufficient, and a particular description repugnant to this general description is to be treated as surplusage, under the maxim "*Falsa demonstratio non nocet*": Martindale on Conveyancing, 2d ed., sec. 96; 3 Washburn on Real Property, 6th ed., secs. 2317, 2321; Harris v. Hull, 70 Ga. 831 (1); Boggess v. Lowrey, 78 Ga. 539, 6 Am. St. Rep. 279, 3 S. E. 771; Rogers v. Rogers, 78 Ga. 688 (2), 3 S. E. 451; Polhill v. Brown, 84 Ga. 338 (2), 10 S. E. 921; 2 Devlin on Deeds, 2d ed., sec. 1016. These authorities are directly in point, and show that a mere error in the number of the lot will not vitiate the mortgage,<sup>199</sup> there being a general description therein from which the property can be identified. Had the property been described solely by lot number which was given incorrectly, reformation of the instrument would have been necessary, but here the lot number may be wholly disregarded and still the description be sufficient.

4-5. In order, however, for the plaintiff to make out a prima facie case it was necessary for him to make the description certain by extrinsic evidence, and to show that the defendant in execution was in possession of or had title to the particular property at the time the mortgage was given. The evidence as to the possession at the date of the mortgage was decidedly conflicting, the preponderance apparently being in favor of the view that the mortgagor was not in possession at that date. The uncontradicted evidence showed that Mrs. Julia McKay was the widow and sole heir at law of her deceased husband, H. D. McKay, and that he acquired title to the Bazemore place by deed in 1848, and to the Emerson place in the same manner in 1854. These deeds describe the respective tracts in substantially the same manner as they are described in the mortgage. It was therefore necessary for the plaintiff in execution to resort to parol evidence to identify the two places. We have studied



most carefully and anxiously the evidence relied on for this purpose; and while we are not prepared to say that it was absolutely impossible for the jury to ascertain what land was intended to be covered by the mortgage, the identity of the two tracts are certainly involved in much uncertainty and doubt. A half century had elapsed since the purchase of the property by H. D. McKay and since these two tracts, doubtless well known at the time, were combined with other property belonging to the purchaser into a larger place thenceforward to be known as the McKay land. Old landmarks had been forgotten or obliterated, and coterminous owners had changed. There was but one witness that knew anything about the old tracts; and while he spoke with a great deal of confidence, an analysis of his testimony shows that he could not with absolute certainty indicate the lines. A plat of the tracts, called the Chiles survey, was introduced in evidence, but the surveyor testified that he got his information as to the lines from the witness above referred to. As stated above, we do not say that the jury might not have found that this survey was correct; but certainly the evidence is not so <sup>200</sup> definite and certain as to justify us in holding that the judge erred in awarding a second new trial. Viewing the evidence as a whole, it was perhaps better for both parties that a new trial should have been granted.

As the case is to be tried again, we deem it proper to state our views with reference to the decree rendered in the suit of Julia McKay v. G. W. F. McKay. The suit was filed March 25, 1895; the mortgage was executed on October 1, 1895; and the decree was rendered October 19, 1896. If the doctrine of *lis pendens* was applicable, Johnson, the mortgagee, was bound simply by the description of the property in the declaration, and if that did not embrace the property mortgaged, he would be protected, without regard to whether the decree described the property or not, and without regard to whether the decree would be void because covering property not described in the declaration. As stated above, the evidence shows that H. D. McKay acquired the Bazemore place by deed executed in 1848, and the Emerson place by deed made in 1854. The declaration describes the land sued for as eleven hundred and forty-three acres adjoining the lands of certain parties, and lying on the waters of Town creek, and obtained by H. D. McKay "in the year 1856, under an agreement made between his mother, Sarah McKay, and the defendant George W. F. McKay and himself." The agreement referred to was in evidence, and in that the land obtained thereunder by

H. D. McKay was described as set out in the declaration. This land may or may not have embraced the Emerson and Bazemore tracts. There was a survey of the lands supposed to have been included in the suit against G. W. F. McKay by Julia McKay, and this survey seems to embrace the two tracts in controversy. A witness for the claimant testified positively that the two tracts were involved in the suit, though the witness admitted that he was not acquainted with the inside lines of the tracts. If these two tracts were embraced in the agreement and involved in the suit, this could be explained only on the hypothesis that the tracts were bought for H. D. McKay in 1848 and 1854, and afterward by consent of all parties included in the agreement between the two McKay sons and their mother. In view, however, of the uncertainty whether these two tracts were involved in the suit and the agreement, and also of the uncertainty whether the two tracts were sufficiently identified, we will **201** let the second grant of a new trial stand, in order that these two questions may be again submitted to the jury. These are the controlling questions. On another trial the jury will be instructed to find, first, whether the plaintiff in execution has carried the burden resting on him by identifying with reasonable certainty the Emerson and Bazemore tracts; and if so, it will be for them to say whether the claimant has rebutted this prima facie case by showing that the tracts in question were involved in the suit between Julia McKay and G. W. F. McKay. There are the two vital questions, and we think the ends of justice will be best met by allowing the case to go again to the jury and be heard by them with their minds specially directed to the two issues. The propriety of affirming the second grant of a new trial in this case is made manifest when the fact is considered that the case has been tried by two judges, each a lawyer of ability and experience, and each has emerged from the trial, not only with doubt as to whether the result is in accord with justice and the law, but doubt of such grave and controlling nature as to constrain the setting aside of the verdicts. No possible harm can come from another trial. Serious injury and irremediable wrong might be the result of a reversal of the judgment.

Judgment affirmed.

All the justices concur.

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*The Description in a Mortgage of chattels is sufficient if it will enable third persons to identify the property when aided by such inquiries as the instrument suggests: Reynolds v. Strong, 10 N. Dak.*

81, 88 Am. St. Rep. 680, 85 N. W. 987. And it is not essential that the description in a mortgage of realty should completely identify the property; and if it does not, extrinsic evidence is admissible to aid in the identification: *Derrick v. Sams*, 98 Ga. 397, 58 Am. St. Rep. 309, 25 S. E. 509. See, also, *Parker v. Salmons*, 101 Ga. 160, 65 Am. St. Rep. 291, 28 S. E. 681; *Simpson v. Blaisdell*, 85 Me. 199, 35 Am. St. Rep. 348, 27 Atl. 101; note to *Higgins v. Higgins*, 66 Am. St. Rep. 59-62. A devise of lands by a description partly false, in that the wrong section number is given, may be effective if what remains after rejecting the false reasonably corresponds with the realty indicated by extrinsic evidence: *Pate v. Bushong*, 161 Ind. 523, post, p. 287, 69 N. E. 291.

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### McCOLLUM v. STATE.

[119 Ga. 308, 46 S. E. 413.]

**EVIDENCE OF AGE.**—A Witness may Testify as to His Own Age, although his information has been derived solely from his mother, who is in the county of the trial. (p. 172.)

**CRIMINAL LAW.**—An Erroneous Instruction is not ground for a new trial, if it is manifest that the accused was in no way prejudiced thereby. (p. 173.)

**CRIMINAL LAW.**—The Amount of a Fine, within the limits prescribed by statute, rests in the discretion of the trial judge, and is not subject to review. (p. 173.)

**CRIMINAL LAW.**—An Excessive Sentence is not cause for a new trial. (p. 174.)

Fermor Barrett, for the plaintiff in error.

W. A. Charters, solicitor general, for the defendant in error.

309 FISH, P. J. David McCollum was convicted of unlawfully selling intoxicating liquor to a minor, one John D. Ayers. A new trial having been refused, the accused excepted. Upon the trial, in September, 1903, Ayers testified that he was nineteen years old in the summer of that year; that he purchased the liquor from the accused in the early part of the year 1902, before the bill of indictment was found, in March of that year. He further swore that all he knew about his age was what his mother told him, and that she was then living in the county where the trial was had. Counsel for the accused moved to rule out the testimony of Ayers as to his age, upon the ground that his mother, who knew the fact and was living in the county, was a competent witness, and what she had told her son in reference to his age was hearsay and inadmissible. The court refused to

rule out the testimony, and complaint was made of this ruling, in the motion for a new trial. The ruling of the court was not erroneous. It is well settled that a witness may testify as to his own age: *Central R. R. Co. v. Coggin*, 73 Ga. 689; 1 *Greenleaf on Evidence*, sec. 430 (k); *Underhill on Criminal Evidence*, sec. 342; 22 *Am. & Eng. Ency. of Law*, 647; 1 *Encyclopedia of Evidence*, 735. In *Bain v. State*, 61 Ala. 75, it was held: "A witness may testify as to his own age, though he states that his knowledge is derived from what his mother told him; and the fact that his mother, who is not shown to be dead, or out of the jurisdiction of the court, was not introduced, does not affect the admissibility of the evidence, though the jury may consider it, with the other circumstances of the case, in determining its credibility." It was held in *Cherry v. State*, 68 Ala. 29, that: "A person may testify to his own age; and his testimony is not rendered inadmissible by his further statements, given as reasons for his testimony as to the fact, 'that his mother told him so, that it was written down in a book which his father had in the courthouse.'" And in *Pearce v. Kyzer*, 16 Lea (Tenn.), 521, 57 *Am. Rep.* 240, it was held: "A defendant in a suit, who relies upon the defense of infancy, is a competent witness to prove his own age, and it is no objection to his testimony that he obtained the information as to the year of his birth from his mother, who is living in the county in which the suit is tried." In *State v. Cain*, 9 W. Va. 559, it was held that it was competent for a witness to <sup>310</sup> testify as to his own age, with a view of proving that he was a minor at the time of a sale of intoxicating liquors to him, notwithstanding there was evidence given to the jury tending to show that his father and mother were living: See, also, *People v. Ratz*, 115 Cal. 132, 46 *Pac.* 915. Our Civil Code, section 5177, provides: "Pedigree, including descent, relationship, birth, marriage, and death, may be proved either by the declarations of deceased persons related by blood or marriage, or by general repute in the family, or by genealogies, inscriptions, 'family trees,' and similar evidence." This section, however, does not, as contended by the plaintiff in error, render a witness incompetent to testify to his own age, when his father or mother is living and within the jurisdiction of the court. The section, in providing that pedigree, etc., may be proved by the declarations of deceased persons related by blood or marriage, refers to the declarations of third persons, which, according to the authorities, are not admissible, unless such persons be dead: See cases above cited.



2. Upon cross-examination, Ayers swore that no one was with him when he bought the liquor from the accused, and that he did not tell the accused, at a given time and place, that one Watson was with him, at the house of the accused, when the liquor was bought, but that he told the accused that he left Watson some two or three hundred yards from the house of the accused when he went to buy the liquor, and that he carried it back to where Watson was, and he and Watson drank it. Watson testified that he was never at the house of the accused with Ayers. The accused, in his statement, said that Ayers told him, at the time and place referred to, that Watson was with him (Ayers) at the time that he bought the liquor. The accused also stated that he never sold Ayers any liquor at any time. The court charged the jury: "If a witness has been impeached in any of the modes known to the law, or in any manner known to the law, it is the duty of the jury to disregard his testimony, unless corroborated in material particulars; and if a witness has been impeached as required by law so that the jury would disregard his entire testimony, still it is their right and privilege to believe him if he is corroborated by other testimony in the case—corroborated in material particulars in the case, although impeached." In the motion for a new trial error was assigned upon this charge, because there was no corroborating <sup>311</sup> evidence to sustain the witness sought to be impeached. The exception to the charge was well taken. Ayers was the only witness for the state, and there was nothing to corroborate his testimony. We do not think, however, that this error of the court was such as to require the grant of a new trial, as it is manifest that the accused was in no way prejudiced by the charge. There was absolutely no evidence which the charge could have misled the jury to consider as corroborating Ayers' testimony, and if in the mind of the jury Ayers had been impeached, they would, under the instruction given, and in the absence of any corroboration whatever, have disregarded his testimony. It is evident that they did not believe the statement of the accused; for in it he said he had never sold any liquor to Ayers, and if they had believed that the statement successfully impeached Ayers, they certainly, it seems, would have believed the balance of the statement that the accused had never sold the liquor as charged, and have acquitted him. It has been frequently held by this court that the statement of the accused is not, strictly speaking, evidence, and it may be doubted if the mere statement of the accused will authorize a charge upon the subject of the impeachment of witnesses. It is perfectly ob-



vious that the testimony of Watson did not even tend to impeach Ayers.

3. The fine imposed by the court upon the accused was five hundred dollars. Complaint was made in the motion for a new trial that this was excessive. Under the statute the court could have imposed a fine not to exceed one thousand dollars, and a fine within that limit was within the discretion of the trial judge, and is not the subject of review: *Baldwin v. State*, 75 Ga. 482. Moreover, if it were excessive, this would not be cause for a new trial: *Bellinger v. State*, 116 Ga. 545, 42 S. E. 747.

4. The evidence fully warranted the verdict, and the court did not err in refusing to grant a new trial.

Judgment affirmed.

All the justices concur.

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*A Witness may Testify as to His Own Age.*—Thus, in *Pearce v. Kyzer*, 16 Lea, 521, 57 Am. Rep. 240, it is held that, to prove the defense of infancy in an action on a promissory note, the infant may testify as to information derived from his mother, although she is living and within the county of the trial: See, also, *Washington v. Bank for Savings*, 171 N. Y. 166, 89 Am. St. Rep. 800, 63 N. E. 831.

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## CHESTNUT PYRITES COMPANY v. CAVENDERS CREEK GOLD MINING COMPANY.

[119 Ga. 354, 46 S. E. 422.]

**EMINENT DOMAIN.**—A Foreign Corporation cannot exercise the power of eminent domain in this state without affirmative authority from the legislature. (p. 177.)

**EMINENT DOMAIN Foreign Corporations.**—A statute conferring the right of eminent domain on any mining corporation does not include foreign companies. (pp. 177, 178.)

**EMINENT DOMAIN—Strict Construction.**—Statutes conferring the right of eminent domain must be construed strictly. (p. 178.)

**INJUNCTION Against Eminent Domain Proceedings.**—A court of equity may restrain the condemnation of private property by a foreign corporation which has no authority to exercise the right of eminent domain. (p. 178.)

W. A. Charters and H. H. Perry, for the plaintiff.

H. H. Dean, J. W. H. Underwood and R. H. Baker, for the defendant.

**354** SIMMONS, C. J. The Chestatee Pyrites Company filed an equitable petition against the Cavenders Creek Gold Mining Company. The petition alleged that the plaintiff owned and possessed certain tracts of land through which ran the Chestatee river; that it had developed on said land, at great expense, a pyrites mine from which it was actually engaged in taking out ore; that it had purchased the land on both sides of a large water-power in the Chestatee river, a non-navigable stream, owned this water-power, and had also purchased the right to overflow the adjoining lands by the erection of a dam in this stream; that it had purchased this water-power for the purpose of developing and working its mine; that the Chestatee river is partially formed by the four named streams which empty into it above the plaintiff's land and augment the waters of the river which flow over plaintiff's lands. The plaintiff also alleged that all of the water is essential to the proper operation of its mine, but that the defendant, a corporation chartered under the laws of North Carolina, had bought lands above the property of plaintiff, for the purpose of operating a gold mine, and had given notice that it would proceed under the Political Code, section 650 et seq., and Civil Code, section 4685, to condemn the water in the four tributary streams above mentioned and divert it from the river by means of ditches and canals to its mine, returning it to **355** the river below the land of plaintiff, and had fixed a date for arbitrators to meet to pass upon the necessity for such condemnation and the amount of damages to the plaintiff. The petition charged that the defendant was a foreign corporation, and had no power or authority, under the code and the acts amendatory thereof, to condemn private property for its own use. It further alleged that, even if the code applied to foreign corporations, the sections under which the proceedings were to be had were unconstitutional, that these sections sought to give the power to condemn for a private use and not for a use by the public. The answer admitted that the defendant was a corporation organized under the laws of North Carolina, but insisted that the code sections apply as well to foreign as to domestic corporations. The view we take of the case renders it unnecessary to decide upon the validity of these code sections.

1. The right of eminent domain is a sovereign right of the state. It is inherent in every sovereignty, and existed before constitutions were adopted. It lies dormant until the legislature sets it in motion. As the legislature cannot in every case

supervise the condemnation, it may confer the power upon agencies. These agencies may be individuals or corporations, and the legislature may even confer this power upon foreign corporations or individuals living in another state. The power thus conferred is always to be strictly construed, and will not be permitted to be exercised except where it is affirmatively granted. Its grant is in derogation of common right, and is the exercise of one of the highest of the powers of sovereignty. Where, therefore, a private individual or corporation seeks to take the property of another under the power of eminent domain, affirmative authority for the exercise of the power must be shown. The power may be conferred either by special act creating the corporation or by general acts relating to all corporations of designated classes. If a foreign corporation undertakes in this state to condemn private property, it must show legislative authority to do so. We have searched the authorities diligently to ascertain if any court has ever decided that a foreign corporation could exercise the right of eminent domain without legislative authority from the state wherein it proposes to exercise the right, and have been unable to find a single case so holding. All the courts seem to hold that this right of eminent <sup>356</sup> domain does not exist as a matter of comity between the states, and all hold, so far as we can find, that a foreign corporation must have affirmative authority from the state in which it proposes to exercise the right. "A railroad company or other quasi public corporation cannot exercise the right of eminent domain in another state than that by which it was created, unless it is expressly or impliedly authorized to do so by the laws of such other state. Such power does not come within the rule of comity": Clark & Marshall on Private Corporations, 2734, sec. 854. Judge Thompson, in his excellent and valuable work on Corporations (volume 6, section 7932), says: "The power of a private corporation to acquire private property for the public purposes for which it may have been chartered is a power which comes to it alone through the delegation of the state of its sovereign right of eminent domain. The power cannot, therefore, be exercised by a foreign corporation on a mere principle of comity, because it will never be presumed, in the absence of affirmative legislation, that the state delegates any part of its sovereignty to a foreign corporation. It may be stated with confidence in every case that this power cannot be exercised by a corporation created under the laws of one state or country, within the limits of another state or country

without the consent of the legislature of that other state or country, affirmatively expressed." We are satisfied to close this part of the opinion with this authority from so eminent an author.

2. The defendant in error claimed, however, that sections 650-657 of the Political Code are broad enough to include foreign corporations. We think that they should not be so construed. We think that the legislature cannot be held to have granted the right of eminent domain, one of the highest of the sovereign rights of the state, to any and every corporation which may be created by any other state or country. These sections must be construed strictly. We cannot believe that the legislature, by the use of the words "any corporation," intended to confer part of the sovereignty of the state upon every corporation created in any state or country in the world which might be engaged in one of the businesses designated in these sections. As Judge Thompson says in the quotation above, "it will never be presumed, in the absence of affirmative legislation, that the state delegates any part of its sovereignty to a foreign corporation. . . . <sup>357</sup> This power cannot be exercised by a [foreign] corporation . . . without the consent of the legislature, . . . affirmatively expressed." Had the legislature intended to confer this power upon foreign mining corporations, it would have done so as it did in conferring similar powers upon foreign telegraph companies in the act of 1889 (Civ. Code, sec. 2347), where it said: "Any telegraph company, chartered by the laws of this or any other state of the United States," etc. This last cited act and code section expressly confer the power upon telegraph companies chartered by a sister state, which is an answer to the argument of counsel that the cases of Savannah Ry. Co. v. Postal Tel. Cable Co., 112 Ga. 941, 38 S. E. 353, 113 Ga. 916, 39 S. E. 399, and 115 Ga. 554, 42 S. E. 1, recognized that land in this state may be condemned by a corporation chartered by another state.

Our code declares that "any . . . corporation who may be actually engaged in the business of mining" certain metals or minerals shall have the right to condemn private property. This language seems very broad—broad enough to include both domestic and foreign corporations doing business of the designated kind in any state or country; but, as has been shown, statutes conferring the right of eminent domain must be construed strictly, and courts will never assume, in the absence of affirmative legislation, that it was intended to grant such powers to

corporations over which the legislature had no control. Since the adoption of the Code of 1863, the legislature has reserved to itself the right to change or modify the charters of corporations of its creation, and to control the conduct of such corporation. It has no such powers with regard to a foreign corporation. In an act governing procedure or of a remedial nature, such words as are used in these code sections would probably be held to embrace all corporations, foreign and domestic; for such an act would receive a liberal construction. But acts granting powers in derogation of common right must always be construed strictly, and these words held not to include foreign corporations.

3. It was argued that the plaintiff had a complete remedy at law. After much reflection, we have concluded that the remedy at law was not as complete as the remedy in equity. The remedy at law pointed out by counsel for the defendant in error was for the plaintiff to go before the arbitrators and there make the questions raised by his petition in this case, and, in the event of <sup>358</sup> an adverse decision, to renew the points on an appeal to the superior court. In the first place, we think that the arbitrators could not entertain a motion to dismiss the condemnation proceedings on the ground that the gold mining company had no authority to institute them. Under the code the arbitrators' only duties are to pass upon the necessity for the condemnation and the amount of damage to the owner of the property condemned. Even if they could have decided as to the authority of the gold mining company to institute the proceedings and had decided in favor of such authority, and there had been an appeal to the superior court, the gold mining company could have tendered the amount of damages fixed and then could have proceeded to dig its ditches and divert the water, regardless of the appeal. Equity, on the other hand, immediately stops the illegal proceedings and prevents any illegal act. We think, therefore, that the remedy at law was not as complete as the one in equity. For the reasons given, we think that the court should have granted the injunction, and that it was error to refuse it.

Judgment reversed.

All the justices concur, except Candler, J., disqualified.

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*In a Recent Case in Illinois*—*Illinois State Trust Co. v. St. Louis etc. Ry. Co.*, 208 Ill. 419, 70 N. E. 357—the authority of a foreign corporation to exercise the power of eminent domain was denied. Said the court: "The power of eminent domain is an incident to sov-



eighty and inherent in the state, and can be exercised only on the occasion, in the mode and by the agency prescribed by the legislature. No other state can authorize the exercise of that power within this state, and the laws under which petitioner has its existence could not and do not purport to do so. The petitioner can have no legal existence in this state, outside of the boundaries of the states where it was incorporated, and can exercise none of the powers conferred by its charter except by consent of the legislature of this state. It is competent for the legislature to delegate the exercise of the power of eminent domain to a foreign corporation (13 Am. & Eng. Ency. of Law, 2d ed., 858), but the power can be exercised only when so granted. The power to take the property of the individual without his consent is against common right, and all acts authorizing such a taking are to be strictly construed: *Chicago etc. R. R. Co. v. Wiltse*, 116 Ill. 449, 6 N. E. 49; *Chicago etc. Ry. Co. v. Galt*, 133 Ill. 657, 23 N. E. 425, 24 N. E. 674. Unless both the letter and the spirit of the statute relied upon clearly confer the power it cannot be exercised: *Ligare v. City of Chicago*, 139 Ill. 46, 32 Am. St. Rep. 179, 28 N. E. 934. The question under what conditions the power shall be exercised is purely legislative, but it is the duty of the court, when called upon, to decide whether the statutory conditions exist and whether the taking of the property is within the statutory power conferred: *Harvey v. Aurora etc. Ry. Co.*, 174 Ill. 295, 51 N. E. 163."

That a foreign corporation may be authorized by the legislature to acquire property, by condemnation, see *New York etc. R. R. Co. v. Welsh*, 143 N. Y. 411, 42 Am. St. Rep. 734, 38 N. E. 378. And the fact that a foreign corporation is interested in a corporation organized under the laws of the state to construct a telegraph line does not affect the latter's right to condemn a right of way: *Postal Telegraph Cable Co. v. Oregon Short Line R. R. Co.*, 23 Utah, 474, 90 Am. St. Rep. 705, 65 Pac. 735. Statutes conferring the right of eminent domain receive a strict construction: *Waterbury v. Platt*, 75 Conn. 387, 96 Am. St. Rep. 229, 53 Atl. 958.

## STEWART v. GARRETT.

[119 Ga. 386, 46 S. E. 427.]

**CEMETERY LOT**—Nature of Title to.—The Purchaser of a lot in a public cemetery for burial purposes does not acquire the fee to the soil, but only the easement or license of burial therein. (p. 181.)

**CEMETERY LOT**.—Ejectment does not Lie to Recover a cemetery lot. (p. 182.)

Reese Crawford and McNeill & Levy, for the plaintiffs.

Charlton E. Battle, for the defendant.

**386 TURNER, J.** This bill of exceptions was founded upon an action of ejectment, brought in the superior court of Muscogee county, for a lot in a cemetery in the city of Columbus,

known and distinguished in the plan of said cemetery as lot No. 184, in section or extension C of said cemetery, "the said tract or parcel of land being a cemetery lot for burial purposes." The action was founded on the several demises of James A. Stewart and others, also of "The city of Columbus," and also of "The mayor and council of the city of Columbus," these two latter demises being framed to cover the different names by which the municipality was designated in the acts of the general assembly. To <sup>387</sup> the petition in this case an abstract of title was appended, the particulars of which need not be set out in full. The defendant filed a general demurrer, the substance of which may be stated in the language of the fourth ground thereof, as follows: "Because the petition shows upon its face that the land sued for is a cemetery lot contained in the public cemetery in the city of Columbus, known as Linwood Cemetery, and said tract or parcel of land being, as described in said petition, a cemetery lot for burial purposes, the right and title of the plaintiffs, if any, in such property is not of such a character as will support an action of ejectment, the right of burial in such cemetery lot being merely a license, or at best an easement, in said property, and ejectment will not lie for the recovery of a license or an easement." The court below sustained the demurrer and dismissed the case. The plaintiffs excepted in due form and brought the case to this court.

The question is whether an action of ejectment will lie for the recovery of a tract or parcel of land averred to be a cemetery lot for burial purposes. The courts in many of the states have held that the purchaser of a lot in a public cemetery, though under a deed absolute in form, does not take any title to the soil, but that he acquires only a privilege or license to make interments in the lot purchased, exclusively of others, so long as the ground remains a cemetery: See the cases collected in 6 *Cyclopedia*, 717. And there would seem to be good reason for holding that when a cemetery lot is conveyed for burial purposes, it cannot be devoted to any other use, whatever may be the form of the conveyance. In the case of *Jacobus v. Congregation of the Children of Israel*, 107 Ga. 518, 73 Am. St. Rep. 141, 33 S. E. 853, the same being styled an equitable petition, this court held that even punitive damages could be recovered for an unlawful interference with a cemetery lot; and Mr. Justice Fish, reasoning upon the case, used this language (page 521): "As a general rule, one who purchases and has conveyed to him a lot in a public cemetery does not acquire the fee to the soil, but only the ease-

ment or license of burial therein." The opinion then proceeds to cite an array of authorities to the effect that damages may be recovered from any person who wrongfully trespasses upon, desecrates or invades the burial lot of another. And in a proper case the courts will by injunction restrain a trespass upon a burial lot: See 6 Cyclopaedia, 720, and citations. The case of New York Bay Cemetery <sup>388</sup> Co. v. Buckmaster, 49 N. J. L. 449, 9 Atl. 591, cited by counsel for the plaintiffs in error, on examination does not seem to support his view that one who has the right of burial in a cemetery lot can maintain an action of ejectment against another who wrongfully enters thereon. While the deed under consideration in that case recited that the premises were to be had and held for the uses of sepulture only, and for no other uses whatever, the law of New Jersey (Pamphlet Laws 1850, p. 194) required the cemetery company to grant the fee to the purchasers of lots, and for that reason the court held that an action of ejectment would lie for the recovery of the lot. We have also examined the other cases cited by the able counsel for the plaintiffs in error, but we have not found them sufficient to overcome the great weight of authority which supports the view which we have adopted.

In the present case, the parcel of land sought to be recovered being averred to be a cemetery lot for burial purposes, any conveyance upon those terms would carry only a limited use or an easement. Such a use is also sometimes called a mere license. To recover such an easement or license, an action of ejectment will not lie: Adams on Ejectment, \*16; Perley on Mortuary Law, 177, 178, 187; 6 Cyclopaedia, 717 (note 50); 10 Am. & Eng. Ency. of Law, 2d ed., 474; Union Petroleum Co. v. Bliven Petroleum Co., 72 Pa. St. 173; Hancock v. McAvoy, 151 Pa. St. 460, 31 Am. St. Rep. 774, 25 Atl. 47, 18 L. R. A. 781. If for any public reason the disestablishment of a cemetery is necessary, the police power is adequate. It may be added that while the action of ejectment has its uses, its quaint fictions and devices do not seem appropriate to the ascertainment of any right in a burial lot. If any fiction is pardonable in a case of this kind, it would be fitter to hold that the fee in these sacred premises belong to the dead. Within these hallowed precincts, no court would desire to send the sheriff with a writ of possession. This instinct of humanity is loyalty to a statute impressed upon all hearts. Its influence is not confined to the weak and ignorant. The plaintive appeal which marks the

grave of Shakespere is said to have been inspired by his fear of a removal of his bones to a charnel-house:

“Good friend, for Jesus’ sake forbear  
To dig the dust inclosed here.”

Judgment affirmed.

All the justices concur.

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*For Authorities in support of the principal case, see Hancock v. McAvoy, 151 Pa. St. 460, 31 Am. St. Rep. 774, 25 Atl. 47; Bessemer Land etc. Co. v. Jenkins, 111 Ala. 135, 56 Am. St. Rep. 26, 18 South. 565; Jacobus v. Congregation etc. of Israel, 107 Ga. 518, 73 Am. St. Rep. 141, 33 S. E. 853; Gardner v. Swan Point Cemetery, 20 R. I. 646, 78 Am. St. Rep. 897, 40 Atl. 871. And see the monographic note to Keyes v. Konkel, 75 Am. St. Rep. 424-430.*

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## GORE v. STATE.

[119 Ga. 418, 46 S. E. 671.]

**RAPE.—The Words “Against Her Will”** are synonymous with “without her consent,” and sexual intercourse is against the woman’s will when, from any cause, she is not in a position to exercise any judgment about the matter. (p. 183.)

**RAPE OF IMBECILE—Necessity of Force.**—A man who, knowing her mental imbecility, has sexual intercourse with a woman incapable of expressing any intelligent assent or dissent, or of exercising any judgment in the matter, is guilty of rape, although he uses no more force than that involved in the carnal act, and although she offers no resistance. (p. 187.)

M. B. Eubanks and C. E. Carpenter, for the plaintiff in error.

Moses Wright, solicitor general, for the defendant.

**419 COBB, J.** “Rape is the carnal knowledge of a female forcibly and against her will”: Pen. Code, sec. 93. This is the common-law definition as given by Blackstone: 4 Blackstone’s Commentaries, 210; 2 Bishop’s New Criminal Law, sec. 1113 (2). Rape as thus defined was an offense at common law. English statutes were enacted making the offense penal, but these have been treated as simply declaratory of the common law. Various definitions of the offense have been given. A number of these are collected in an article in 13 Criminal Law Magazine, page 503, the author of which puts into the following definition the various elements of the several definitions: “Rape is the act of having carnal knowledge, by man, of a woman, for-

cibly and against her will, or without her conscious permission, or where permission has been extorted by force or fear of immediate bodily harm." This is probably as comprehensive as any definition that could be given. Ordinarily, penal laws are construed strictly, and, strictly speaking, it might with some force be contended that an act cannot be "against the will" of a person when he or she is not in a physical or mental condition to exercise any will on the subject: See, in this connection, *Croswell v. People*, 13 Mich. 427, 437, 87 Am. Dec. 774; *Bloodworth v. State*, 6 Baxt. (Tenn.) 614, 32 Am. Rep. 546. The authorities generally, however, construe the words "against her will" to be synonymous with "without her consent," and hold that the act of sexual intercourse is against the woman's will when, from any cause, she is not in a position to exercise any judgment about the matter. Thus intercourse with a woman whose will is temporarily lost from intoxication, or unconsciousness arising from the use of drugs or other cause, or sleep, etc., is rape. As stated above, there are a few cases opposed to this view, but the great weight of authority is undoubtedly in favor of giving to the statute such a construction as that just indicated. We have to consider in this case, however, only that form of inability to consent which is presumed to arise from idiocy or imbecility.

420 The rule of law applied by the English courts in cases where the female is alleged to have been idiotic or imbecile is the one generally followed in this country. The rule laid down by those courts is that if the female is so idiotic as to be incapable of expressing any intelligent consent or dissent, or of exercising any judgment in the matter, the offense is rape: See *Queen v. Ryan*, 2 Cox C. C. 115; *Regina v. Fletcher*, 8 Cox C. C. 131. The case of *Regina v. Fletcher*, 10 Cox C. C. 248, L. R. 1 C. C. 39, has been regarded (and it would seem with much reason) as being in conflict with the two decisions above cited, and as laying down the broad rule that in no case could a conviction be had where nothing appears but the connection and the imbecility of the female. But the English criminal court of appeals has not so treated that decision: See *Regina v. Barrett*, 12 Cox C. C. 498. In that case it was held: "Upon the trial of an indictment for rape upon an idiot girl, the proper direction to the jury is, that if they are satisfied that the girl was in such a state of idiocy as to be incapable of expressing either consent or dissent, and that the prisoner had connection with her without her consent, it is their duty to find him guilty." And it was said that "the two cases of *Regina v. Fletcher* are



not adverse to one another. The principle is properly laid down in the first case, and the second case was only a decision on the facts that there was not that requisite testimony of want of assent to justify leaving the case to the jury": See, also, *Regina v. Connolly*, 26 U. C. Q. B. 317, where the earlier English decisions are reviewed, and the rule is thus stated: "In the case of rape of an idiot or lunatic, the mere proof of connection will not warrant the case being left to the jury. There must be some evidence that it was without her consent, e. g., that she was incapable from imbecility of expressing assent or dissent; and if she consent from mere animal passion, it is not rape."

A comprehensive statement of the law of the subject as applied by the American courts is found in *Clevenger on Medical Jurisprudence of Insanity*, volume 1, pages 202, 203. This summary of the law is merely an epitome of the decisions which are cited, and seems to us to be a very fair analysis of those decisions. We quote the following from its author: "Sexual intercourse with a woman who is so destitute of mind as to be incapable of giving consent is rape, though she does not resist. The test of mental <sup>421</sup> capacity under this rule is whether she was capable or incapable of giving consent or of exercising any judgment in the matter. And very slight proof of force is necessary where the woman lacks the intelligence to comprehend the nature and consequences of the act, and to distinguish morally and legally between right and wrong; and when the man does not suppose that he has her consent, the force required and which is involved in the carnal act is sufficient. But where the will is active, though perverted, the act is not rape, when all idea of force or unwillingness is distinctly disproved. And the mere fact that a woman is weak-minded does not disable or debar her from giving consent to the act, and intercourse with her when she is capable of exercising her will sufficiently to control her personal actions is not rape; and if there is reasonable doubt whether force was used, the jury should acquit though the woman was of weak mind. A woman with less intelligence than is requisite to make a contract may consent to sexual intercourse so that the act will not be rape upon the part of the man. And connection with a woman who is in a state of dementia, and not idiotic, but approaching toward it, having a predisposition to be with men and a morbid desire for sexual intercourse, is not rape when no circumstances of either force or fraud accompany the act; nor is intercourse without resistance with a woman subject to epi-

leptic fits, where the evidence does not show that she was under the influence of a fit at the time. The burden of proof of insanity at the time of the act and that the carnal knowledge was obtained by force and without consent, rests with the prosecution. There must be some evidence that she was incapable, from imbecility, of expressing assent or dissent, and when consent is given from mere animal passion or instinct, it is not rape, and a conviction cannot be sustained in the absence of evidence as to her general character for chastity and decency, or anything else to raise a presumption that she did not consent. Evidence of the connection and the imbecility alone is insufficient. But evidence of habits of decency raises a presumption that she would not have consented": See, also, the following authorities: 2 Bishop's New Criminal Law, secs. 1121, 1123; Clark & Marshall on the Law of Crimes, sec. 295; 1 Wharton on Criminal Law, 10th ed., sec. 560; 13 Criminal Law Magazine, 510; 2 Russell on Crimes, 6th ed., 226; 2 Roscoe on Criminal Evidence, 8th ed., 1119; May on Criminal Law, sec. 195.

<sup>422</sup> The following is the rule stated in 23 American and English Encyclopedia of Law, second edition, 856: "Sexual intercourse with an insane or idiotic woman whose mind, to the knowledge of the man, is totally incapable of consenting to the act is rape, though she submits to the act without resistance, as in such a case the intercourse is without her consent and against her will. If, however, the female, though weak-minded or idiotic, consents to the intercourse for animal instincts, passion, or morbid desires, the act is not rape": See, also, *State v. Williams*, 149 Mo. 496, 51 S. W. 88; *Payne v. State*, 40 Tex. Cr. 202, 76 Am. St. Rep. 712, 49 S. W. 604; *State v. Cunningham*, 100 Mo. 383, 12 S. W. 376; *State v. Atherton*, 50 Iowa, 189, 32 Am. Rep. 134; *McQuirk v. State*, 84 Ala. 435, 5 Am. St. Rep. 381, 4 South. 775; *State v. Tarr*, 28 Iowa, 397.

There was evidence to show that the accused was acquainted with the mental condition of the female; and hence the sole question is, whether the present case falls within the rule declaring the act to be rape where the woman is so idiotic as to be incapable of exercising any intelligent judgment in the matter; or whether the girl belongs to that class of unfortunate females who, while weak-minded, yet possess sufficient mental capacity to comprehend the nature and consequences of the act, and are able to bring to bear that judgment which a woman with that knowledge would exercise. We have reached the conclusion that the conviction should be upheld, and in stating the result of

our deliberations we do not deem it necessary to discuss at length the evidence in the case. The most important consideration which has led us to this conclusion is the fact that the girl herself was sworn as a witness and the judge and jury had an opportunity to pass upon her mental condition by inspection as it were. There was testimony other than that of the girl, upon which the jury could base a finding that the act of sexual intercourse had taken place; and hence the state is not in the embarrassing situation in which the prosecution found itself in a Texas case, where it had to rely upon the woman's testimony to show that the carnal act was accomplished, and at the same time contend for a conviction on the ground that the female was an imbecile and incapable of consenting: See *Thompson v. State*, 33 Tex. Cr. 472. Apparently the girl could answer only leading questions, generally responding to these by a simple "yes" or "no." And even these brief answers are contradictory in important <sup>423</sup> respects. She said she consented to the act, and yet when counsel for the state explained to her what opposing counsel meant by consent, she said she did not agree for the accused to do what he did. Questions asked for the purpose of eliciting any extended information as to what took place she wholly failed to answer. She testified that she was fifteen years of age, whereas her mother said she was nineteen. She said she had been to school and could read and write, could read in the third and fourth readers. She was not, however, so far as appears, put to the test before the jury; and her father distinctly swore that she could not learn anything at all at school, and that notwithstanding she had been to several teachers, she did not even know her alphabet.

The jury saw the girl, heard her conflicting statements, and witnessed her demeanor and manner of testifying. A great deal would depend on her appearance. The jury are constituted by law the judges of all these matters. They have by their verdict solemnly affirmed that the girl's intellect was so weak that she was incapable of consenting to the act of sexual intercourse, and we do not feel disposed to usurp their functions, and at this distance, upon a printed record, without ever having seen the girl, declare that we are better judges of the girl's mental condition than the members of the jury were. The trial judge also saw the girl and heard her testimony, and he is satisfied with the verdict. The supreme court of Iowa, in a recent case where the accused was charged with having committed a rape on an imbecile woman, said: "Taking the testimony of the witnesses on

both sides of the question, without more, we would be strongly inclined to reverse the case. But the record shows that the complainant was examined as a witness, and that her examination was quite lengthy. Her answers to questions show that she is almost an imbecile, unless she was feigning imbecility. The learned judge and the jury who tried the case saw and heard her while she was on the witness-stand, and we cannot put ourselves in the place of the judge and jury. Her appearance and demeanor while testifying were most important considerations in determining her mental capacity, and, under the circumstances, we think it is not proper for this court to interfere with the verdict." Inasmuch as no complaint has been made of any charge or ruling of the trial judge, it is necessarily to be presumed that the law was fully and <sup>424</sup> fairly given in charge, and that the accused was deprived of no right to which he was entitled. Women like the unfortunate girl involved in this case must be protected, not only against the animal lusts of the members of the opposite sex, but against themselves as well; and men, who, knowing of their imbecility, take advantage of their helpless condition to gratify their own lustful desires, are guilty of rape, though they use no more force than that involved in the carnal act, and though the woman offer no resistance to the consummation of their purpose. In the language of Lord Chief Justice Campbell, in *Regina v. Fletcher*, 8 Cox C. C. 131: "It would be monstrous to say that these poor females are to be subjected to such violence, without the parties inflicting it being liable to be indicted. If so, every drunken woman returning from market, and happening to fall down on the roadside, may be ravished at the will of the passers-by."

Judgment affirmed.

All the justices concur, except Simmons, C. J., absent.

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*For Authorities* upon the question involved in the principal case, see *McQuirk v. State*, 84 Ala. 435, 5 Am. St. Rep. 381, 4 South. 775; *People v. Griffin*, 117 Cal. 583, 59 Am. St. Rep. 216, 49 Pac. 711; *Payne v. State*, 40 Tex. Cr. 202, 76 Am. St. Rep. 712, 40 S. W. 604; monographic note to *Smith v. State*, 80 Am. Dec. 365.

## WOODWARD v. MILLER.

[119 Ga. 618, 46 S. E. 847.]

**TORT**—**Absence of Privity as Affecting Liability.**—**The Manufacturer** of a buggy, who sells it to a city for the use of one of its employés, representing it to be in good condition, but in fact concealing a defect, is answerable for injuries caused by the defect to the person for whose use the vehicle was contemplated when sold, notwithstanding there was no privity between them in the contract of sale. (p. 189.)

**PLEADING.**—**Amendments to a Petition** which merely amplify it, setting out more in detail the cause of action, are not objectionable. (p. 192.)

Arnold & Arnold and Howell C. Erwin, for the plaintiffs.

W. H. Terrell and Black & Jackson, for the defendants.

**618 CANDLER, J.** The main bill of exceptions assigns error upon the sustaining of a general demurrer to the plaintiff's petition. The defendant filed a cross-bill complaining of the allowance of an amendment to the petition. The case made by the declaration was, in substance, as follows: The plaintiff is superintendent of the waterworks department of the city of Atlanta, and in the performance of his duties has occasion to ride between different points in the city. The defendants are manufacturers and sellers of buggies, carriages, and other vehicles. On July 30, 1901, the plaintiff, in behalf of the city of Atlanta, bought of the defendants a buggy for his use, the defendants at the time representing to him that the buggy was in good condition, extra strong, and fitted for the service for which it was intended. After purchasing the buggy the plaintiff began to use it, and on or about November 12, 1901, while riding in it on the streets of Atlanta, "the spindle extending from the right front axle broke, the buggy was wrecked and turned over, causing the horse to run away, and plaintiff was thrown about and around and on the belgian-block pavement, and greatly and permanently injured." The defendants were lacking in ordinary care in the manufacture, inspection, sale and handling of the buggy. An ordinary test would have led to the discovery of the defect which caused the spindle to break. "There was a large crack in said axle, but the defendants had caused and directed **619** the same to be covered with grease and the crack filled in. This crack extended through the larger part of the spindle, and so weakened the same that the weight of the buggy caused



the same to break. The crack was visible to the defendants, in the exercise of ordinary care, before they placed the grease upon the spindle; and had the defendants exercised ordinary care in sounding and testing the buggy in any way, they would have discovered the break or crack." On account of the crack being filled and covered with grease, the plaintiff could not, in the exercise of ordinary care, discover its existence, and was unaware of it. The defendants falsely represented to the plaintiff that the buggy was in good condition, knowing at the time that the representation was false. The plaintiff's injuries were described, and were alleged to be permanent. Two amendments to the petition were offered, and were allowed over the defendants' objection. The first alleged that the spindle which broke was made of "defective, cheap, imperfect, and improperly welded iron and steel, . . . and flaws and incipient cracks were present in it." The second set up that at the time of his injuries the plaintiff was in the discharge of his duties as superintendent of the waterworks system at Atlanta; that the defendants, who reside in Atlanta, knew at and prior to the time the buggy was sold that it was to be used by the plaintiff in the discharge of his duties, and sold the buggy expressly for such use; and that the plaintiff was injured by being thrown out into the street by the giving way and breaking of the axle, which caused the buggy to drop to the ground. "He was not hurt by the horse running away. The horse ran away after the buggy fell, and after plaintiff was injured."

1. We do not hesitate to hold that the petition set out a cause of action. Independently of the question of liability to the plaintiff on the alleged warranty of the buggy, we are clear that, under the allegations, the defendants were guilty of a tort for which the plaintiff could hold them liable. The gist of the action is the alleged false representation, knowingly made, as to the quality and condition of the buggy. In this it is very similar to an action of deceit. It makes no difference that there was no privity of contract between the parties. It appears that the plaintiff's injuries were sustained while the buggy was being put to a use expressly contemplated by the parties when the sale was made. "A <sup>620</sup> particular transaction may sometimes be looked upon as affording the right to bring an action either for the breach of contract or in tort. Take, for instance, the too familiar case of a railway disaster caused by the company's negligence; and the company are liable to the passenger, in contract, because they gave him a ticket, and in tort, because they

were not sufficiently careful in carrying him. In such a case as this there is clearly direct privity between the plaintiff and the defendants. But, generally speaking, privity is not necessary to support an action in tort. . . . If a railway company contract with a master to carry his servant, and in doing so are guilty of negligence, which causes bodily hurt to the servant and consequent damage by loss of service to the master, the company may be sued in contract by the master and in tort by the servant": Note to *Landridge v. Levy*, 4 Mees. & W. 337, *Shirley's Leading Cases*, 346. In that case, which is closely in point in the present discussion, a father bought from a gunsmith a gun, which was warranted, telling the gunsmith at the time of the purchase that he wanted the gun for the use of himself and his sons. The gun, while being used by one of the sons, exploded, injuring him, and suit was brought by him against the seller of the gun for the tort. The defendant contended that the right of action, if any, was in the father, to whom the sale had been made; but it was held that the suit in tort could be maintained by the son. In the able and exhaustive brief of counsel for the plaintiff a large number of cases of similar import are cited; but for the purposes of the present discussion we deem it necessary to refer to only a few of those most closely in point. In *Lewis v. Terry*, 111 Cal. 39, 52 Am. St. Rep. 146, 43 Pac. 398, 31 L. R. A. 220, it was held that: "One who sells a folding-bed, representing it to be safe for use when he knows it to be dangerous, is liable for injuries caused by the defects in the bed to any person who uses it, although there may be no privity of contract between them." That decision was based on the principle that the defendant was guilty of a wrong independently of his contract, viz., his false representation as to the safety of the bed, and that thereby the case was brought within the operation of the law of torts. In *Schubert v. J. R. Clark Co.*, 49 Minn. 331, 32 Am. St. Rep. 559, 51 N. W. 1103, 15 L. R. A. 818, the plaintiff was a painter in the employment of a contractor. The contractor ordered of a retail merchant a stepladder for the use of the plaintiff. The merchant, not having such a ladder in his stock, ordered the defendant, <sup>621</sup> a manufacturer, to deliver one to the place designated by the contractor. The ladder so delivered was made of defective and inferior material, and was dangerous, but its defects were hidden from view by paint, varnish, and oil. By reason of its weakness the plaintiff fell from it and was injured. The court held the defendant "liable for injuries caused by such negligence to one

into whose hands the dangerous implement comes for use in the usual course of business, even though there be no contract relation between the latter and the manufacturer."

We have been able to find in our reports only one case at all in point in the present discussion. In *Blood Balm Co. v. Cooper*, 83 Ga. 457, 20 Am. St. Rep. 324, 10 S. E. 118, 5 L. R. A. 612, this court held: "Where one prepares a proprietary or patent medicine and puts it upon the market and recommends it to the world as useful for the cure of certain diseases, the bottle containing it having therewith a prescription made by the proprietor of the medicine, in which he states that it is to be taken in certain quantities, and the medicine with this prescription is sold by the proprietor to a druggist for the purpose of being resold to persons who might wish to use it, and the druggist sells the same to a person who uses it in the quantity thus prescribed, and the same contains an ingredient such as iodide of potash in such quantity as proves harmful to the person thus using it, the proprietor is liable." We recognize that there is some distinction between the case cited and the case now under consideration, but it seems clear that the same principle of law is applicable in both. Many courts have laid down a different rule governing the sale of articles which are inherently dangerous, such as a deadly poison or a powerful explosive, from that which is applied to the sale of ordinary articles of commerce: holding that the negligent sale, shipment, or handling of such inherently dangerous articles will render the negligent person liable to anyone who may be injured by reason of his negligence, regardless of the question of privity between them, while as to articles not inherently dangerous there must be some privity between the parties to give a right of action. This rule, however, can have no application to the present case, in view of the fact that the petition distinctly alleges that the plaintiff's use of the buggy was contemplated by the defendants when the sale was made, that they knew of the defect in the spindle, and that they concealed this defect from <sup>622</sup> him by the use of paint and grease and represented to him that the buggy was in perfect condition. The case of *Cobb v. Clark Co.*, 118 Ga. 483, 45 S. E. 305, cited in the brief of counsel for the defendants, has no bearing upon the case now under discussion. There the plaintiff entered into a written contract with a building company which was erecting a building adjoining his premises, concerning the building of a party-wall between the two buildings. The defendant, a contractor for the building company, was not a party

to this contract. The suit was brought against it for alleged negligence in the erection of the wall for the building company. This court held, necessarily, that whatever duty was owed to the plaintiff in the construction of the wall was by the building company, with which he had a written contract on the subject; that the defendant owed the plaintiff no duty, and was not liable to him in damages.

2. There was no error in allowing the amendments to the petition. These amendments merely amplified the original petition, and set out more in detail the nature of the alleged defect in the buggy and the circumstances of the plaintiff's injury. By no construction can they be held to introduce a new cause of action.

Judgment reversed.

All the justices concur, except Simmons, C. J., absent.

### THE RIGHT TO RECOVER FOR NEGLIGENCE WHERE THERE IS NO PRIVACY.\*

- I. Doctrine of Nonliability Where There is No Duty or Privity.
- II. Modifications of This Doctrine.
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  - a. Firearms and Ammunition.
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  - j. Written Instruments.
    1. Wills and Certificates of Search of Records.
    2. Tax and Grain Certificates.

#### I. Doctrine of Nonliability Where There is No Duty or Privity.

Actions for negligence are for breaches of duty. And actionable negligence exists only when one negligently injures another to whom he owes the duty, created by contract or operation of law, of exercising care or skill: *Gibson v. Leonard*, 143 Ill. 182, 36 Am. St. Rep. 376, 32 N. E. 182; *Welch v. Walsh*, 177 Mass. 555, 83 Am. St. Rep. 302, 59 N. E. 440; *Baltimore etc. Ry. Co. v. Cox*, 66 Ohio St. 276, 90 Am. St. Rep. 583, 64 N. E. 119; *Woolwine v. Chesapeake etc. Ry. Co.*,

#### \*REFERENCES TO MONOGRAPHIC NOTES.

Liability for misrepresentations indirectly made to the complaining party: 85 Am. St. Rep. 368-391.

Contracts for the benefit of a third party, when he may sue thereon: 71 Am. St. Rep. 176-207.



36 W. Va. 329, 32 Am. St. Rep. 859, 15 S. E. 81. Proceeding upon this principle, the courts, perhaps, without exception, have laid down the general doctrine that ordinarily a contractor, manufacturer, or vendor is not answerable to third persons who have no contractual relations with him for negligence in the construction, manufacture or sale of those things in which he deals. Generally speaking, the limits of liability for negligence and for breaches of contract, in cases of this character, are identical. Under some circumstances, however, one may owe a general or universal duty of care and skill independently of, or in addition to, that imposed by contract, which he must exercise toward others than those with whom he holds contractual relations. This may be the case where the article or instrumentality causing injury is one inherently dangerous, or where it contains a known defect. But where the cause of the injury is not in its nature essentially or imminently dangerous, where it does not depend upon fraud, concealment, or implied invitation, and where the plaintiff is not in privity of contract with the defendant, actions for negligence cannot generally be maintained: *Heizer v. Kingsland etc. Mfg. Co.*, 110 Mo. 605, 33 Am. St. Rep. 482, 19 S. W. 630; *McCaffrey v. Mossberg etc. Mfg. Co.*, 23 R. I. 381, 91 Am. St. Rep. 637, 50 Atl. 651; *Huset v. J. I. Case Threshing Machine Co.*, 120 Fed. 865. The question is thoroughly considered in these three cases, and unusually able opinions rendered. Other decisions recognizing and applying the same rules are *Marvin Safe Co. v. Ward*, 46 N. J. L. 19; *Styles v. Long Co.*, 67 N. J. L. 413, 51 Atl. 710; *Blakemore v. Bristol etc. Ry. Co.*, 8 El. & B. 1035; *Longmeid v. Litchfield*, 6 Eng. L. & Eq. 562; *Tollitt v. Sherstone*, 5 Mees. & W. 283, 289.

Different reasons have been assigned for this doctrine, such as the necessity for limiting the range of possible litigation, the inexpediency of embarrassing contractors or manufacturers or vendors with liability for machines and structures which may be used or operated by third persons of all degrees of skill and diligence, and the inconvenience of allowing to third parties an interest in contracts which were intended only to create duties and obligations inter sese: *Roddy v. Missouri Pac. Ry. Co.*, 104 Mo. 234, 24 Am. St. Rep. 333, 15 S. W. 1112; *Marvin Safe Co. v. Ward*, 46 N. J. L. 19; *Huset v. J. I. Case Threshing Machine Co.*, 120 Fed. 865. Probably the true reason is that there is no causal connection between the injury and the negligence: *Field v. French*, 80 Ill. App. 78; *Heizer v. Kingsland etc. Mfg. Co.*, 110 Mo. 605, 33 Am. St. Rep. 482, 19 S. W. 630. "Where a right or duty is created wholly by contract, it can be enforced only between the contracting parties. But where the defendant has violated a duty imposed upon him by the common law, it seems just and reasonable that he should be held liable to every person injured whose injury is the natural and probable consequence of the misconduct. In our opinion, this is the well-established and ancient doctrine of the common law, and such liability extends to consequential injuries by whomsoever sustained, so long as they are



of a character likely to follow, and which might reasonably have been anticipated as the natural and probable result under ordinary circumstances of the wrongful act. The damage is not too remote if, according to the usual experience of mankind, the result was to be expected. An action can be maintained only where there is shown to be, first, a misfeasance or negligence in some particular as to which there was a duty toward the party injured or the community generally; and, secondly, where it is apparent that the harm to the person or property of another which has actually ensued was reasonably likely to ensue from the act or omission complained of. . . . The mere circumstance that there have intervened between the wrongful cause and the injurious consequence acts produced by the volition of animals or of human beings, does not necessarily make the result so remote that action can be maintained. The test is to be found, not in the number of intervening events or agents, but in their character, and in the natural and probable connection between the wrong done and the injurious consequences": *McDonald v. Snelling*, 14 Allen, 294, 92 Am. Dec. 768.

## II. Modifications of This Doctrine.

a. **In Case of Inherently Dangerous Articles.**—A well-recognized modification of the general rule of nonliability for negligence where there is no privity exists in the case of articles intrinsically dangerous to human life and health, such as a poison, an explosive, or the like. One who delivers an article which he knows to be inherently dangerous or noxious to another, without notice of its nature and qualities, is liable for any injury which may reasonably be contemplated as likely to result, and which does result therefrom, to that person or any other who is not himself in fault. Thus, one who, understanding its dangerous properties, sells naphtha to a retailer of illuminating fluids, who is ignorant of such properties, knowing it was the intention of the latter to retail it in his business, is liable to the wife of a purchaser of the retailer, who is injured while burning the fluid: *Wellington v. Downer Kerosene Oil Co.*, 104 Mass. 64. And a person who is negligent in manufacturing or bottling champagne cider may be answerable to one injured by an explosion thereof, without regard to contractual relations between them: *Weiser v. Holzman*, 33 Wash. 87, 99 Am. St. Rep. 932, 73 Pac. 797.

In the management and control of such a powerful and dangerous agency as electricity, persons and corporations are held to a very high degree of care and diligence to the public generally, as well as to those with whom they have contract relations: *Ennis v. Gray*, 87 Hun, 355, 34 N. Y. Supp. 379; note to *Hebert v. Lake Charles etc. Co.*, post, p. 515.

It is the duty of a shipper of dangerous goods and explosives to give notice of their nature, and a failure to do so renders him responsible for the consequences: *Standard Oil Co. v. Tierney*, 92 Ky. 367, 36 Am. St. Rep. 595, 17 S. W. 1025; *Barney v. Burnstenbinder*,

64 Barb. 212, 7 Lans. 213. If one delivers a carboy of nitric acid to a carrier, without advising him of the nature of the contents, he is answerable for an injury occasioned by the leaking out of the acid upon another carrier to whom it is delivered by the first in the ordinary course of transportation: *Farrant v. Barnes*, 11 Com. B., N. S., 553.

The placing of dynamite in a vacant lot, insufficiently covered and in such a position as to be readily discovered and easily tampered with by, and to form an attraction to, children accustomed to play upon or pass over the lot, is negligence which may cause liability for injury to such children from the explosive: *Nelson v. McLellan*, 31 Wash. 208, 96 Am. St. Rep. 902, 71 Pac. 747. See, also, *Harriman v. Pittsburgh etc. Ry. Co.*, 45 Ohio St. 11, 4 Am. St. Rep. 507, 12 N. E. 451; *Hughes v. Boston etc. R. R. Co.*, 71 N. H. 279, 93 Am. St. Rep. 518, 51 Atl. 1070. And if a railway company negligently suffers a car known to be loaded with giant and blasting powder to remain an unnecessary and unreasonable length of time upon a switch near many residences, where an explosion resulting from a fire started in an empty boxcar causes damage to the plaintiff's property, such negligence must be deemed to be the proximate cause of the damages: *Fort Worth etc. Ry. Co. v. Beauchamp*, 95 Tex. 496, 93 Am. St. Rep. 864, 68 S. W. 502.

**b. In Case of Fraud or Concealment.**—Fraud or deceit is a circumstance which may modify the general rule of nonliability where there is no privity. This is a circumstance which is usually present in the case of inherently dangerous articles, which has just received attention. But although an article is not in its nature inherently dangerous, still if it contains defects rendering it in fact dangerous to life and limb, the liability of one who puts it forth by fraud or deceit extends to persons injured thereby who may reasonably be deemed to be within the contemplation of the parties to the transaction. For example, if a tradesman sells or furnishes a folding-bed, representing it to be safe for the uses it is contemplated to serve, but knowing it to be dangerous because of concealed defects, he is answerable to one not a party to the sale who is injured by reason of the defective condition of the bed: *Lewis v. Terry*, 111 Cal. 39, 52 Am. St. Rep. 146, 43 Pac. 398. The same rule is applied in the principal case as against the vendor and manufacturer of a buggy, and in *Huset v. J. I. Case Threshing Machine Co.*, 120 Fed. 865, as against the vendor of a threshing machine.

And it is not necessary that the knowledge of the defective and dangerous condition of an article should exist at the time of its sale and delivery. It is enough that such knowledge on the part of the manufacturer existed at the time the article was made and placed in his general stock for sale. This was considered to be the law in *Schubert v. J. R. Clark Co.*, 49 Minn. 331, 32 Am. St. Rep. 559, 51 N. W. 1103, in respect to a stepladder made of poor, cross-

grained timber, the defective condition being concealed by paint and varnish. A painter, between whom and the manufacturer there was no privity, was injured by the breaking of the ladder, and the manufacturer was held liable for the injury. Said the court: "When the defendant manufactured and put the dangerously faulty article in its stock for sale, it is to be deemed to have anticipated that, in the ordinary course of events, it would come to the hands of a purchaser, either directly from the defendant or from some intermediate dealer, for actual use, and with the consequences which actually were suffered. It must have been deemed probable that any intervening dealer would not discover the defect, and that nothing would be likely to occur to avert the danger to which the person who might use the ladder would be subjected by the defendant's negligence; hence it would be difficult to distinguish such a case, in principle, from one where the transaction is directly between the wrongdoer, then knowing the danger, and the party who is injured. If any distinction is to be made it must rest upon grounds of expediency, the arbitrary fixing of a limit to the liability of the wrongdoer; but we consider that in principle the defendant should be held to responsibility for an injury resulting proximately, and without any intervening wrongful agency, from its confessedly negligent act, which was such as to expose another to great bodily harm; and that no reason of policy forbids this."

c. **In Case of Invitation to Use Dangerous Property.**—A still further modification of the general rule that there is no responsibility for negligence in the absence of privity between the person who is negligent and the person who is injured, exists as against the owner of dangerous premises or appliances who, by implication or otherwise, invites people to make use of the same. Such negligence and invitation on the part of an owner visit responsibility upon him for the consequences: *Pelton v. Schmidt*, 104 Mich. 345, 53 Am. St. Rep. 462, 62 N. W. 552; *Shobert v. May*, 40 Or. 68, 91 Am. St. Rep. 453, 66 Pac. 466; *Bright v. Barnett*, 88 Wis. 299, 60 N. W. 418. See the illustration of this principle in the case of persons giving public exhibitions and the like in *Hart v. Washington Park Club*, 157 Ill. 9, 48 Am. St. Rep. 298, 41 N. E. 620; *Thornton v. Maine Agricultural Soc.*, 97 Me. 108, 94 Am. St. Rep. 488, 53 Atl. 979; *Thompson v. Lowell, etc. Ry. Co.*, 170 Mass. 577, 64 Am. St. Rep. 323, 49 N. E. 913; *Sebeck v. Plattdeutsche Volkfest Verein*, 64 N. J. L. 624, 81 Am. St. Rep. 512, 46 Atl. 631.

### III. Application of the Doctrine to Particular Articles and Agencies.

a. **Firearms and Ammunition.**—Where a father buys a gun for the use of himself and sons, on the warranty that it is good and safe, whereas it is unsafe and dangerous, and the gun bursts in the hands of a son, the vendor is answerable therefor: *Levy v. Langridge*, 4 Mees. & W. 337. So, if one sells firearms to a child who is

incompetent to have charge of them, or intrusts him therewith, he is liable for injuries sustained to third persons occasioned by a discharge thereof: *Binford v. Johnston*, 82 Ind. 426, 42 Am. Rep. 508; *Gartin v. Meredith*, 153 Ind. 16, 53 N. E. 936; *Dixon v. Bell*, 5 Maule & S. 198.

**b. Oil, Gasoline, Lamps, and Meters.**—Petroleum has been held not to be a "dangerous agency," within the rule governing the liability of the vendor of an inherently dangerous article to persons other than the purchaser. It is held in *Standard Oil Co. v. Murray*, 119 Fed. 572, that an engineer who is injured by an explosion of petroleum cannot recover damages from the vendor, on the ground that the oil was not of the quality represented. And in *Goodlander Mill Co. v. Standard Oil Co.*, 63 Fed. 400, where the defendant shipped crude petroleum in a car having no valve regulating the flow, and the consignee removed it to a sidetrack, and then, knowing the car was leaking, drew off oil near the plaintiff's mill, and, owing to the absence of the valve, the oil rushed out, flowed into the mill, exploded and destroyed it, the defendant was held not liable. The soundness of these decisions is not free from doubt. It is clear that the manufacturer and seller of illuminating oil or gasoline, knowing it to be unsafe, is liable for injuries occasioned by it to others than the immediate vendee: *Elkins v. McKean*, 79 Pa. St. 493; *Waters-Pierce Oil Co. v. Davis*, 24 Tex. Civ. App. 508, 60 S. W. 453. If a vendor of gasoline fails to label it as required by statute, and a daughter of the buyer is injured by it, the seller is liable therefor: *Ives v. Welden*, 114 Iowa, 476, 89 Am. St. Rep. 379, 87 N. W. 408.

In *Collis v. Selden*, L. R. 3 C. P. 495, a declaration that the defendant negligently hung a chandelier in a public house, knowing the plaintiff and others were likely to be thereunder, and that it fell upon the plaintiff, was held bad on demurrer in not showing any duty to him for the breach of which an action would lie. And in *Longmeid v. Halliday*, 6 Ex. 765, where an action was brought for injuries sustained from an unsafe lamp sold to the husband of the plaintiff, a nonsuit was granted because the lamp was not a thing in its nature dangerous, and neither fraud nor knowledge was shown. Negligence in repairing a gas meter, however, whereby the gas escapes into a room, renders the repairer answerable to a servant of the owner of the premises who is hurt by an explosion of the gas: *Parry v. Smith*, L. R. 4 C. P. Div. 325.

**c. Drugs, Chemicals, and Toilet Articles.**—The general liability of druggists and apothecaries will be found discussed in the note to *Howes v. Rose*, 55 Am. St. Rep. 255-258. The liability of a druggist who, by mistake or negligence, sells a dangerous drug for a harmless medicine, is not confined to the purchaser, but extends to third persons who are injured thereby: *Norton v. Sewall*, 106 Mass. 143, 8 Am. Rep. 298; *Davis v. Guarnierie*, 45 Ohio St. 470, 4 Am. St. Rep. 548, 15 N. E. 350; *Peters v. Johnson*, 50 W. Va. 644, 88 Am. St. Rep.

909, 41 S. E. 190. And a manufacturing chemist or druggist who sells to a retail druggist a poison labeled as a harmless drug, is liable to one who takes such poison after it has been sold by the druggist for what it is labeled: *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455. So, the manufacturer of a proprietary medicine, furnishing it to druggists to be sold, is liable for injuries suffered by one who purchases the medicine from a druggist and takes it as directed: *Blood Balm Co. v. Cooper*, 83 Ga. 457, 20 Am. St. Rep. 324, 10 S. E. 118. A chemist who sells a substance, the ingredients of which are known only to himself, representing that it is fit for use as a hair wash, and knowing that it is to be so used by the purchaser's wife, is liable for injuries to her from using it to wash her hair: *George v. Skivington*, L. R. 5 Ex. 1. A druggist who fails to label a poison as required by statute is liable for the death of a child who gets the bottle from a mantel and drinks its contents: *Wise v. Morgan*, 101 Tenn. 273, 48 S. W. 971.

On the other hand, where one substance, black oxide of manganese, in itself harmless, which became dangerous only by being combined with another, was sold by mistake, the plaintiff, who purchased it of a third party and mixed it with another substance, the combination with which caused an explosion, was held to have no cause of action against the original vendor who made the mistake: *Davidson v. Nichols*, 11 Allen, 514. The manufacturer of soap was held not liable for an excess of alkali therein, which caused injury, when he had no knowledge of the fact: *Slattery v. Colgate*, 25 R. I. 220, 55 Atl. 639.

**d. Unwholesome Food.**—The furnishing of food or provisions which endanger human life or health stands on much the same ground as the administering of improper drugs or medicines, from which a liability springs irrespective of any question of privity of contract between the parties. A public caterer, employed to furnish refreshments at a public ball, is liable for an injury suffered by one attending, by reason of unwholesome provisions furnished by him: *Bishop v. Weber*, 139 Mass. 411, 52 Am. Rep. 745, 1 N. E. 154. This decision is cited with approval in *Craft v. Parker*, 96 Mich. 245, 55 N. W. 812, where it is held that a dealer who sells meat for consumption which is dangerous to those eating it, is answerable for the consequences to others than the purchaser, if he knew, or should have known, its condition. A restaurant keeper, however, is not an insurer of the food furnished his patrons, and therefore is not liable if they are made sick by eating it, unless he has been negligent: *Sheffer v. Willoughby*, 163 Ill. 518, 54 Am. St. Rep. 483, 45 N. E. 253.

**e. Horses, Vehicles, and Saddles.** If a wife is injured by a vicious horse, sold to her husband as a kind animal and good family horse, it has been decided that she has no remedy against the vendor, on the ground of false representations to her husband, where it does not appear that the seller understood that the animal was being purchased for her use, or that he expected she would rely on his representations: *Carter v. Hatten*, 78 Me. 528, 7 Atl. 392. The presence



of fraud in this case renders the correctness of the decision more than doubtful: See "Fraud or Concealment," ante. The seller of a side-saddle is held not liable to third persons, in the absence of fraud, who are injured through defects in its material or construction: *Bragdon v. Perkins-Campbell Co.*, 87 Fed. 109. In *Winterbottom v. Wright*, 10 Mees. & W. 109, A contracted with the postmaster general to provide a mail-coach to carry the mail along a certain line, and B contracted to horse the coach. B hired C to drive the coach. It was held that C could not maintain an action against A for injuries suffered while driving the coach, through its breaking down from a defect in its construction. But one letting an unsafe coach to a social club for an excursion is answerable to a guest of the club for his injuries: *Glenn v. Winters*, 40 N. Y. Supp. 659, 17 Misc. Rep. 597. It is said by the court, however, that there would be no liability in such a case to a stranger, that is, a person not connected with the club, or a member thereof, and not carrying out some right which the club or its members had in using the coach pursuant to the contract. It will be remembered that in the principal case, ante, p. 188, the manufacturer and vendor of a buggy who concealed defects therein and represented it to be a good safe vehicle, is held answerable to one who was not the purchaser, but for whose use the buggy was contemplated.

**f. Diseased Animals.**—One who, by false representations, sells to an innocent person a horse afflicted with glanders, is liable for the death of a person who contracts the disease while in charge of the animal for the purchaser: *State v. Fox*, 79 Md. 514, 47 Am. St. Rep. 424, 29 Atl. 601. But it is held in *Wells v. Cook*, 16 Ohio St. 67, that where the owner of diseased sheep falsely and fraudulently represents them as healthy to A, who, acting as the agent of B, buys them with the avowed purpose of mingling them with a flock then belonging to B, and as a result of the mingling the entire flock is infected, and, A and B still being unaware of the existence of the disease, A buys the whole flock and sustains further damage from the spread of the disease, the original owner is not liable to A. Compare "Fraud and Concealment," ante.

**g. Tools, Machinery, and Appliances.**—Where one undertakes to furnish appliances for a particular work, the negligent performance of which duty imperils the lives of many men, he is answerable for negligence to an injured person, notwithstanding there may be no privity between them: *Connors v. Great Northern Elevator Co.*, 85 N. Y. Supp. 644, 90 App. Div. 311. See, too, *Sweeney v. Rozell*, 64 N. Y. Supp. 721, 31 Misc. Rep. 640. If the owners of a threshing machine leave its bevel wheel and cogs uncovered, a laborer about the machine who is injured by the wheel and cogs in obeying an order to oil the cylinder, may recover from the owners of the machine, whether or not he was their servant at the time: *Mastin v. Levagood*, 47 Kan. 36, 27 Am. St. Rep. 277, 27 Pac. 122.

The manufacturer or vendor of a tool, machine, or appliance, which is not in its nature intrinsically dangerous, is not ordinarily liable for defects therein to one not in privity with him. This has been held to be the law in respect to a land roller (*Kuelling v. Roderick Lean Mfg. Co.*, 84 N. Y. Supp. 622, 88 App. Div. 309), a drop press (*McCaffrey v. Mossberg etc. Mfg. Co.*, 23 R. I. 381, 91 Am. St. Rep. 637, 50 Atl. 651), a threshing-machine cylinder (*Ileizer v. Kingsland etc. Mfg. Co.*, 110 Mo. 605, 33 Am. St. Rep. 482, 19 S. W. 630), a balance wheel (*Loop v. Litchfield*, 42 N. Y. 351, 1 Am. Rep. 543), a steam boiler (*Losee v. Clute*, 51 N. Y. 474, 10 Am. Rep. 638), a hoisting apparatus (*Burke v. De Castro*, 11 Hun, 354), a gasoline pear burner (*Talley v. Beever* (Tex. Civ. App.), 78 S. W. 23), a passenger elevator (*Field v. French*, 80 Ill. App. 78), or a freight elevator (*Zieman v. Kieck Elevator Mfg. Co.*, 90 Wis. 497, 63 N. W. 1021).

But the constructor of an elevator, while in possession of and operating it to ascertain why it does not work well, is liable to a stranger for injuries caused from its negligent and unsafe construction: *Necker v. Harvey*, 49 Mich. 517, 14 N. W. 503. And, generally, where machinery is originally defective when delivered and accepted, and thereafter the contractor or manufacturer is in charge of it for the purpose of making repairs or improvements, he must be held responsible to a third person for injuries from such defect or from his own negligence: *Empire Machinery Co. v. Brady*, 164 Ill. 58, 45 N. E. 486.

**h. Premises and Structures.**—In order to maintain an action for an injury due to negligence, there must be shown to exist some obligation or duty toward the plaintiff which the defendant has left undischarged or unfulfilled: *Sweeney v. Old Colony etc. R. R. Co.*, 10 Allen, 368, 87 Am. Dec. 644. Hence it is that the owner of dangerous premises is not answerable for injuries suffered by a trespasser or mere licensee who comes thereon without invitation, allurement, or right. To such persons he owes only the duty to do them no wanton or willful harm. This seems a harsh rule which justifies a man, legally, in keeping his property in a needlessly dangerous condition, but it has the support of the authorities without, perhaps, exception: *McCaughna v. Owasso etc. Electric Co.*, 129 Mich. 407, 95 Am. St. Rep. 441, 89 N. W. 73; *Paolino v. McKendall*, 24 R. I. 432, 96 Am. St. Rep. 736, 53 Atl. 268; *Uthermohlen v. Bogg's Run Co.*, 50 W. Va. 457, 88 Am. St. Rep. 884, 40 S. E. 410. In respect to buildings negligently or defectively constructed, the law seems to be that the contractor or builder is responsible only to his employer, and not to third persons with whom he has no contractual relations who suffer injury through his negligence: *Daughtery v. Herzog*, 145 Ind. 255, 57 Am. St. Rep. 204, 44 N. E. 457; *Curtin v. Somerset*, 140 Pa. St. 70, 23 Am. St. Rep. 220, 21 Atl. 244. The same rule is applied to the case of a public bridge in *Mayor etc. of Albany v. Cunliff*, 2 N. Y. 165, and in the case of a platform or scaffold in *Swan v. Jackson*, 55 Hun, 194, 7 N. Y. Supp. 821.

It seems, however, that the law is otherwise where from the nature and position of the structure it is evident that death or great bodily

harm would be the natural and inevitable consequence of negligent construction. Such is held to be the law in respect to defective staging and scaffolds (*Coughtry v. Globe Woolen Co.*, 56 N. Y. 124, 15 Am. Rep. 387; *Devlin v. Smith*, 89 N. Y. 470, 42 Am. Rep. 311; *Bright v. Barnett*, 88 Wis. 299, 60 N. W. 418; *Heaven v. Pender*, L. R. 11 Q. B. D. 503), and also in respect to a dangerous derrick: *Davies v. Pelham Hod Elevating Co.*, 65 Hun, 573, 20 N. Y. Supp. 523. Perhaps some of the above decisions in which the structure involved was a scaffold are based on the theory of implied invitation. But at least one of them—*Devlin v. Smith*, 89 N. Y. 470, 42 Am. Rep. 311—is placed on the ground that the structure was such as to be eminently dangerous to life, and to render serious injury to any person using it the natural and probable consequence of its use.

The subcontractors of one who has agreed with the owner to move and fit up a building in a workmanlike manner are liable to the owner for negligent injury to the building in doing the work, although there is no privity of contract between them. The gist of the action is the breach of duty owed by the subcontractor to the owner not to negligently injure his property, which duty does not grow out of or depend on contract: *Bickford v. Richards*, 154 Mass. 163, 26 Am. St. Rep. 224, 27 N. E. 1014.

**1. Railways and Carriers.**—A master cannot sue a carrier, according to *Alton v. Midland R. R. Co.*, 19 Com. B., N. S., 213, for injuries to his servant, where the contract out of which arose the duty of transportation is between the carrier and the servant. And according to *Aiken v. Southern Ry. Co.*, 118 Ga. 118, 98 Am. St. Rep. 107, 44 S. E. 828, the purchase of an ordinary railway ticket by a husband for his wife does not constitute a contract between him and the carrier for her safe transportation, but the contract for safe passage which the law implies is in her favor, and in her behalf alone can an action be maintained for its breach.

A railroad company is not answerable, it seems, to a trespasser on its train for negligence, and owes him no duty other than doing him no wanton, willful or grossly negligent injury: *Earl v. Chicago etc. Ry. Co.*, 109 Iowa, 14, 77 Am. St. Rep. 516, 79 N. W. 381; *Mendenhall v. Atchison etc. Ry. Co.*, 66 Kan. 438, 97 Am. St. Rep. 380, 71 Pac. 846; *Richmond etc. R. R. Co. v. Burnsed*, 70 Miss. 437, 35 Am. St. Rep. 656, 12 South. 958; *Baltimore etc. Ry. Co. v. Cox*, 66 Ohio St. 276, 90 Am. St. Rep. 583, 64 N. E. 119. But it is liable to him for injuries due to reckless or wanton conduct, or gross negligence amounting to willfulness: *Illinois Cent. R. R. Co. v. Leiner*, 202 Ill. 624, 95 Am. St. Rep. 266, 67 N. E. 398; *Enright v. Pittsburg etc. R. R. Co.*, 198 Pa. St. 166, 82 Am. St. Rep. 795, 47 Atl. 938; *Bolin v. Chicago etc. Ry. Co.*, 108 Wis. 333, 81 Am. St. Rep. 911, 84 N. W. 446. As to how far the railway company's liability may be modified by the fact that the injured person is riding by the invitation or assent of its employes, see *Lake Shore etc. R. R. Co. v. Brown*, 123 Ill. 162, 5 Am. St. Rep. 510, 14 N. E. 197; *Matthews v. Great Northern Ry. Co.*, 81 Minn. 363, 83 Am.

St. Rep. 383, 84 N. W. 101; Baltimore etc. Ry. Co. v. Cox, 66 Ohio St. 276, 90 Am. St. Rep. 583, 64 N. E. 119.

Statutory requirements as to the giving of signals by a railroad company when trains approach a crossing are held to be only for the benefit of persons about to cross the track at the usual crossings: Louisville etc. R. R. Co. v. Hall, 87 Ala. 708, 13 Am. St. Rep. 84, 6 South. 277; Atlanta etc. Ry. Co. v. Gravitt, 93 Ga. 369, 44 Am. St. Rep. 145, 20 S. E. 550; Cleveland etc. Ry. Co. v. Workman, 66 Ohio St. 509, 90 Am. St. Rep. 602, 64 N. E. 582. The statute imposes no duty on the company as to farmers at work in adjoining fields, and they cannot recover for the negligence of the company in failing to give the required signals: Williams v. Chicago etc. R. R. Co., 135 Ill. 491, 25 Am. St. Rep. 397, 26 N. E. 661.

A railway company which delivers a defective car to a connecting carrier is not, according to some authorities, liable for injuries sustained by an employé of the latter by reason of such defect, after the receiving company has inspected the car and taken it in charge for transportation over its line: Missouri etc. Ry. Co. v. Merrill, 65 Kan. 436, 93 Am. St. Rep. 287, 70 Pac. 358; Glynn v. Central R. R. Co., 175 Mass. 510, 78 Am. St. Rep. 507, 56 N. E. 698; Sawyer v. Minneapolis etc. Ry. Co., 38 Minn. 103, 8 Am. St. Rep. 648, 35 N. W. 671. But see Moon v. Northern Pac. R. R. Co., 46 Minn. 106, 24 Am. St. Rep. 194, 48 N. W. 679; Pennsylvania R. R. Co. v. Snyder, 55 Ohio St. 342, 60 Am. St. Rep. 700, 45 N. E. 559. A car with defective brakes, so it is held in Roddy v. Missouri Pac. Ry. Co., 104 Mo. 234, 24 Am. St. Rep. 333, 15 S. W. 1112, is not an imminently dangerous instrument, so as to render the railway company liable to the servant of another, in the absence of some relation between the servant and the company, arising out of contract or otherwise. The servant referred to in that case was employed by a quarry owner to whom the railway company furnished the unsafe car on his sidetrack.

### J. Written Instruments.

1. **Wills and Certificates of Search of Records.**—The liability of one who undertakes to search the records to determine the state of the title to real estate is by the weight of authority confined to those who employ him: See the monographic notes to Worden v. Witt, 95 Am. St. Rep. 87, 88; Brown v. Sims, 72 Am. St. Rep. 317-319. One who loans money on the faith of a search not made for him has been held to have no cause of action for negligence in the search whereby a deed was omitted: Day v. Reynolds, 23 Hun. 131. But see Brown v. Sims, 22 Ind. App. 317, 72 Am. St. Rep. 308, 53 N. E. 779; Peabody Bldg. etc. Assn. v. Houseman, 89 Pa. St. 261, 33 Am. St. Rep. 757. And the liability of a recorder of deeds is to the person who asks and pays for the certificate of search, and not, it is held, to his assigns or alienees: Houseman v. Girard Nat. Bldg. etc., 81 Pa. St. 256.

The liability of an attorney is usually to his client only. If he examines a title and pronounces it good, when in fact it is bad, a third

person relying thereon has no right of action: *Savings Bank v. Ward*, 100 U. S. 195. And a son cannot recover of an attorney damages suffered by him through the negligence of the attorney in preparing his mother's will, the employment being by her and not by him: *Buckley v. Gray*, 110 Cal. 339, 52 Am. St. Rep. 88, 42 Pac. 900.

2. **Tax and Grain Certificates.**—A grain inspector who negligently, but without fraud, issues a false certificate is not liable to a purchaser of the grain upon the faith of the certificate, but with whom the inspector has not contracted: *Gordon v. Livingston*, 12 Mo. App. 267. And if a tax collector is neither authorized nor required by law to give certificates that property is discharged from taxes, his receipts given in the usual course of business, if used for such purposes, are used at the peril of those relying thereon: *Kahl v. Love*, 37 N. J. L. 5.

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## BURT v. STOCKS COAL COMPANY.

[119 Ga. 629, 46 S. E. 828.]

**EXEMPTIONS.**—A **Dentist's Chair** is not exempt from execution as a "common tool of trade," nor as a chair suited to the "use of the family." (pp. 203, 204.)

L. R. Ray, for the plaintiff in error.

W. H. Terrell, for the defendant in error.

629 LAMAR, J. An execution in favor of Stocks Coal Company against W. P. Burt, a dentist, was levied upon a dentist's chair, which was claimed as exempt both as a chair and as a common tool of trade of himself under the statutory or short homestead: Civ. Code, sec. 2866, pars. 5, 8. The schedule of exempted property included "one dental chair (tool of trade), seventy-five dollars, one lounge, two tables, six chairs, one carpet, and other office fixtures, wearing apparel, fifty dollars," besides other property not material to the questions here involved. The property was found not subject to the execution. The judge of the superior court sustained a certiorari, and Dr. Burt excepted.

It is not necessary to determine whether Civil Code, section 2866, paragraph 8, was intended to make a distinction between trade and profession; for the phrase "common tools of trade" therein has uniformly been construed to refer, not to tools in common use by the debtor regardless of their value, but to those simple and inexpensive appliances used in his <sup>630</sup> trade: *Lenoir*



v. Weeks, 20 Ga. 596; Kirksey v. Rowe, 114 Ga. 893, 88 Am. St. Rep. 65, 40 S. E. 990. Nor does the dentist chair come within the Civil Code, section 2866, paragraph 5, exempting "one table and set of chairs sufficient for the use of the family." Indeed it was not so scheduled when the petition was filed. The chair may be set apart, as exempt from levy and sale, under the Civil Code, section 2827, but not under section 2866.

Judgment affirmed.

All the justices concur, except Simmons, C. J., absent.

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*Exemption Laws* are construed liberally in favor of the debtor: Dayton v. Ewart, 28 Mont. 153, 72 Pac. 420, 98 Am. St. Rep. 549, and cases cited in the cross-reference note thereto. That the library and implements of a professional man are exempt from execution, see Roberts v. Moudy, 30 Neb. 683, 27 Am. St. Rep. 426, 46 N. W. 1013; Equitable Life Assur. Soc. v. Goode, 101 Iowa, 160, 63 Am. St. Rep. 378, 70 N. W. 113. As to the exemption of tools of a dentist, see Maxon v. Perrott, 17 Mich. 332, 97 Am. Dec. 191; monographic note to Skinner v. Conant, 21 Am. Dec. 554.

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## HILTON & DODGE LUMBER COMPANY v. INGRAM.

[119 Ga. 652, 46 S. E. 895.]

**EMPLOYER'S LIABILITY** When One Servant Assigns a Task to Another.—If a master employs competent employés, and a fellow-servant of the plaintiff, without the master's knowledge or authority, selects one of such employés and transfers him from work he can do to work he cannot do, the act of thus assigning him is not the negligence of the master, but that of a fellow-servant. (p. 206.)

**VICE-PRINCIPAL, Fellow-Servant Assuming to Act as.**—A fellow-servant, without his master's knowledge, cannot, by an assumption of authority, convert himself into a vice-principal. (p. 206.)

**EMPLOYER'S LIABILITY**—Instruction Without a Special Request.—If, in an action against an employer for injuries received by an employé, there is evidence to warrant the defendant's contention that the injuries were due to an accident, he is entitled to a charge adjusted to that theory, without a special request therefor. (p. 208.)

W. E. Kay and W. G. Brantley, for the plaintiff in error.

D. W. Krauss and Toomer & Reynolds, for the defendant.

**652 LAMAR, J.** Lumber as sawn was trucked along an elevated platform or "brow," and thence lowered to a pile on the ground. Dudley was inspector on the brow. The regular truckman, Bryan, was absent. There is a conflict in the evidence

as to who selected Anderson <sup>653</sup> to act as a substitute. Anderson testifies that he was directed to leave his work on the ground, and to take Bryan's place, by Lyles, the general superintendent, of the defendant company; and that he objected at the time, saying that he "had not experience enough to do that work, and had never done it." Dudley testifies that he "picked up" Anderson "and put him there to work"; but, on cross-examination, says he is not positive whether he or Lyles put Anderson "up there." Wiles, who was in charge of the hands in the yard, testifies: "I do not know anything about who sent . . . Anderson out on the brow . . . Dudley requested me to send him a man, and I sent Anderson; he was in my charge that morning." There is no evidence that either Dudley or Wiles had the right to employ or discharge, or to assign employes engaged in one department to work in another; no evidence that either knew that Anderson was inexperienced, incompetent, or unable to truck lumber on a two-wheeled truck, and no evidence that the master knew of the absence of the regular truckman, or that Anderson had been assigned to the new work. Lyles, the general superintendent, was dead at the time of the trial. There was evidence that Ingram, the plaintiff, had originally employed Anderson for the company, when Anderson was a boy of about fourteen years; that afterward Ingram had promoted Anderson to a man's work and pay; that Anderson had been with the company for three or four years, engaged at different classes of work, and had trucked lumber on the ground with a four-wheeled truck; that he had sometimes worked on the brow, but not with a two-wheeled truck; that during the morning of the day of the injury another employe assisted Anderson with the two-wheeled truck; that in the afternoon, while Anderson alone was pushing the lumber, the truck "got away from him," and a stick of lumber fell through a hole on the edge of the platform, striking Ingram, who was inspecting lumber underneath. The plaintiff insists that the company was negligent in allowing Anderson, an incompetent and inexperienced boy, to engage in the work, and was also negligent in allowing the hole to remain in the platform. The company insists that Anderson was competent to perform the work, which required strength but no special skill; that the lumber fell while being placed sidewise on the pile on the ground; that it did not fall through the hole, and that the injury was occasioned either by <sup>654</sup> the negligence of a fellow-servant of the plaintiff, or as the result of an accident for which no one was to blame. Among other grounds of the mo-

tion for a new trial it was alleged that the court erred in failing to charge on the theory that the plaintiff's injuries were occasioned by the accident; and in charging that if Anderson was assigned to work on the brow by the general superintendent, or the inspector Dudley, then such officer or agent would be the alter ego of the defendant, and any negligence in this respect, if any be shown, would be attributable to the company. The defendant assigns as error that this charge was unauthorized by the evidence, and was in direct conflict with the further charge of the court that the inspector Dudley, the truckman Anderson, and the plaintiff were all fellow-servants; and that under the testimony Dudley was under the jurisdiction and subject to the control of the superintendent Lyles, not an alter ego of the defendant, but a fellow-servant of the plaintiff.

There was evidence from which the jury could have found that Anderson was transferred from the work on the ground, for which he was competent, to work with a two-wheeled truck on the elevated platform, for which he was alleged to be incompetent. This assignment to a new department of work was by the concurrent action of Wiles, who was in charge of the hands in the yard, and Dudley, who was inspector of lumber on the elevated platform. All three were fellow-servants of the plaintiff, Ingram. The record presents the question as to the responsibility of the master for injuries inflicted by Anderson upon Ingram, Anderson being competent for the work for which he was selected, and alleged to be incompetent for the new task for which he had been assigned to fill a vacancy caused by temporary absence of the regular truckman. The master is bound to furnish safe material and safe appliances with which, and competent servants by whom, his work is to be carried on. If, however, he complies with this requirement of the law, and a fellow-servant of the plaintiff, out of proper instrumentalities and agencies, makes an improper selection, the employer is not liable to a coemployé injured as a result thereof. If the <sup>655</sup> master supplies the proper material, and the plaintiff's fellow-servant selects, from the mass of good lumber supplied, a piece which is too small, or puts it together so unskillfully as to construct an unsafe ladder, staging, or scaffold, in consequence of which the same falls, the resulting injury is referable to the negligence of the fellow-servant in making an unfit selection, or in improperly putting together the proper material furnished. By parity of reasoning, when the master performs the duty imposed by law of employing competent servants, and a fellow-servant of the

plaintiff, without the master's knowledge or authority, selects, from the competent servants thus employed, one who is unsuited for the special task, and transfers him from work he can do to work he cannot do, the act of thus assigning him is not the negligence of the master, but that of a fellow-servant. It was therefore error to charge that whether the servant alleged to be incompetent was assigned to the task by the general superintendent, or by the inspector, in either case they would be the company's alter ego, and negligence by either would be attributable to it. A fellow-servant without the master's knowledge cannot, by an assumption of authority, convert himself into a vice-principal or alter ego.

Treating the assignment of Anderson to the new duty as the equivalent of an original employment for that purpose, the result is not different. The duty of selection need not always be performed by the master himself. In the nature of things, in the case of corporations such selection must be by agents. If the one to whom this duty has been committed is negligent, it is treated as the negligence of the master. On the other hand, if the agent making the selection was diligent, it is to be treated as the diligence of the master. If the record is silent as to whether the agent making the selection was negligent or diligent, then it is the same as though the record were silent as to the master's conduct in transferring Anderson from one task to another. There is no presumption in such a case against the master, nor does any presumption arise from the happening of the injury; but it must appear that the master, or the person authorized to make the selection, knew, or negligently failed to learn, of the incompetency of the person selected: *McDonald v. Eagle & Phenix Co.*, 68 Ga. 842. There is here neither evidence nor presumption that Dudley himself was incompetent, or that he knew, or was negligent in failing <sup>656</sup> to know, that Anderson was unsuited for the work of trucking on the elevated platform.

One would suppose that there were many cases in which the question presented by the charge here had been discussed and decided; but after diligent search we have found few bearing on the point. In *Norfolk R. Co. v. Thomas*, 90 Va. 205, 44 Am. St. Rep. 909, 17 S. E. 884, it was raised, but left open. In other cases, where a fireman had been permitted to do the work of an engineer, the company was held liable to the injured plaintiff, it appearing that the conductor who made the assignment was authorized so to do by the company, and knew of the incompe-



tency of the fireman; or else that the defendant knew of the custom to permit firemen to perform such duties: *Harper v. Indianapolis R. Co.*, 47 Mo. 567, 4 Am. Rep. 353; *Ohio etc. Ry. Co. v. Collarn*, 73 Ind. 261, 38 Am. Rep. 134; *McElligott v. Randolph*, 61 Conn. 157, 29 Am. St. Rep. 181, 22 Atl. 1094; *Henry v. Brady*, 9 Daly, 142; *Fraser v. Schroeder*, 163 Ill. 459, 45 N. E. 288. Compare *Blackman v. Thomson-Houston Co.*, 102 Ga. 69, 29 S. E. 120. There are, however, a few cases directly in point, from which we quote. In *Felch v. Allen*, 98 Mass. 572, it was held that if, without authority from the master in whose warehouse they are engaged in the same work, one of two servants directs the other to use in the work an elevator in a dangerous and improper manner, for which it was not intended, and the master had no reason to believe that it would be so used, and such other in complying with this direction is injured by a fall caused by a defect in the elevator, the master is not liable in damage for the injury. In *Greenwald v. Marquette R. R.*, 49 Mich. 199, 13 N. W. 513, an engineer allowed a fireman to operate the engine. Without warning he backed the train; and the court held that the plaintiff was not entitled to recover, as the injury was occasioned by the negligence of the fireman, who was a fellow-servant: See, also, *Thompson v. Lake Shore R. Co.*, 84 Mich. 281, 47 N. W. 584.

In *Houston etc. R. R. Co. v. Myers*, 55 Tex. 110, the engineer was competent, but was not on the engine, which was being operated by the fireman, who backed rapidly without giving the signal. The court said: "Conceding that it was an act of negligence upon the part of the engineer to leave the engine in the hands of the fireman, to be operated by him, and that it was an act of negligence for the fireman to attempt to operate the 657 same, still the testimony shows that the engineer selected by the company, and placed in charge of the engine, was a good and competent man for the business, and that this is the isolated act of negligence shown by the record, upon his part. Neither is there any complaint but that the fireman was a good and competent man for the business for which he had been selected, and to which he had been assigned by the company. If, as claimed by appellee, the injury was the direct result of negligence of the engineer and fireman, then he not only failed to show the use of [want of] reasonable care upon the part of the company in selecting and retaining such servants, but he affirmatively shows that the engineer is a good and competent man for the business. Upon clear and well-established principles of law, appellee could



not recover for the injury on account of the neglect of his fellow-servants, under the facts and circumstances of this case."

In *Core v. Ohio River R. R. Co.*, 38 W. Va. 468, 18 S. E. 600, where a brakeman was injured by the alleged negligence of a fireman who had been permitted by the engineer to operate the locomotive, the court held that it was necessary for the plaintiff to show that the fireman was incompetent; that he was negligent; that the defendant knew he was unskilled; that the plaintiff did not know it; that the fireman was managing the engine, and "that the defendant permitted, either expressly or impliedly, the fireman to manage the engine." Compare *Wright v. New York Cent. R. R. Co.*, 25 N. Y. 562, which, however, has been criticised because there the inexperienced engineer was assigned to duty by the superintendent, whose negligence was that of the company.

There was evidence to warrant the contention on the part of the defendant that the injury was the result of an accident, and it was entitled to a charge adjusted to that theory, without a special request therefor.

The foregoing conclusions require the grant of a new trial, and it is unnecessary to consider in detail the other grounds.

658 Judgment reversed.

All the justices concur, except Simmons, C. J., absent.

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*The Subject of Fellow-servants* is discussed in the monographic note to *Fox v. Sanford*, 67 Am. Dec. 588-597; and the subject of vice-principals is discussed in the monographic note to *Mast v. Kern*, 75 Am. St. Rep. 584-640. Whether employes are fellow-servants does not depend upon their respective grade or rank, but upon the nature of the services being rendered: *Wiskie v. Montello Granite Co.*, 111 Wis. 443, 87 Am. St. Rep. 885, 87 N. W. 461; *McLaine v. Head*, 71 N. H. 294, 93 Am. St. Rep. 522, 52 Atl. 545. A fellow-servant may, temporarily, be elevated to the rank of vice-principal: *Shroufe v. Moran*, 28 Wash. 681, 92 Am. St. Rep. 847, 68 Pac. 896. A beginning has been made toward the abolition by statute of the fellow-servant rule: See the monographic note to *Houston etc. Ry. Co. v. De Walt*, 97 Am. St. Rep. 891.

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## NORTHINGTON-MUNGER-PRATT COMPANY v. FARMERS' GIN AND WAREHOUSE COMPANY.

[119 Ga. 851, 47 S. E. 200.]

**SALE of Property to be Acquired in the Future.**—One may contract to convey property to be acquired in the future. He may make the contract conditional upon his being able to acquire title from some one else; but if he contracts absolutely, he will be bound by the terms of his agreement. (p. 211.)

**SALE—Damages Against Vendor for Failure to Consummate.**—Where a sale is made, the title not to pass until the purchase price is paid, and if, on default in payment the vendor resells the chattel to a third person, but thereafter, the first vendees refusing to surrender possession, the vendor makes terms with and allows one of them to take or retain the chattel, the second vendee may recover damages for breach of the contract made with him. (p. 211.)

The Northington-Munger-Pratt Company sold a cotton gin to Freeman & Williams, to be paid for in installments, title to remain in the vendors until the purchase price was paid. There was a default in the payment of the first note, whereupon the vendors instructed their agent, Baker, to obtain possession of the outfit and sell it. He notified the Farmers' Gin and Warehouse Company of the default, and negotiated for a sale of the gin plant to that company. It made an offer, which was reported to the Northington company, which instructed Baker to accept it. The contract was reduced to writing, whereby the president of the Farmers' company offered "one thousand dollars for the gin outfit including the house located at Rover," to be paid for "upon the Northington company giving possession and a good title to the same." This offer was marked "accepted" and signed by Baker for the Northington company. Subsequently Baker demanded possession of the gin from Freeman & Williams, who refused to surrender it, stating that one of the firm was willing to pay his proportion of the price, while the other was not. Freeman, after further negotiations, for twelve hundred and fifty dollars, took a transfer of the purchase money notes and took or retained the gin. The Northington company reported these facts to the Farmers' company, and insisted that the sale to them was conditional on the Northington company obtaining possession and being able to make good title. The Farmers' company sued for damages. The judge instructed the jury that there was a contract between the plaintiff and the defendant, and that damages were recoverable. The

jury found for the plaintiff seven hundred and fifty dollars, and to the refusal for a new trial the defendant excepted.

C. J. Lester and W. W. Lambdin, for the plaintiff in error.

Thomas F. Corrigan and James L. Mayson, for the defendant in error.

**853** LAMAR, J. There was no plea of the statute of frauds, and the pleadings of the defendant, as well as the correspondence, written contract, and undisputed evidence leave no room to question the making of the contract on the terms stated or the authority of the agent to sell. The offer and acceptance made a complete contract, the obligation of each furnishing a sufficient consideration for that of the other: Civ. Code, sec. 3661. The defendant insists that, construed in the light of the circumstances when the contract was made, it appears that the acceptance was with full knowledge by the buyer that the vendor was not in possession of the gin, and that it would be obliged to secure the property before it could comply. One cannot make good title to that which he does not own. But that does not prevent him from contracting to convey property to be acquired by him in the future. He may make the obligation conditional upon his being able to acquire title from someone else (*Lacy v. Hall*, 37 Pa. St. 360; *Forsyth v. Castlen*, 112 Ga. 199, 81 Am. St. Rep. 28, 37 S. E. 485, Civ. Code, sec. 3537); but if he contracts absolutely, he will be bound by the terms of his agreement. And even if because of the want of title a decree for specific performance could not be rendered, this would not deprive the purchaser of his right to damages for the breach. Here the contract was not conditional. The offer to buy and the acceptance were absolute. The only uncertainty was as to the time when the payment should be made. That, instead of being fixed by the date of the month, was postponed until the vendor made a good title and delivered possession. The Farmers' company was bound to pay one thousand dollars for the **854** gin outfit, if within a reasonable time the seller tendered a good title and made delivery. On the other hand, the Northington company was bound within a reasonable time to tender such title and surrender possession. If a destruction of the property sold, or other fact, had operated to release the vendor from its liability under the contract, it is elementary that the Northington company could not sell the gin to Freeman, and claim that it had become impossible to comply with its agreement. It could not

disable itself, and then take advantage of its own wrong when sued for the consequent breach: Civ. Code, sec. 3725; Pomeroy on Specific Performance of Contracts, 2d ed., sec. 475. There was evidence to sustain the verdict as to the amount of the damages.

Judgment affirmed.

All the justices concur.

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*A Contract for the Sale of goods is not invalid because the vendor does not have them at the time, or because they are not yet in existence: See Forsyth Mfg. Co. v. Castlen, 112 Ga. 199, 37 S. E. 485, 81 Am. St. Rep. 28, and note.*

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## HARP v. SOUTHERN RAILWAY COMPANY.

[119 Ga. 927, 47 S. E. 206.]

**CARRIERS—Loss of Ticket.**—If a passenger fails to produce his ticket, he cannot establish a right to transportation by making proof to the conductor that he has purchased a ticket but has lost it, even though such proof includes the testimony of another employé on the train to the effect that the passenger just showed him the ticket, and that as he handed it back the wind blew it away. (p. 214.)

**PLEADING—Amendment.**—If a general demurrer to a petition is sustained, and the judgment affirmed in the supreme court, there is nothing to amend by. (p. 214.)

Action by Harp against the Southern Railway Company for wrongful expulsion from its train. He alleged that he purchased a ticket over the defendant's road; that when on the rear platform of the train an employé of the company, whom he supposed was the conductor, asked where he was going, whereupon he showed the employé his ticket; that the employé took the ticket, and after looking at it, handed it back, when it was blown out of his hands; that presently the conductor demanded his ticket, whereupon, he explained the circumstances of its loss, the employé corroborating his statements; that the conductor ordered him to leave the train, and put his hand on him for the purpose of removing him, when he leaped from the train, which was running from ten to fifteen miles an hour, to escape being forcibly expelled; that there were few passengers for the station of his destination, and the conductor could have easily telegraphed to the ticket agent who sold the ticket and ascertained that the ticket had been sold as stated; that he did not have suf-

ficient money to pay his fare when the ticket was demanded; that he was compelled to walk some fifteen miles; and that his expulsion was aggravated by the threats and commands of the conductor. The defendant demurred generally and specifically on the grounds that there was no cause of action alleged, that the complaint was duplicitous, and that it was uncertain whether the action was for an illegal expulsion or for an abuse of duty in a lawful expulsion. The court passed an order reciting that "the plaintiff admitted that the suit was only for the wrongful expulsion, and that the company had a regulation authorizing conductors to eject passengers who neither paid fare nor produced a ticket," and directing that the general demurrer be sustained and the case dismissed. Plaintiff requested, in his brief, that if the judgment should be affirmed, leave be granted him to amend by alleging that the conductor failed to demand the cash fare.

M. D. Womble and W. R. Hammond, for the plaintiff.

Dorsey, Brewster & Howell and J. R. Hutcheson, for the defendant.

929 LAMAR, J. This suit was for wrongful expulsion, and not for damages inflicted upon the plaintiff as a result of his being compelled to alight from a moving train. The fact that one actually purchased a ticket, and that this was known to the agent who sold it, or to the gatekeeper who examined it, or to employes on the train who saw it, would not relieve the passenger of the obligation to surrender it to the conductor. Tickets vary in their terms. Some are good only on certain trains; others only on particular dates; others require validation. The mere fact that the plaintiff has a ticket does not, therefore, necessarily establish his right to be transported on a given train. These matters must be passed on by the conductor, and not by other employes who are not charged with this duty by the company. When the conductor makes his demand, he is entitled to have the ticket surrendered. He cannot be required to hear evidence or investigate the bona fides of the passenger's excuse for its nondelivery, nor to wait until he arrives at the next station and, by telegraphic correspondence with the selling agent, undertake to verify the correctness of the plaintiff's statement, or determine the character and validity of the ticket sold. It is manifest that such course would necessarily give rise to delay, and seriously interfere with the operation of trains and the rights



of the traveling public. Had the plaintiff's money blown out of his hand, it is evident that his misfortune would have to fall upon himself and not upon the company. Such loss would not have prevented his lawful eviction. The same result would follow where the ticket itself was lost; for it might have come into the hands of another, and the company might thereby have been compelled to carry two passengers for one fare. Besides, any rule allowing an excuse as a substitute for a ticket would give rise to so much uncertainty and so many possibilities of fraud that the courts have uniformly held that the failure to pay the fare or produce the ticket warrants an eviction. In fact, the plaintiff in error concedes the general rule to be that the passenger must produce his ticket, pay his fare, or suffer expulsion. He insists, however, that the special circumstances take this case out of the general rule. We fail to find any case warranting such a holding. Those cited by him, in *Sloane v. Southern Cal. R. Co.*, 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193, and *Schofield v. Pennsylvania Co.*, 112 Fed. 855, 50 C. C. A. 553, 56 L. R. A. 224, as well as *Pullman P. C. Co. v. Reed*, 75 Ill. 125, 20 Am. Rep. 232, were on facts essentially different. See, on the general subject, *Louisville etc. R.R. Co. v. Fleming*, 14 Lea, 128; *Rogers v. Atlantic City R. R. Co.*, 57 N. J. L. 703, 34 Atl. 11; *Fetter on Carriers*, sec. 279. Compare *Southern Ry. Co. v. De Saussure*, 116 Ga. 53, 42 S. E. 479; *Georgia etc. Ry. Co. v. Asmore*, 88 Ga. 529, 15 S. E. 13, 16 L. R. A. 53. Pleadings are to be strictly construed against the pleader. Here it affirmatively appears that plaintiff did not have funds with which to pay the cash fare. The general demurrer having been sustained, and the judgment affirmed here, there is nothing to amend by. It is not like the case where the demurrer was overruled in the lower court and the judgment reversed, nor like the case where the demurrer was sustained or should have been sustained only on a special ground not concluding the merits: *Central R. Co. v. Patterson*, 87 Ga. 646, 13 S. E. 525; *Savannah Ry. Co. v. Chaney*, 102 Ga. 817, 30 S. E. 437; *Brown v. Bowman*, 119 Ga. 153, 46 S. E. 410. There is nothing in the facts here to require the exercise of any discretionary power by this court to permit such amendment.

Judgment affirmed.

All the justices concur.

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*On the Right of a Carrier to require passengers to produce their tickets on pain of expulsion, see Mahoney v. Detroit St. Ry. Co.*, 93 Mich. 612, 32 Am. St. Rep. 528, 53 N. W. 793; *Van Dusan v. Grand*

Trunk Ry. Co., 97 Mich. 439, 56 N. W. 848, 37 Am. St. Rep. 354, and cases cited in the cross-reference note thereto; Monnier v. New York Cent. etc. R. R. Co., 175 N. Y. 281, 96 Am. St. Rep. 619, 67 N. E. 569; Garrison v. United Ry. etc. Co., 97 Md. 347, 99 Am. St. Rep. 452, 55 Atl. 371. It is held that where a passenger purchases a berth in a sleeping-car, loses it, and gives evidence to the conductor that he has done so, he may recover damages from the sleeping-car company if the conductor expels him and compels him to ride in a common car: Pullman Palace Car Co. v. Reed, 75 Ill. 125, 20 Am. Rep. 232. As to the effect of giving a passenger a wrong transfer, see Indianapolis St. Ry. Co. v. Wilson, 161 Ind. 153, post, p. 261, 67 N. E. 993.

CASES  
IN THE  
SUPREME COURT  
OF  
ILLINOIS.

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CHICAGO CITY RAILWAY COMPANY v. LEACH.

[208 Ill. 198, 70 N. E. 222.]

**FELLOW-SERVANT—Burden of Proof as to the Relation.**—In an action by an employé against his employer for injuries caused by the negligence of another employé, the burden of proof is on the plaintiff to show that he and the negligent employé were not fellow-servants. (p. 218.)

**FELLOW-SERVANT—Question of Law.**—What facts will create the relation of fellow-servants between two employés is a question of law. (p. 219.)

**FELLOW-SERVANT—Question of Law.**—If there is no controversy about the facts, and they bring the parties within the relation of fellow-servants so that a verdict to the contrary would not be supported by any evidence, the court should not submit the question to the jury. (p. 219.)

**FELLOW-SERVANTS.**—They are Fellow-servants who are co-operating, at the time of an injury, in the particular business in hand, or whose usual duties are of a nature to bring them into habitual association, or into such relations that they can exercise an influence upon each other promotive of proper caution. (p. 221.)

**FELLOW-SERVANTS.—The Relation of Fellow-servants Depends** upon the existence of association between employés which enables them, better than the employer, to guard against risks or accidents resulting from the negligence of each other. (p. 221.)

**FELLOW-SERVANTS—Previous Association and Personal Acquaintance.**—The existence of the relation of fellow-servants does not rest in any degree upon personal acquaintance or actual previous association between the employés, but upon the relation of their duties to each other and the respective positions which they hold. (p. 222.)

**FELLOW-SERVANTS—Co-operation in Some Particular Work.** The rule that they are fellow-servants who are directly co-operating with each other in some particular work must have a reasonable and practical interpretation; it should not be construed to mean

identical work, nor, on the other hand, to include the general business of the employer. (p. 223.)

**FELLOW-SERVANTS.**—**Employés on One Train of a Cable Street Railway** are fellow-servants with the employés on the train next preceding. (p. 224.)

W. J. Hynes, S. S. Page and H. H. Martin, for the appellant.

Wing & Wing and James C. McShane, for the appellee.

**199** **CARTWRIGHT, J.** This case was before us on a former appeal, when the judgments of the appellate court for the first district and the superior court of Cook county were reversed for error of the superior court in sustaining a demurrer to a plea of the statute of limitations. An additional count of the declaration, stating a new cause of action, had been filed after the statute had run and issues of fact under that count had been submitted to the jury, and found in favor of the appellee: *Chicago City Ry. Co. v. Leach*, 182 Ill. 359, 55 N. E. 334. The case has since been tried upon proper issues, resulting in a verdict for appellee for fifteen thousand dollars upon which judgment was entered. On appeal to the appellate court for the first district the judgment was affirmed.

Plaintiff was a conductor on defendant's street railway, and in his declaration alleged that he was injured through the negligence of other servants of the defendant. On the trial he offered evidence tending to prove that his injury was caused by the negligence of Golden, a gripman, and the first alleged error consists in the refusal **200** by the trial court of an instruction offered by defendant that the burden of proof was upon the plaintiff to prove, by a preponderance of all the evidence in the case, that he and Golden were not fellow-servants. The instruction correctly stated the law as declared in *Joliet Steel Co. v. Shields*, 134 Ill. 209, 25 N. E. 569, where that subject was given full consideration and where it was the determining question in the case. The charge in the declaration was that the plaintiff, a track repairer, had been injured by the negligence of other servants of the defendant in placing an iron mold in an insecure and dangerous position near the track, and the declaration neither alleged in express terms that they were not fellow-servants of the plaintiff, nor such facts as would lead to that conclusion. It was held that in all actions for negligence the burden is upon the plaintiff to allege and prove such negligent acts of the defendant as will entitle the plaintiff to recover; that it is not sufficient for one servant to prove that he has been injured by another servant of the common master,

but that it is also necessary to prove that the relation of the servants is such as to render the master liable to one for the negligence of the other. In the subsequent case of *Louisville etc. R. R. Co. v. Hawthorn*, 147 Ill. 226, 35 N. E. 534, where the declaration alleged that the plaintiff was a fence builder and was injured by the negligence of a locomotive engineer, the court, calling attention to the fact that in the *Shields* case there was nothing in the declaration to show that the other servants were not track repairers with the plaintiff, held that it was not necessary to aver in the declaration, in so many words, that the negligent servant was not the fellow-servant of the plaintiff, where the facts stated showed that the relation of fellow-servant did not exist. In *Chicago etc. R. R. Co. v. Swan*, 176 Ill. 424, 52 N. E. 916, the facts showing the relation of the two servants were stated, and showed that they were not fellow-servants, and the same rule was declared. Of <sup>201</sup> course, the rule as to pleading does not apply where the charge of negligence is against the master himself: *Libby, McNeill & Libby v. Sherman*, 146 Ill. 540, 37 Am. St. Rep. 191, 34 N. E. 801. Previous to the *Swan* case an opinion of an appellate court had been adopted in *Chicago etc. R. R. Co. v. House*, 172 Ill. 601, 50 N. E. 151, in which it was said that upon the question whether the servants in that case were fellow-servants appellant was the affirmant though the declaration contained the negative allegation. No question as to the burden of proof was in any way involved, and it cannot be presumed that the appellate court attempted to overrule the decisions of this court on that question. Whatever may have been meant by the statement, if it was intended to establish a new rule as to the burden of proof it was incorrect. There was no intention in adopting the opinion, or in the case of *Hartley v. Chicago etc. R. R. Co.*, 197 Ill. 440, 64 N. E. 382, which referred to it, to overrule the previous cases on that question. It appears to us, however, that the question where the burden of proof rested was properly and sufficiently covered by another instruction given at the instance of the defendant. That instruction stated that the burden of proof was upon the plaintiff upon several different propositions, and that he could not recover unless the fact that he and the gripman, *Golden*, were not fellow-servants was established by a preponderance of all of the evidence in the case. That instruction being correct and covering the ground, it was not error to refuse the instruction concerning which complaint is made.



At the close of the evidence the defendant requested the court to give an instruction of not guilty, which the court refused to do, and this ruling is the principal subject of discussion by the respective counsel. Plaintiff was injured by another train, on which Golden was the gripman, running against the rear of the train on which plaintiff was conductor while plaintiff was on the ground between the cars, and it is contended that his injury resulted <sup>202</sup> from an ordinary hazard of his employment, and from his own negligence in going between the cars and not providing any lookout for approaching trains, and that the plaintiff and Golden were fellow-servants of the defendant. The main question is whether plaintiff and Golden were fellow-servants, the other questions being controverted questions of fact, which, in our opinion, were properly submitted to the jury.

What facts will create the relation of fellow-servants between two employes of a common master is a question of law, and whether such facts exist is ordinarily a question of fact to be submitted to the jury, but where there is no evidence fairly tending to prove that they are not fellow-servants, and the undisputed facts show that the relation exists, the question is one of law. If there is any evidence fairly tending to prove the required averment that they are not fellow-servants the court should submit the issue to the jury, but if there is no controversy about the facts and they bring the parties within the relation of fellow-servants so that a verdict to the contrary would not be supported by any evidence, the court should not submit the question to the jury: *Abend v. Terre Haute etc. R. R. Co.*, 111 Ill. 202, 53 Am. Rep. 616; *Chicago etc. R. R. Co. v. Driscoll*, 176 Ill. 330, 52 N. E. 921. In this case there was no controversy as to the material facts concerning the relation between plaintiff and Golden as servants of the defendant, which were all either proved by the plaintiff or admitted of record by his counsel upon the trial. If the evidence would justify different conclusions in any respect, it would be with regard to special relations and acquaintance which were wholly immaterial.

The undisputed facts were, in substance, as follows: The accident occurred on September 27, 1893, during the World's Fair. The defendant was operating a double track cable street railway from Randolph street, on Wabash avenue, to Twenty-second street, and thence on <sup>203</sup> Cottage Grove avenue to Seventy-first street, in the city of Chicago. There was a loop at the north end, around which the cars ran. At the intersection of Madison street with Wabash avenue one of the tracks ran

east on Madison street one block to Michigan avenue, thence north two blocks to Randolph street, thence west on Randolph street one block to Wabash avenue, and thence south on Wabash avenue. Plaintiff's train consisted of a grip-car and two passenger cars. McCarthy was the gripman, plaintiff was the conductor on the car next the grip-car and Baker was the conductor on the rear car. The train was made up at appellant's barn, between Thirty-eighth and Thirty-ninth streets, on Cottage Grove avenue, to make its regular trip north around the loop and back to the south. When the train was leaving the barn plaintiff boarded it, and after it had gone a few blocks he discovered that there was too much slack between the grip-car and his car, causing them to bump back and forth. It was his duty to correct this, but he waited to do so until he should reach the north end of the loop, when there would be few, if any, passengers, and he would have more time and the cable ran at but half as high a rate of speed. The train ran north and turned from Wabash avenue around the loop. When it reached the east side of Wabash avenue and was about to turn into that avenue it was stopped on Randolph street to shorten up the draw-bars. The trains ran about two minutes apart, and there was about three hundred feet of clear track between the rear of the train and the corner of Michigan avenue, around which the next train would come. The sun was shining, and it was a bright, dry, clear morning. Plaintiff got down from his car, and the gripman, McCarthy, fastened his brake and went to the rear end of the grip-car and took hold of the next car to hold them together while plaintiff took up the slack. Plaintiff looked eastward and there was no train in sight, and he then got down between the cars to make the necessary <sup>204</sup> change. Neither McCarthy, the gripman, nor Baker, the other conductor, kept any lookout to see whether any other train was approaching. At the usual time the next train, in charge of Golden, came around the corner of Michigan avenue into Randolph street, and ran, without stopping or warning, against plaintiff's train, driving it around the curve into Wabash avenue and knocking down the plaintiff, who was dragged along under the train and seriously and permanently injured. The evidence tended to prove that Golden was looking to the northeast and not looking out for plaintiff's train.

Defendant had over five hundred gripmen and conductors running its trains, who all had the same headquarters and the same superintendent and were governed by the same rules. The trains followed each other over the tracks, regulating

their movements by the trains ahead. There were frequent stops and delays by obstructions and accidents or something getting into the slot, and if a train stopped, the one behind was required and accustomed to stop. If a train lost the cable it would wait for the one behind to push it to a point where the cable could be taken up. Each train consisted of a grip-car and one or more passenger cars, each of which had a conductor. The defendant had two lists—one of conductors and the other of gripmen—and the men at the head of the gripmen's list ran with the men at the head of the conductors' list, and so on down the line. Whenever a conductor or gripman missed his run, quit the service or was discharged, all those below him were moved up one point, so that a conductor generally ran with the same gripman, but on account of the changes plaintiff ran with many different gripmen. There is no evidence that he ever ran with Golden, and he did not remember that he had ever seen him, but they had run on the same line for several months.

The rule in this state as to what will constitute fellow-servants has been very frequently defined and explained. <sup>205</sup> This court has held the master to a stricter accountability for injuries to one servant by the act of another servant than courts in general. The generally prevailing rule that all servants of a common master are fellow-servants was rejected, and it was held that where a servant was employed in a department separate and distinct from that of a servant whose negligence caused an injury, the master would be liable: *Ryan v. Chicago etc. Ry. Co.*, 60 Ill. 171, 14 Am. Rep. 32; *Pittsburg etc. Ry. Co. v. Powers*, 71 Ill. 341. The rule as to consociation was also adopted, and was first expounded at length, in the case of *Chicago etc. Ry. Co. v. Moranda*, 93 Ill. 302, 34 Am. Rep. 168. In that case, servants of a common master were classified on the basis of their relation to each other at the time of an injury or their usual duties. The rule established was, that those are fellow-servants who are co-operating, at the time of an injury, in the particular business in hand, or whose usual duties are of a nature to bring them into habitual association, or into such relations that they can exercise an influence upon each other promotive of proper caution. If they are not co-operating in some particular work, or if their usual duties are not such as to bring them into habitual association so that they may have the opportunity and power to influence each other to the exercise of caution, they are not fellow-servants. It was said in that case that the rule of respondeat superior rests upon considerations of public policy and is

founded on the expediency of throwing the risk upon those who can best guard against it, and that the liability of the master must turn upon the same consideration. This is the principle underlying the application of the doctrine whether it was adopted on grounds of public policy or because the risk is assumed by the servant in entering the service, and the relation is made to depend upon the existence of association between servants which enables them, better than the employer, to guard against risks or accidents resulting from the <sup>206</sup> negligence of each other. The rule, however, does not rest in any degree upon personal acquaintance or actual previous association between the servants, but upon the relation of their duties to each other, and the respective positions which they hold. The rule, stated as a mere abstract proposition, might suggest previous personal acquaintance between individuals, and it is apparent from the opinion of the appellate court in this case that that court so regarded it, but this is clearly incorrect.

Counsel for the appellee concedes that a personal acquaintance between the plaintiff and Golden was not essential to make them fellow-servants; that it was the position which Golden held and the position which the plaintiff held which should determine the question, and that if plaintiff had taken the position of some conductor who had been running the same train with Golden they would be fellow-servants while on the same train, even though plaintiff should be injured within a few minutes after his employment, and their claim is that the employés on different trains are not fellow-servants. The classification is of servants as such, and not of individuals, and if two servants are brought within the classification they instantly become fellow-servants, although they may never have seen each other before. That was the case in *Abend v. Terre Haute etc. R. R. Co.*, 111 Ill. 202, 53 Am. Rep. 616, where it was held that a blacksmith and other employés in a wrecking crew, made for the occasion, became fellow-servants. The nature of the employment determines the relation, and the rule must be uniform and capable of a reasonable application. To hold the master exempt from liability for an injury to one who had been long in his service and had associated with the other employés, and to hold him liable for a like injury under the same circumstances to a new servant, would be wholly unwarranted.

One branch of the doctrine is, that those are fellow-servants who are directly co-operating with each other <sup>207</sup> in some particular work, and it is contended that the particular work in



hand at the time of the accident to plaintiff was the running of defendant's trains at the place of the accident, and therefore the employés on the two trains were fellow-servants. The rule must have a reasonable and practical interpretation, and if co-operation in particular work should be construed to mean identical work, the rule would not apply in any case, since no two servants would ever be doing the same identical thing at the same time. A conductor and gripman have separate duties, and yet they are directly co-operating with each other in the particular work of running a train. On the other hand, the particular work in hand does not include the general business of the master. The general business of the defendant was the running of trains on its road, and we do not see how the particular business in which plaintiff was engaged could be extended to include other trains which were following him. The question whether the qualifying words with respect to the exercise of influence modify both branches of the rule is of no importance. Where two servants are directly co-operating in the particular work in hand, they are brought into such relations that they may exercise such influence: *Pagels v. Meyer*, 193 Ill. 172, 61 N. E. 1111. The addition of qualifying words is wholly unnecessary, and if there is direct co-operation, nothing further is required to bring them within the relation. Where the servants are not so directly co-operating in some particular work, their usual duties must require co-operation or habitual association.

The remaining question is whether the plaintiff and Golden were fellow-servants under the second branch of the rule, or, in other words, whether the usual duties of the employés of the defendant upon one train were of a nature to bring them into habitual association with the employés on the next train preceding or following them, so that they might exercise an influence upon each other promotive of proper caution. There is no similarity between <sup>208</sup> the relation of servants on different trains on a steam railroad, which are run under orders and directed by a train dispatcher for the purpose of preventing interference and collisions, and the relation of servants on these trains, which followed each other over the tracks and managed their trains with reference to each other. This case is very much like the case of *Chicago etc. R. R. Co. v. Driscoll*, 176 Ill. 330, 52 N. E. 921, where it was held that yard crews employed to perform the same character of service at the same time, using the same tracks and working near each other, were



fellow-servants though under different foremen. It was there held that an instruction to find for the defendant should have been given on that ground. In *Leeper v. Terre Haute etc. R. R. Co.*, 162 Ill. 215, 44 N. E. 492, it was held that a finding by the appellate court that an injury to a fireman on one section of a train which was running in three sections was caused by the negligence of an engineer running another section, and that said servants were in the same general grade of service and the same line of employment, whose duty it was to be on constant guard not to injure each other and whose relation was such as to promote caution for the safety of each other, was a finding that the servants were fellow-servants. In this case, the undisputed evidence was that plaintiff and Golden were in the same general service and the same general line of employment, and that it was the duty of the employ  s on one train to run it in such a manner as not to injure those on the train next preceding, and that the duties of employ  s on such trains were such as to bring them into habitual association, with power and opportunity to influence each other by advice and caution. They were, in the strictest sense, engaged in the same character of service, in which they were brought into such relations to each other as to depend upon each other for their safety, and with power to observe the manner in which each discharged his duty, and to influence each other by caution, <sup>200</sup> advice and example. There was no disputed fact to be submitted to the jury, and the facts proved by plaintiff, or admitted, brought him and Golden within the legal definition of fellow-servants. It was, therefore, error to refuse the instruction asked for by the defendant.

The judgments of the appellate court and the superior court are reversed and the cause is remanded to the superior court.

Magruder, Wilkin and Ricks, JJ., dissenting.

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*Employ  s of a Railroad Company* on one train have been held fellow-servants with employ  s on a different train: See the monographic notes to *Mast v. Kern*, 75 Am. St. Rep. 610; *Fisk v. Central Pac. R. R. Co.*, 1 Am. St. Rep. 32; *Fox v. Sandford*, 67 Am. Dec. 595. Consult, also, *Brewster v. Chicago etc. Ry. Co.*, 114 Iowa, 144, 89 Am. St. Rep. 348, 86 N. W. 221.

## STEGER v. TRAVELING MEN'S BUILDING ASSOCIATION.

[208 Ill. 236, 70 N. E. 236.]

**CURATIVE STATUTE.**—The Legislature May Ratify and Confirm any act which it might lawfully have authorized in the first instance, where the defect arises out of the neglect of some legal formality, and the curative act interferes with no vested rights. (p. 230.)

**CURATIVE STATUTE.**—A Statute Validating Prior Acknowledgments of deeds and mortgages taken before an officer who was a stockholder in the grantee corporation is not invalid as being an exercise of judicial power or as impairing the obligation of contract between grantee and grantor. (p. 230.)

**CURATIVE STATUTE—Vested Rights.**—A statute legalizing prior acknowledgments of deeds and mortgages taken before an officer who was a stockholder in the grantee corporation can have no effect as against intervening judgment and mortgage liens. (p. 231.)

**LIS PENDENS.**—A Purchaser of Securities pendente lite takes them subject to all equities existing against them in the hands of his assignor, and subject to any decree which might have been entered against him. (p. 231.)

**EQUITY JURISPRUDENCE—Limits Upon.**—While equity is based on moral right and natural justice, it is not coextensive with them. Equities are rights which are established and enforced in accordance with principles of equity jurisprudence under some general principle or acknowledged rule governing courts of equity. (p. 231.)

**HOMESTEAD—Debt for Its Improvement.**—If a building association makes a loan to one who intends to apply the proceeds to the payment of a new building, and part of the loan is advanced for other purposes, and the balance is held until the building is practically completed, when, for its own protection, the association requires releases of mechanics' liens, and at a meeting of interested parties distributes the money to the contractor and subcontractors, the debt, as between the borrower and lender, is not for the making of an improvement of the homestead. (p. 232.)

**MASTER'S REPORT—What Should Contain.**—In a master's report the conclusions of fact and law should be clearly and concisely stated, and there should not be lengthy arguments and quotations from reports. (p. 233.)

Frederick Mains, for the appellant.

Ives, Mason & Wyman, C. A. Williams, J. E. and Cyrus J. Wood, for the appellees.

<sup>237</sup> **CARTWRIGHT, J.** The only question to be decided on this appeal is one of priority between liens held by the appellant and by the Traveling Men's Building and Loan Association, one of the appellees, upon a homestead estate in a lot in Chicago. The property, at the time the liens were created,

was the homestead of Joseph Strozewski. The lien of the building association on the lot is by virtue of a trust deed executed June 18, 1894, by Joseph Strozewski and Marcianna, his wife, to the American Trust and Savings Bank, trustee, to secure an indebtedness in the sum of three thousand three hundred dollars for money loaned, with interest and penalties. The acknowledgment of this trust deed was taken by George J. Kuebler, a notary public, who was secretary of the building association and a stockholder therein, and for that reason the estate of homestead was not released and the trust deed created no lien upon it: *Ogden Building etc. Assn. v. Mensch*, 196 Ill. 554, 89 Am. St. Rep. 330, 63 N. E. 1049. The liens of the appellant were created by a trust deed executed by said <sup>238</sup> Joseph Strozewski and wife on August 2, 1894, to L. L. Gilman, trustee, to secure the payment of four promissory notes to different persons, aggregating four hundred and forty-three dollars and seventy cents, and by a judgment recovered in the circuit court of Cook county in October 28, 1895, for improvements on the homestead premises and an execution levied thereon. In the trust deed securing the notes held by the appellant the homestead estate was released and the trust deed was acknowledged in accordance with the statute, so that it became a lien upon the homestead estate. The controversy is over the question whether the act in force May 15, 1903, legalizing acknowledgments taken before stockholders or officers of corporations, had the effect to make the trust deed securing the building association a lien upon the homestead prior to the liens held by appellant.

The building association and the trust and savings bank, as trustee, filed their bill in the superior court of Cook county November 20, 1901, for the foreclosure of the trust deed securing the building association. Among the defendants were the holders of the four notes now owned by appellant and L. L. Gilman, the trustee, and Joseph Strozewski and his wife. Gilman, the trustee, and the holders of the notes, as well as Joseph Strozewski and his wife, in their answers set up the homestead estate, and alleged that the trust deed of the building association was null and void so far as that estate was concerned. Gilman and the holders of the notes claimed that their trust deed was a first lien on the homestead, and afterward filed their cross-bill to foreclose said trust deed, making the same averments. The owner of the judgment recovered for the improvement of the homestead premises answered the cross-bill,

claiming a second lien on the estate of homestead, subject only to that of the trust deed to Gilman. Replications having been filed to all the answers, the issues under the original bill and cross-bill were referred to a master in chancery, who filed his report September 19, 1902, finding that there was a <sup>239</sup> homestead estate in the premises; that the trust deed securing the building association was null and void as to such estate; that the trust deed securing the cross-complainants was a first lien on the homestead; that by the levy of an execution the judgment became a second lien on the estate of homestead; that the building association had a first lien on the excess over and above the homestead; that the Gilman trust deed was a second lien on such excess and the judgment a third lien thereon. Other liens not involved in this appeal were also disposed of by the report. On December 15, 1902, the issues were again referred to the master on the question whether the trust deed securing the building association was a lien on the homestead as a debt incurred for the improvement thereof. The master filed his supplemental report on April 28, 1903, finding that said trust deed secured a debt in part for the improvement of the premises; that as to such part it was a first lien on the homestead estate, and that the Gilman trust deed and judgment were second and third liens. The case stood on exceptions to this report, when appellant, who had become the owner of the notes secured by the Gilman trust deed and of the judgment, by leave of court, together with Gilman, the trustee, filed a supplemental cross-bill on June 2, 1903, alleging the purchase of said securities as first and second liens in reliance upon the law as it existed at the time of the purchase, and claiming priority for his liens. The answer of the complainants in the original bill admitted the purchase of the securities by appellant on July 21, 1902, after examination of the records and in the belief that they were first and second liens on the homestead, but averred that the indebtedness to the building association was incurred for the improvement of the homestead, with the exception of seven hundred and fifty dollars. The answer of Joseph Strozewski and wife set up the act of 1903, legalizing acknowledgments. Replications having been filed to the answers, it was stipulated that the issues should <sup>240</sup> be submitted to the court on the evidence taken and reported by the master.

The material facts shown by the evidence are as follows: Joseph Strozewski, the owner of the premises occupied as a



homestead, entered into a contract with John Skotnicki to erect a building thereon, and on May 22, 1894, Strozewski made application to the building association for a loan of three thousand three hundred dollars, offering said premises and thirty-three shares of capital stock of the association as security, and stating that the property was encumbered by a mortgage for seven hundred and fifty dollars, and that he had agreed to pay the contractor three thousand two hundred dollars to complete the building. The application was accepted and the trust deed was executed and acknowledged before the secretary of the association, who was also a stockholder. The association advanced money to pay the existing encumbrance and commissions, attorneys' fees, insurance and other expenses, together with two hundred dollars to a subcontractor, amounting to thirteen hundred and fifteen dollars and seventy cents. The balance of the loan was retained until August 2, 1894, when the building was completed, and it was insufficient to pay the entire amount due on the building. By agreement the contractor and subcontractors entitled to liens met at the office of the association on that day, and the balance of the loan was distributed among them upon their executing releases of their claims for liens. At the same time Joseph Strozewski and wife executed the four promissory notes to contractors and secured them by the trust deed to Gilman, which was acknowledged so as to convey the homestead. They also executed two other notes for work on the building on which the judgment was afterward entered. On July 21, 1902, appellant purchased the judgment and the notes secured by the trust deed to Gilman.

Upon the hearing the superior court entered a decree finding that the lien of the building association was a first lien on the premises, including the homestead estate; that the liens of appellant were subject thereto; <sup>241</sup> that there was due the building association three thousand eight hundred and fifty-six dollars, including three hundred dollars for solicitor's fees; that on July 21, 1902, appellant, in consideration of four hundred and twenty-eight dollars and nine cents, became the owner of the notes secured by the trust deed to Gilman; that the amount due thereon was six hundred and twenty dollars; that on August 11, 1902, appellant, for the consideration of two hundred and two dollars and sixty-two cents, purchased the judgment; that the act of 1903, legalizing acknowledgments, had the effect to make the trust deed securing the building association a valid and legal conveyance of the estate of homestead as against ap-



pellant, the same as though it had been originally acknowledged in accordance with the law, and that appellant purchased his notes and judgment before the passage of said act but with knowledge that the building association claimed a lien on the homestead estate. The master was ordered to sell the property and pay the amount due the building association and bring the surplus into court.

The trust deed securing the building association, when executed, was null and void as to the estate of homestead (Ogden Building etc. Assn. v. Mensch, 196 Ill. 554, 89 Am. St. Rep. 330, 63 N. E. 1049), and so remained until the curative act of 1903 took effect. The Gilman trust deed and the judgment are prior liens on the homestead estate unless that act had a retroactive effect to validate the lien of the building association from the time of the original transaction. The validity of that act is attacked by appellant on several grounds. It is first contended that it is not a law, but a mere legislative direction to the courts to decide and adjudge in a particular manner, and is therefore an invasion of the province of the judicial department. The act provides as follows: "That all deeds, mortgages or other instruments in writing, relating to or affecting any real estate situated in this state, wherein a corporation was or may be the grantor, mortgagor, grantee or mortgagee, which have been acknowledged or proven before any notary public, justice of the peace or other officer authorized by the statutes of this state to take acknowledgments of <sup>242</sup> such instruments in writing, when so acknowledged or proven, in conformity with the statutes of this state, shall be adjudged and treated by all courts of this state as legally executed and acknowledged or proven, notwithstanding such acknowledgments or proof of the execution thereof were taken before a notary public, justice of the peace, or such other officer who was, or may have been at the time of such acknowledgment, a stockholder or officer of such corporation; and all such acknowledgments or proofs of such deeds, mortgages or other instruments in writing heretofore taken before any such notaries public or other officers, who were at the time of such execution, acknowledgment or proof, a stockholder or officer of such corporation, are hereby legalized": Laws 1903, p. 120. There is language in the act which, standing alone, might be interpreted as a mandate of the legislature to decide cases arising prior to the enactment according to the legislative will. The legislature cannot exercise judicial power, either directly or through a legislative com-

mand; but the substance of this act is, that acknowledgments taken before an officer or stockholder of a corporation shall be legal and valid, and that acknowledgments so taken before the passage of the act are legalized. That is not an exercise of judicial power, since it does not purport to settle suits or controversies, but only gives effect to acknowledgments in a matter under the legislative control. The legislature might doubtless have provided by a prior law that an acknowledgment could lawfully be taken before an officer or stockholder of a corporation, and the act goes no further than to bind the mortgagor where the acknowledgment is void by reason of personal disability of the officer to take it. The legislature may ratify and confirm any act which it might lawfully have authorized in the first instance, where the defect arises out of the neglect of some legal formality and the curative act interferes with no vested rights: *United States Mortgage Co. v. Gross*, 93 Ill. 483.

<sup>243</sup> The next proposition is, that the act is in violation of the constitution, as impairing the obligation of a contract. It seems clear that it does not violate the obligation of the contract between the building association and Strozewski, but rather validates it and makes it enforceable. It goes no further than to bind the mortgagor by a contract which he attempted to enter into, but which was void for defective execution. The intention of the parties failed merely through the disability of the officer. Neither does the act impair the contract between Strozewski and the parties secured by the Gilman trust deed. Their contract remains in force, to be executed according to its terms.

The third proposition we consider sound, and it is, that the act cannot have the effect to deprive appellant of his vested rights and transfer them to the building association, which would constitute a taking of property without due process of law. Under the law of the land the building association had no lien on the homestead prior to the passage of the curative act of 1903. After the execution of the trust deed securing the building association, Strozewski was still vested with a perfect, unencumbered title to the estate of homestead, and on August 2, 1894, that estate was conveyed to Gilman in trust, to secure the holders of the four notes. The judgment was recovered on two notes given for improving the homestead, and a levy was made on the homestead estate under an execution issued on that judgment. Under the law the judgment was a second lien on the homestead. A mortgage lien and a judgment, which is a lien, are each vested rights of property, and in this case both had

become vested before the passage of this act. It is not within the power of the legislature to transfer such vested rights from one to another: *Lane v. Soulard*, 15 Ill. 123; *Russell v. Rumsey*, 35 Ill. 362; *Conway v. Cable*, 37 Ill. 82, 87 Am. Dec. 240; *Rose v. Sanderson*, 38 Ill. 247. To make vested prior liens inferior and subsequent to a trust deed which was <sup>244</sup> not a lien when such rights vested would be to transfer property from one to another by legislative enactment. Appellant was purchaser of the securities pendente lite, and took them subject to all equities existing against them in the hands of his assignors and subject to any decree which might have been entered against such assignors. Perhaps this would have been the case whether he purchased during the pendency of the suit or before. At any rate, it cannot be denied that he took the liens subject to any equities existing against the original holders. The building association, however, had no equities which could overcome the legal and equitable rights of appellant's assignors. Much of the argument on behalf of appellees relates to such supposed equities treated as synonymous with natural justice; but it must be remembered that while equity is based upon moral right and natural justice, it is not coextensive with them. Equities are rights which are established and enforced in accordance with the principles of equity jurisprudence under some general principle or acknowledged rule governing courts of equity: 1 *Pomeroy's Equity Jurisprudence*, 46, 47. The building association did not, by virtue of its loan or its trust deed, acquire any equitable estate in the homestead. No court of equity would think of decreeing an equitable estate in a homestead under a mortgage which in the law did not create any lien. All deeds or instruments of writing for the alienation of a homestead are invalid unless the homestead is released in the manner prescribed by the statute, and if a mortgage contains no release or waiver of the homestead a court of equity cannot make the mortgage effectual against such estate: *Stodalka v. Novotny*, 144 Ill. 125, 33 N. E. 534. The lien of the building association was subject to the homestead estate of *Strozewski*, but in the trust deed to *Gilman* the homestead was released and waived, and in such a case the second mortgage is entitled to priority over the first to the extent of one thousand dollars: *Shaver v. Williams*, 87 Ill. 469; *Eldridge* <sup>245</sup> *v. Pierce*, 90 Ill. 474. The act can have no effect as against subsequent bona fide purchasers, who cannot be deprived of their property by legislative enactment. The right of a person having a vested

interest is secure against any act of the legislature: *Cooley's Constitutional Limitations*, 378; *Fisher v. Green*, 142 Ill. 80, 31 N. E. 172. It would not be contended that if *Strozewski* had conveyed the premises to a third person the legislature could deprive him of his title by validating the acknowledgment, so that the homestead estate could be appropriated to the payment of the debt to the building association. In the case of *United States Mortgage Co. v. Gross*, 93 Ill. 483, it was held competent for the legislature to validate a mortgage by a curative act, on the ground that the purchaser had no vested right to keep property released from a debt which he was paid for assuming. It would have been inequitable and unjust to permit a purchaser to hold valuable property discharged of a debt which was a large portion of the purchase price and which he had agreed to pay. There are no such equities in this case.

It is urged, however, that the trust deed of the building association is a first lien because it is for a debt incurred for the improvement of the homestead. The loan was made by the building association to *Strozewski*, who intended to apply the proceeds in payment for the new building. Part of the loan was advanced for other purposes and the building association held the balance until the building was practically completed, when, for its own protection, it required releases of mechanics' liens, and at a meeting of all the parties interested distributed the money to the contractor and subcontractors. The debt was not a debt for making any improvement. As between the contractor and *Strozewski* the debt was for the improvement of the homestead, but as between *Strozewski* and the building association he was a borrower and it was a lender. The improvement was considered by the association in making the loan with reference to <sup>246</sup> the sufficiency of the security, and the money was held and paid to the contractors for the protection of the lender. Money so borrowed and used in the improvement of real estate does not constitute a debt incurred for an improvement of the homestead, within the meaning of the law: *Parrott v. Kumpf*, 102 Ill. 423. In the cases of *Austin v. Underwood*, 37 Ill. 438, 87 Am. Dec. 254, and *Magee v. Magee*, 51 Ill. 500, 99 Am. Dec. 571, money was paid as purchase money directly to the vendor for the purpose of having land conveyed, and was not borrowed to pay for the land. Those cases were different from this, in which the debt was the debt of *Strozewski* to *Skotnicki*, under the building contract, and money was borrowed to discharge the debt.



A question is raised as to the reasonableness of the allowance made to the master for reporting his conclusions, but counsel says that he submits it without argument. The reports, and especially the first one, consist of lengthy arguments and quotations from decisions of courts, which are not proper to be contained in a report. Such a practice imposes unnecessary burdens upon litigants and perhaps affords an apparent basis for exorbitant charges. The conclusions of fact and law should be clearly and concisely stated, and it is not a proper practice for the master to present a treatise on the law, with citations of cases and quotations from reports. That is the proper function of counsel, and the record should not be filled with such material. In view of the fact that the objection does not appear to be insisted upon, we are inclined to permit the allowance in this case to stand as made.

The decree of the superior court is reversed and the cause is remanded to that court, with directions to enter a decree in accordance with the views herein expressed.

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A *Curative Statute* is a retroactive law acting on past cases and existing rights, and its effect is to validate irregularities in legal proceedings, or to give effect to contracts between parties which might otherwise fail for failure to comply with technical legal requirements: *Meigs v. Roberts*, 162 N. Y. 371, 76 Am. St. Rep. 322, 56 N. E. 838; *Nottage v. Portland*, 35 Or. 539, 76 Am. St. Rep. 513, 58 Pac. 883. Such laws may be enacted to correct errors in deeds, mortgages, and other instruments: *Wingert v. Zeigler*, 91 Md. 318, 80 Am. St. Rep. 453, 46 Atl. 1074; *Middleton v. St. Augustine*, 42 Fla. 287, 89 Am. St. Rep. 227, 29 South. 421; *McCardia v. Billings*, 10 N. Dak. 373, 88 Am. St. Rep. 729, 87 N. W. 1008. But a curative act which undertakes to take vested rights is void: *McCord v. Sullivan*, 85 Minn. 344, 89 Am. St. Rep. 561, 88 N. W. 989; *Koeh v. West*, 118 Iowa, 468, 96 Am. St. Rep. 394, 92 N. W. 663; *Maguiar v. Henry*, 84 Ky. 1, 4 Am. St. Rep. 182. Generally speaking, if the thing wanting or failed to be done, which constitutes the defect in the proceeding, is something, the necessity for which the legislature might have dispensed with by prior statutes, it is not beyond its power to dispense with it by a subsequent statute; and if the irregularity consists in not doing some act or in the manner of doing some act, which the legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law: *Gordon v. San Diego*, 101 Cal. 522, 40 Am. St. Rep. 73, 36 Pac. 18.

*The Law of Lis Pendens* is the subject of a monographic note to *Stout v. Philippi Mfg. Co.*, 56 Am. St. Rep. 853-878. See, also, the subsequent cases of *Bergman v. Inman*, 43 Or. 456, 99 Am. St. Rep. 771, 72 Pac. 1086, 73 Pac. 341; *Noyes v. Crawford*, 118 Iowa, 15, 96 Am. St. Rep. 363, 91 N. W. 799; *Goff v. McLain*, 48 W. Va. 445, 37 S. E. 566, 86 Am. St. Rep. 64, and cases cited in the cross-reference note thereto.



## BLINN v. GILLETT.

[208 Ill. 473, 70 N. E. 704.]

**WILLS—Intention of Testator.—In Construing a Will** the intention of the testator should control, and to ascertain such intention the entire will should be considered in the light of all the circumstances surrounding the testator at the time the will was made. (p. 237.)

**WILLS.—Words May be Read into a Clause in a Will** to make plain what is the manifest intention of the testator, considering the will as a whole, but which intention the testator has not accurately or completely expressed by the words he has used. (p. 240.)

**WILLS—Gift of Stock Includes What.**—A devise by a man to his wife, for life, of all “the use, dividends, and profits” on bank stock, with remainder to their children, passes to the remaindermen money paid to the widow from some of the banks that went into voluntary liquidation, and also passes to them a stock dividend issued to the widow by one of the banks from its earnings prior to the death of the testator. (p. 242.)

Bill to construe the will of John D. Gillett, who left a widow, Lemira P. Gillett, and the following children: Emma S. Oglesby, Grace A. Littler, Nina L. Gillett, Amaryllis T. Gillett, Mary C. Hill, John P. Gillett, Jessie D. Gillett, and Charlotte L. Barnes. The paragraphs of the will calling for construction are these:

“Ninth—I give and devise to my wife, in case she shall survive me, for and during the period of her natural life, all the use, interest, dividends and profits that may accrue during such period on or from any share of bank stock which I may own at the time of my death. She shall be entitled to the possession of all certificates representing such stock, and to vote them in person or by proxy during her life. If, during the life of my said wife and after my death, any of the banks in which I shall own said stock shall wind up its business and distribute its capital among its stockholders, my said wife shall be entitled to receive and receipt for all sums payable on the certificates so to be held by her for life. She is hereby empowered to reinvest the principal of said stock as safely as possible, and to collect and retain to her own use all interests and profits derived from such investment during her natural life. The principal so invested shall, after the death of my said wife, be applied and distributed as hereinafter directed. If my said wife shall become satisfied, at any time after my death, that it would be wise and judicious to sell any part of said bank stock, she is hereby fully empowered, by and with the advice and consent

of my said executors, to sell any part or all of the stock so owned by me in the banks at Pekin, Mt. Pulaski, Farmer City and Bloomington. In the event of making such sale she shall invest the proceeds thereof as aforesaid, and shall be entitled to take to her own use, as her own property, all the interest and profits arising from such investment during her natural life. At her death the principal so invested shall be applied as hereinafter directed."

"Twenty-third—I hereby direct that the proceeds of the sale of all my personal property, other than bank stock, and not otherwise herein disposed of, together with the proceeds of all debts and demands due or to become due me, and of all real estate in this last will declared and directed to be disposed of as personalty, shall be applied and disposed of by my executors as follows: They shall first pay to my daughter Emma Susan Oglesby the sum of \$10,000, and they shall divide the remainder of the proceeds of said personal property in equal parts amongst all of my said children"—naming them, and providing that if any of his children shall depart this life before him leaving children, the children should take the parent's share; or if they died before him leaving no children, then the proceeds of said debts, demands and personal estate to be divided in equal parts among the survivors or their descendants.

"Twenty-fourth—In case my said wife shall not survive me, I give and bequeath all my bank stock as follows: To Emma Susan Oglesby \$5,000; to Grace Adeline Littler \$5,000; to Nina Lemira Gillett \$5,000; to Mary Catherine Hill \$4,000; to Jessie D. Gillett \$4,000; to Amaryllis Tuttle Gillett \$4,000; to Charlotte Lancraft Gillett \$3,000; and the remainder, if any, to my son, John Park Gillett. I direct that said stock shall be distributed by my executors, not on the face or par value of said stock, but on its market or selling value, so that the share given to each of my said children shall amount in real value to the sum above specified as intended for her. If there shall not be sufficient stock to make up the sums indicated, then I direct that all of said bequests shall abate pro rata. If any of my said children shall depart this life before me leaving any child or children who shall survive me, then such child or children shall take in equal parts amongst them the share or shares which his, her or their deceased parent or parents would have taken if alive. If any of my said children shall depart this life before me leaving no child or children who shall survive me,

then the share or shares of such deceased child or children shall be divided in equal parts amongst my surviving children named as aforesaid, the surviving children of any of my children so named as aforesaid to take in equal parts amongst them the share or shares which his, her or their deceased parent or parents would have taken if alive. If my said wife shall survive me, I give and bequeath all my bank stock that shall remain unsold at the time of her death, and all money arising from the sale of said bank stock by my wife, in manner following, to wit: To each of my following named children who shall survive my said wife the following parcels or portions, to wit: To Emma Susan Oglesby \$5,000; to Grace Adeline Littler \$5,000; to Nina Lemira Gillett \$4,000; to Mary Catherine Hill \$4,000; to Jessie D. Gillett \$4,000; to Amaryllis Tuttle Gillett \$3,000; to Charlotte Lancraft Gillett \$3,000; and the remainder, if any, to my son, John Park Gillett. I direct that my executor shall make distribution, not on the par value or face of said stock, but on the basis of the market or selling value thereof, so that the share given to each of said children shall amount in real value to the sum above specified as intended for her. If my bank stock, together with the money arising from the sale of any part thereof, shall not be sufficient to discharge said specific bequests, then each bequest shall abate pro rata. If any of my said children shall depart this life before my said wife leaving any child or children who shall survive my said wife, then such child or children shall take in equal parts amongst them the share or shares of said bank stock and money which his, her or their deceased parent or parents would have taken in the event of surviving my said wife. If any of my said children shall depart this life before my said wife leaving no child or children who shall survive my said wife, then the share or shares of said bank stock and money which would otherwise go to such deceased child or children shall be divided in equal parts among the survivors of my children named as aforesaid, the surviving children of any of my children so named to take in equal parts amongst them the share or shares which his, her or their deceased parent would have taken if alive at the death of my said wife. I distinctly direct and declare that in bequeathing said bank stock, and any money that shall arise from the sale of any part thereof by my said wife, it is my desire and intention that none of my children named as aforesaid, or their children or descendants, shall take any vested interest in said stock or money until the death of my said wife, in case she shall sur-

vive me, and that until the death of my said wife, and the consequent vesting of said titles and interests, my said children and their descendants shall not be entitled to sell, transfer or encumber any of said stock or money or any interest therein, and that the same shall be wholly free from all judgments, attachments, executions and legal processes against any of my said children or their descendants until or unless said title or interest shall become vested in them by the death of my said wife."

After Gillett's death some of the banks in which he held stock went into voluntary liquidation, as a result of which there were paid to the widow sums aggregating nine thousand three hundred and forty-five dollars. And one of the banks, the First National Bank of Lincoln, increased its capital stock, and issued a new stock certificate, No. 122, to the widow. On her death it was found that she had bequeathed all her stock in the First National Bank of Lincoln to Charlotte L. Barnes in trust for latter's children.

T. M. Harris and E. D. Blinn, for the appellants.

Hamilton & Catron, R. C. Maxwell and Beach & Hodnett, for the appellees.

<sup>484</sup> HAND, C. J. The first question presented for consideration is, To whom did the nine thousand three hundred and forty-five dollars received from the banks that had gone into voluntary liquidation belong upon the death of Lemira P. Gillett? The rule is fundamental that in construing a will the intention of the testator, if legal, should control, and to ascertain such intention the entire will should be considered in the light of all the circumstances surrounding the testator at the time the will was made. In *Decker v. Decker*, 121 Ill. 341, on page 354 (12 N. E. 756), the court said: "In every case calling for construction the question of first importance is, What was the testator's <sup>485</sup> intention?" And in *Finlay v. King's Lessee*, 3 Pet. 346: "The intent of the testator is the cardinal rule in the construction of wills, and if that intent can be clearly perceived and is not contrary to some positive rule of law, it must prevail." And in *Johnson v. Askey*, 190 Ill. 58, on page 61 (60 N. E. 76): "The rule is well settled that in construing a will the intention of the testator must control, and to ascertain such intention the entire will should be considered

in the light of all the circumstances surrounding the testator at the time the will was made."

If those paragraphs of the will of John D. Gillett which deal with the bank stock of the testator be read as a whole, it will appear clear, we think, that the testator intended his widow should have the absolute control of his bank stock, or the funds arising therefrom, during her lifetime, and that no interest therein should vest in his children or their descendants so long as the widow should live, and that the testator, upon the death of Lemira P. Gillett, intended that the principal of his bank stock, in whatever form it might be at that time—that is, whether in stock, cash received from the sale of stock or cash received from banks that had gone into voluntary liquidation—should be divided among his then surviving children and the descendants of deceased children. By paragraph 9 it is provided, if his wife survive him, for and during her natural life she shall have "all the use, interest, dividends and profits that may accrue during such period on or from any share of bank stock which I may own at the time of my death," and in case any of the banks in which the testator owned stock should wind up their business and distribute their capital, it is provided the widow shall be entitled to receive the funds received from such banks upon liquidation, and she is given the right to reinvest the principal and to retain to her own use all interest and profit derived from such reinvestment during her natural life. She is also given power, with the advice and consent of the <sup>486</sup> executors, to sell any part or all of the stock in certain of said banks, and in case of such sale, she is given authority to reinvest the proceeds arising therefrom, and is to have as her own property all the interest and profit arising from such investment, and at her death the principal arising from a voluntary liquidation shall "be applied and distributed as hereinafter directed," and in case of sale the principal shall "be applied as hereinafter directed." While the stock, or the funds arising from a sale of the stock or from a voluntary liquidation of any bank, remained in the widow's hands, no distinction is made with reference to the profit arising therefrom—whether in the form of dividends upon the stock, interest upon the money or profit upon the investment. It is all treated as income and is given to the widow for life.

As showing the intention of the testator with reference to the division of his bank stock upon the death of the widow, we think the first part of paragraph 24 of the will has an impor-



tant bearing. The testator there provides in what proportions he desires his bank stock divided among his children in case he shall survive his wife, and provides that in case any of his children shall die before he dies, leaving a child or children then surviving, such child or children shall take the share of the parent, and that in case a child shall die before he dies, without leaving a child or children him surviving, the share or shares of such deceased child shall be divided in equal parts among his surviving children, and that the surviving children of any of his children shall take the share which their deceased parent would have taken if living, thereby clearly manifesting an intention that the principal of his bank stock should be divided among his children and the children of his deceased children. In the same paragraph, after devising the income of the bank stock to his wife for life if she should survive him, upon her death he divides the bank stock among his children in the same proportion he had provided <sup>487</sup> it should be divided among them upon his death in case he should survive his wife, and then provides that it is his intention that in case his wife survive him none of his children or their children or descendants shall take any vested interest in said stock until after the death of his wife, and that they shall not have the ability to transfer it, and it shall not become liable for their debts by attachment, execution or other legal process, and in case of his widow's death subsequent to his death, limited the right of his children or their descendants to take said bank stock to those who should survive his widow.

It is conceded said limitation applies to the bank stock and to the principal in the hands of the widow at the time of her death, derived from the sale of bank stock, but it is said that no such limitation applies to the fund in the widow's hands received from the banks which had gone into voluntary liquidation. The clause of the will which disposes of the bank stock, and the proceeds thereof, after the death of Lemira P. Gillett, reads as follows: "If my said wife shall survive me, I give and bequeath all my bank stock that shall remain unsold at the time of her death, and all money arising from the sale of said bank stock to my wife, in manner following." etc., which clause does not include the moneys received from the banks which have gone into voluntary liquidation, unless the following or similar words, "and moneys received by her from banks which have gone into voluntary liquidation," can be legitimately read into that clause of the will, and it is earnestly insisted by the appel-

lants to read such words into that clause of the will would be to make a new will for the testator. If the effect of reading into that clause of the will the words above specified would be to change the clause and to make it include something which it did not include before, manifestly the words cannot be read into the clause. But we do not so view the matter. The <sup>488</sup> words are read into the clause to make plain what is the manifest intention of the testator, considering the will as a whole, but which intention the testator has not accurately or completely expressed by the words he has used. And the authorities are clear this may be done. In *Glover v. Condell*, 163 Ill. 566, on page 584 (45 N. E. 179), the language of Mr. Jarman in his work on Wills (2 Randolph & Talcott's 5th Am. ed., p. 60) is quoted with approval. He there says: "It is established that where it is clear on the face of a will that the testator has not accurately or completely expressed his meaning by the words he has used, and it is also clear what are the words which he has omitted, those words may be supplied in order to effectuate the intention as collected from the context." And in that case the court read into the will the words "of the income," or "of the interest," or "of the dividends," the insertion of which words, it was said, "effectuates the clear intention of the testator and is necessary to give expression to his meaning." To the same effect is 29 American and English Encyclopedia of Law (first edition, page 372), where it is said: "Where it is clear on the face of the will that the testator has not accurately or completely expressed his meaning by the words he has used, and it is also clear what are the words which he has omitted, those words may be supplied in order to effectuate the intention as collected from the context."

A glance at paragraph 23 of the will, wherein the testator directs that all of his personal property, other than bank stock, shall be divided in stated proportions among his children, shows that the testator considered the bank stock, and the funds which might arise therefrom—and so treated it—as having been fully disposed of by other provisions of the will, and the clause in relation to the disposition of the fund arising from banks in liquidation and the clause in relation to the disposition of the fund proceeding from sales of stock are in substantially the same language, and both refer to future <sup>489</sup> directions in the will for the distribution of both funds. It would seem to follow that the provision, "I give and bequeath all my bank stock that shall remain unsold at the time of her death [the widow's

death], and all money arising from the sale of said bank stock by my wife, in manner following," should be held to cover and include all money from both sources. If this position be not correct, then it would appear the testator, when dealing with these two funds, intentionally disposed of one fund and left the other to pass under the residuary clause of the will, although both funds were the proceeds of bank stock received by the widow subsequent to his death. This is not probable. In paragraph 24 of the will it is provided that in case any of the children of the testator should die before his wife leaving a child or children, then such child or children should take in equal parts the share or shares of said bank stock and money which his, her or their deceased parent or parents would have taken in the event of surviving the wife of the testator; again, that if any child of the testator should die leaving no child before the death of his wife, then the share of such child in such bank stock and money should be divided among the surviving children of the testator or their descendants; and further, that none of the children or descendants of children of the testator shall take any vested interest in said stock or money until the death of the wife. It seems apparent the money arising from stock in liquidated banks, as well as money derived from sales of stock by the widow, was alluded to in these clauses of the will when the testator spoke in general terms of bank stock and money; and this reference to money in this connection strengthens the position that the testator intended to dispose of all moneys derived from both the sale of stock and the liquidated banks to his children or their descendants who survived the widow, by the provisions of his will, other than the residuary clause.

490 Our conclusion is, that the fund in the hands of Lemira P. Gillett received from banks which had gone into voluntary liquidation, upon her death went, under the terms of the will of John D. Gillett, deceased, to his children who survived his widow.

The next question presented for determination is, Did the one hundred shares of stock of the First National Bank of Lincoln represented by certificate No. 122, issued to Lemira P. Gillett as a stock dividend, belong to her at the time of her death, and pass, by virtue of her will, to Charlotte L. Barnes as trustee, or did the same belong to the estate of John D. Gillett, deceased, and pass to his devisees, under the terms of his will,

at the death of Lemira P. Gillett? It appears that the stock issued to Lemira P. Gillett was paid for with the earnings of said bank which had accumulated prior to the death of John D. Gillett. In the case of *De Koven v. Alsop*, 205 Ill. 309, 68 N. E. 930, it was held that a stock dividend which evidenced a conversion by the corporation into capital of earnings accumulated during the stockholder's lifetime goes to the remaindermen as a part of the corpus of the estate, and not to the life tenant under a will devising the income of the estate to the testator's widow for life and directing the residue to be divided among others at her death. That case considers all the questions urged upon the consideration of the court bearing upon the phase of this case now under consideration, and is conclusive against the right of Charlotte L. Barnes, as trustee, to hold the stock issued as a stock dividend to Lemira P. Gillett by the First National Bank of Lincoln.

The contention is made by appellants other than Charlotte L. Barnes, that if it is held certificate No. 122 does not pass to Charlotte L. Barnes as trustee, then the shares represented by said certificate are so far intestate property that they pass under the residuary clause of the will of John D. Gillett, deceased, to all his children, which would include the devisees of his deceased <sup>491</sup> children. We do not agree with this contention. In *Gibbons v. Mahon*, 136 U. S. 549, 10 Sup. Ct. Rep. 1057, it is said: "A stock dividend really takes nothing from the property of the corporation and adds nothing to the interests of the shareholders. Its property is not diminished and their interests are not increased. After such a dividend, as before, the corporation has the title in all the corporate property. The aggregate interests therein of all the shareholders are represented by the whole number of shares, and the proportional interest of each shareholder remains the same. The only change is in the evidence which represents that interest, the new shares and the original shares together representing the same proportional interest that the original shares represented before the issue of the new ones." The new shares of stock represent the surplus earnings of the bank and go to the remaindermen under the will of John D. Gillett, deceased, the same as the surplus or improvements made with the surplus would have gone had no stock dividend been made. In *Minot v. Paine*, 99 Mass. 101, 96 Am. Dec. 705, the court said (99 Mass. 107): "It is obvious that if the directors had made no stock dividend but had invested the income in permanent improvements, making



no increase of the number of shares, the improvements would have been capital, belonging to the legatees in remainder."

We think it clear that certificate No. 122, upon the death of Lemira P. Gillett, became the property of the children of John D. Gillett, deceased, who survived Lemira P. Gillett, his widow.

Finding no reversible error in this record the judgment of the appellate court will be affirmed.

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*The Intention of the Testator* governs the construction of a will, and to ascertain such intention the court may hear evidence of the circumstances, situation, and surroundings of the testator when the will was made, and the state and condition of his property: *Pate v. Bushong*, 161 Ind. 533, post, p. 287, 66 N. E. 950, 67 N. E. 993; *Elliott v. Elliott*, 117 Ind. 380, 10 Am. St. Rep. 54, 20 N. E. 264; *Murphy v. Carlin*, 113 Mo. 112, 35 Am. St. Rep. 699, 20 S. W. 786; *In re Donge's Estate*, 103 Wis. 497, 74 Am. St. Rep. 885, 79 N. W. 786. See, also, *St. James Orphan Asylum v. Shelby*, 60 Neb. 796, 83 N. W. 553, 84 N. W. 273; *Estate of Fair*, 132 Cal. 523, 84 Am. St. Rep. 70, 60 Pac. 442, 64 Pac. 1000. The intent of the testator must control, even though some words must be rejected (*Rose v. Hale*, 185 Ill. 378, 76 Am. St. Rep. 40, 56 N. E. 1073; *Whitcomb v. Rodman*, 156 Ill. 116, 47 Am. St. Rep. 181, 40 N. E. 553), or transposed: *American Nat. Bank v. Gregg*, 138 Ill. 596, 32 Am. St. Rep. 171, 28 N. E. 839; note to *Goode v. Goode*, 66 Am. Dec. 635. And omitted words may be supplied: *Mitchell v. Donohue*, 100 Cal. 202, 38 Am. St. Rep. 279, 34 Pac. 614; note to *Goode v. Goode*, 66 Am. Dec. 635.

*The Increase of Capital of a Corporation* should be kept for the remainderman, and an increase of income should be paid to the tenant for life: *Minot v. Paine*, 99 Mass. 101, 96 Am. Dec. 705.

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## ZELLERS v. WHITE.

[208 Ill. 518, 70 N. E. 669.]

**PLEADING.**—A Variance between the averments of a declaration and the proof, which is the ground for a motion to instruct the jury to find for the defendant at the close of the plaintiff's evidence, must be particularly specified in the motion. (p. 245.)

**GAMBLING.**—Recovering Loss from Proprietor of House.—One who loses by gambling with a person employed to play for the "house" may, under a statute giving the loser in gambling a right to recover his loss, sue either the proprietor of the house or the employé. (p. 246.)

**GAMBLING.**—Use of Chips Instead of Money.—The fact that poker players use chips, when they are merely markers to indicate the amount of money lost or won, does not render inapplicable a statute giving one a right to recover "money, goods, or valuable thing" lost in gambling. (p. 247.)

**PENAL STATUTES.**—The Object of Construing penal statutes is to discover and give effect to the true legislative intent.



and the rule of strict construction is not to be so unreasonably applied as to defeat the true intent and meaning of the enactment. (p. 247.)

**GAMBLING—What is a “Sitting” at Draw Poker.**—All that transpires in playing the game of draw poker from the time certain players begin playing together on any one occasion until they cease playing together on that occasion, no matter how many hands are played, may be regarded as one transaction or “sitting,” within the meaning of that word as used in a statute authorizing the recovery of money or property lost in gaming. (p. 248.)

**GAMBLING—Winners and Losers at Poker.**—In a game of draw poker all those who have won more than they have lost during a sitting are “winners,” and all those who have lost more than they have won during the sitting are persons “losing,” within the meaning of a statute authorizing the recovery of money or property lost in gaming, and the liability of the winner to the person or persons losing is measured by the net amount of his own winnings. (p. 249.)

**BILL OF PARTICULARS.—A Variance Between the Proof** fixing the date when the gambling occurred and the bill of particulars, in an action to recover money lost in gaming, is not fatal, when it does not appear that the plaintiff ever played in the defendant’s gaming-room except on that occasion. (p. 249.)

Henry M. Kelly and M. T. Moloney, for the plaintiff in error.

George H. Haight, for the defendant in error.

522 SCOTT, J. Section 132 of chapter 38 of Hurd’s Revised Statutes of 1901 reads as follows: “Any person who shall, at any time or sitting, by playing at cards, dice or any other game or games, or by betting on the side or hands of such as do game, or by any wager or bet upon any race, fight, pastime, sport, lot, chance, casualty, election or unknown or contingent event whatever, lose to any person, so playing or betting, any sum of money, or other valuable thing, amounting in the whole to the sum of ten dollars, and shall pay or deliver the same or any part thereof, the person so losing and paying or delivering the same shall be at liberty to sue for and recover the money, goods or other valuable thing, so lost and paid or delivered, or any part thereof, or the full value of the same, by action of debt, replevin, assumpsit or trover, or proceeding in chancery, from the winner thereof, with costs, in any court of competent jurisdiction. In any such action at law it shall be sufficient for the plaintiff to declare generally as in actions of debt or assumpsit for money had and received by the defendant to the plaintiff’s use, or as in actions of replevin or trover upon a supposed finding and the detaining or converting the property of the plaintiff to the use of the defendant, whereby an action hath accrued to the plaintiff according to the form of this act, without setting forth the special matter.”

This suit is to recover money lost at draw poker. The declaration is an ordinary declaration in assumpsit, and does not refer in apt language, as it should do, to the act of which said section is a part, for the purpose of showing that it counts thereon. At the close of the evidence for White, the plaintiff, Zellers, the defendant, moved the court to instruct the jury to find a verdict for the defendant, and it is now stated that one of the grounds was a variance between the pleadings and the proof resulting from this omission in the declaration. The motion was not in writing. At the time of making it, counsel **523** tendered an instruction in the following words: "The court instructs the jury that the plaintiff has failed to show by any evidence that he played cards with defendant on the thirty-first day of October or first day of November, 1901, or that he lost money to defendant on those days in the playing of cards, and you will therefore return the following verdict: 'We, the jury, find for defendant; no cause of action.'" As the motion itself did not specify any ground upon which it was based, and as the instruction offered in connection therewith does show the ground upon which the defendant sought to have the jury instructed in his favor, the defendant cannot now be heard to urge that the motion was based upon the failure of *allegata et probata* to agree.

A variance between the averments of the declaration and the proof, which is the ground of a motion to instruct the jury to find for the defendant at the close of the plaintiff's evidence, must be particularly specified in the motion: *Probst Construction Co. v. Foley*, 166 Ill. 31, 46 N. E. 750; *Illinois Central R. R. Co. v. Behrens*, 208 Ill. 20, 69 N. E. 796.

We will, therefore, not consider the error assigned in this regard. Had this matter been properly called to the attention of the court, the declaration could, and no doubt would, have been amended and the objection obviated.

Again, at the close of all the evidence the defendant moved the court to instruct the jury for the defendant, and it is now urged that there is in the record no evidence which tends to support the verdict. It appears from the evidence of plaintiff, which, for the purposes of this motion, must be taken as true, that he began playing draw poker at about 10 P. M. and continued until about 5 A. M. the next morning; that among those playing were Frank Downey and Chester Kaiser, who were in Zellers' employ and playing for him; that plaintiff lost during the time eighty dollars and that Downey and Kaiser

won a little over one hundred dollars, which was made up of the eighty dollars lost by <sup>524</sup> plaintiff and small amounts lost by others. The money lost by plaintiff was not all lost on any one hand, nor, in the first instance, was it all won by either Downey or Kaiser. Some portions of his losses passed to other persons in the game temporarily, and finally from them to the agents of Zellers, so that in the end they were the only winners and had won an amount in excess of the losses of the plaintiff. The game was not played by betting money directly. Chips were purchased from Zellers, or "the house," as the witnesses expressed it, and at the end of the game or sitting, if the purchaser by any chance had any of the chips left or if they had been won by persons other than Zellers' agents, the house redeemed them, paying for each the price for which it had been sold.

It is first urged that as Zellers, in person, did not play in the game there can be no recovery from him. We think this too narrow a construction of the statute. It appears from the evidence that in his gambling-room roulette was also played. If the position of counsel be correct and Zellers employed an insolvent individual to operate the wheel for him, as a result of which the wheel or the operator won the money of the player for Zellers as the proprietor, the player would be unable to recover from the winner. The proposition carries with it its own answer. What Zellers did by another in this instance he did by himself, and he is responsible for the money won for him by such other. Plaintiff could sue the agent or the principal, at his election.

Plaintiff in error relies upon the case of *Kruse v. Kennett*, 181 Ill. 199, 54 N. E. 965, as authority for the statement that the doctrine of agency has no application so far as the question of the violation of this penal statute is concerned. In that case the suit was brought against brokers or commission agents to recover money lost in gambling in grain options, and in response to the contention that the plaintiff should have brought his suit against the person or persons with whom the brokers had transactions <sup>525</sup> to counterbalance those of plaintiff, and who, in fact, profited by the losses of the plaintiff, it was held that the broker was a "winner," within the meaning of the statute, but there was no holding that the suit could not be maintained against such other person or persons who had profited by the transaction.

It is then said that because that which was actually staked on the game was the chips, and there is no evidence in this record that they had any intrinsic value, there is no evidence of the loss of "money or other valuable thing, amounting in the whole to the sum of ten dollars." The correct view is that the chips were merely markers to indicate the amount of the money lost or won, the money itself being actually deposited with the gaming-house keeper as a stakeholder, to be paid by him to the owner thereof as such owner was indicated by the possession of the chips which the keeper had given in exchange therefor, and that the loss of the chips was a loss of the money which they represented.

Attention is then called to the fact that many hands of draw poker were played—one every two minutes, according to the statement of the defendant—during the hours the plaintiff was engaged in play, and that each hand is a game, and that in each hand the plaintiff would win or lose; that when he lost and that hand was played the transaction was ended; and the person to whom that loss was paid, it is urged, is the only person from whom such loss could be recovered, and that the plaintiff could not recover money which he had so lost to some person other than the defendant's agents, because, in the end, such agents won the money from such other person who had in the first instance won it from the plaintiff. Counsel urge that a strict construction of the statute leads to this conclusion, and authorities are cited in support of the doctrine that penal statutes should be strictly construed. This is the general rule, but it is only one of the rules to be applied in determining the meaning of <sup>526</sup> an enactment of that character. In *Hamer v. People*, 205 Ill. 570, 68 N. E. 1061, the following language from *Sedgwick on Construction of Statutes* was cited with approval (205 Ill. 573, 68 N. E. 1063): "The rule that statutes of this class are to be construed strictly is far from being a rigid and unbending one, or, rather, it has in modern times been so modified and explained away as to mean little more than that penal provisions, like all others, are to be fairly construed according to the legislative intent as expressed in the enactment." And in that case it was also said that the object of construing penal statutes, and all other statutes, is to discover and give effect to the true legislative intent, and the rule requiring strict construction of penal statutes is not to be applied with such unreasonable strictness as to defeat the true intent and meaning of the enactment. The purpose of



the legislature in the enactment of this statute was to lessen, and, if possible, to prevent gambling. The evils resulting therefrom are among the most pernicious that afflict modern society. The practice destroys in its devotees all desire to engage in legitimate employment or business. The loser becomes intent on recovering his losses at the gaming-table and is frequently driven to embezzlement and theft. The winner acquires a contempt for the small gains of honest pursuits. He spends the profits of unlawful hours in idleness and debauchery, among dissolute companions. Thrift is destroyed. Wholesome pleasures soon pall upon the taste. The ties of home and domestic life are disregarded, and eventually annihilated, by the craze for gaming and by the feverish excitement with which it fires its followers. Being itself unlawful, it creates and encourages contempt for all law, weakens every legal restraint, and every honest impulse. Financial ruin and moral degradation alike inevitably overtake every man who cannot resist its allurements, no matter with what degree of skill he engages in the nefarious business. Section 132, *supra*, is calculated to make its gains unavailing <sup>527</sup> to the winner, and to remove, to some extent, at least, the incentive to play. If the loser, after a long night at draw poker, must sue the man who won from him on each hand for the amount lost on that hand, and cannot have this remedy unless the sum so lost on that hand equal or exceed ten dollars, the statute, for all practical purposes, would not be applicable to draw poker. This form of gambling became so common recently that it was denominated the national game of the American people. Its peculiar terms and phrases have found their way into common use in our language, where their aptness for the purposes for which they have been borrowed attracts the attention of many to this game and no doubt leads them to a closer acquaintance with it, when, but for a familiarity with its expressions thus obtained, they would not have sought its beguilements. The interpretation placed upon this statute by defendant, so far as this seductive game is concerned, would enable the winner to substantially escape the salutary and chastening effect of this law and deprive him of the refined pleasure which results from making restitution for wrongdoing. The legislature certainly did not intend that this game, which is a very common vice, should escape the ban of this section of the Criminal Code.

Keeping in view the wrong at which the statute is aimed, and giving consideration to the use of the word "sitting," in



this section, we think the proper construction is, that all that transpires in playing the game of draw poker from the time certain players begin playing together on any one occasion until they cease playing together on that occasion, no matter how many hands are played, may be regarded as one transaction or "sitting," and that all those who have won more than they have lost during the sitting are "winners," and all those who have lost more than they have won during the sitting are persons "losing," within the meaning of the statute; that all money or other valuable thing staked upon <sup>528</sup> the game at any time during the sitting is to be regarded as in play so long as the sitting continues, and that the liability of the winner to the person or persons losing is measured by the net amount of his own winnings. Resort may be had to equity where necessary for the purpose of making proper adjustments between the various winners and the various losers.

It is also claimed that there was a variance between the proof fixing the date when the gambling occurred and the bill of particulars filed with the declaration. We do not regard the statement of the date in this bill of particulars as material. It does not appear that plaintiff ever played in defendant's gaming-room except on this occasion. There are cases where the court below may, on motion, properly require the plaintiff to particularly identify, by date or otherwise, in his statement of account, the transaction or transactions on which he relies, and the plaintiff may be required to confine his proof to transactions so identified. Such a case was not here presented.

We think the rulings upon the admissibility of evidence correct.

What we have said disposes of objections to the action of the court in passing on instructions except as to instruction No. 4 given on the part of the plaintiff, which contains this language: "No winning of the plaintiff can be set off against his demand for loss in this suit unless obtained from the defendant at the same sitting." The objection to this instruction is, that the word "defendant" should have been followed by the words, "or his agent or agents." There is no question of any setoff on account of winnings in the case. Plaintiff only sought to recover the net amount of his losses. Defendant did not offer evidence of any winnings that should have been deducted or set off. The error in the instruction, if any, was harmless.

The judgment of the appellate court will be affirmed.

*The Rule of Strict Construction* of penal statutes is not violated by giving them a reasonable meaning according to the sense in which they were intended: *Meadowcroft v. People*, 163 Ill. 56, 54 Am. St. Rep. 447, 45 N. E. 303. Strict construction also permits of sensible construction, having in view the purpose of the law under consideration: *Nelson v. State*, 111 Wis. 394, 87 Am. St. Rep. 881, 87 N. W. 235.

*On Recovering Money* paid in option dealings in grain, see *Pearce v. Foot*, 113 Ill. 228, 55 Am. Rep. 414.

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## BOOKER v. BOOKER.

[208 Ill. 529, 70 N. E. 709.]

**VENDOR AND VENDEE—Right to Rely on Records.**—The law protects purchasers of real estate as the title appears of record, unless there is notice of something to the contrary. (p. 253.)

**WITNESS—Husband Against Wife.**—In litigation concerning a wife's separate property in which she would, if unmarried, be the defendant, her husband is competent, under the Illinois statutes, to testify for or against her. (p. 253.)

**VENDOR AND VENDEE—Notice of Unrecorded Deed.**—One is not chargeable with notice of an unrecorded deed because he pays an inadequate price for the land. (p. 254.)

**VENDOR AND PURCHASER—Unrecorded Deed.**—The Record of a Mortgage is not, as a matter of law, constructive notice of an unrecorded deed from the holder of the record title to the mortgagor, where the mortgage was executed, not to the grantor in the deed, but to a third person. (p. 257.)

**VENDOR AND VENDEE—Unrecorded Deed.**—Notice to a Husband of an unrecorded deed to his first wife is not chargeable to his second wife, when he was actuated by a selfish and fraudulent purpose in keeping the deed off the records and in dealing with his second wife. (p. 258.)

**VENDOR AND VENDEE—Unrecorded Deed, Laches of Claimant Under.**—If the grantee in an unrecorded deed lives five years after its execution, and seven years after her death the land is conveyed to a third person, who records his deed and holds possession for five years, persons claiming under the unrecorded deed are barred from attacking his title, notwithstanding the false statement of their father that he had no title. (p. 259.)

Appeal from a decree granting relief in a bill alleging that in 1882 forty acres were sold at an administrator's sale; that prior to the sale Nancy Booker, then the second wife of John W. Booker, employed T. F. Dove to purchase the land in his name for her, which was done, and two days later he conveyed the property to her by a deed, which was not recorded but was left in the custody of Dove; that Nancy Booker at the

same time borrowed eight hundred dollars from Minerva Cooper with which to pay a part of the purchase price, and gave her note therefor, secured by a mortgage on the land, which was duly recorded, and subsequently paid except four hundred dollars; that after the death of Nancy Booker, on March 20, 1894, and after the marriage of John W. Booker with his present wife, Lettie C. Booker, the latter, by collusion with her husband, fraudulently obtained another deed of the land from Dove and fraudulently filed it for record; that she and Booker knew of the purchase and encumbrance of the land by Nancy Booker, and knew the second deed was in fraud of Nancy's children; that thereafter Lettie borrowed four hundred dollars from one Smith, securing it by mortgage dated March 20, 1904, and duly recorded; that Booker paid that mortgage and Lettie never paid any part of it; that Lettie's title should be declared void, and to be held in favor of complainants, and the trust executed by decree and partition of the land. The complainants claim title through Nancy Booker.

Walter C. Headen, for the appellant.

W. C. Kelley, for the appellees.

**533** WILKIN, J. The undisputed evidence in the case is, that prior to February 25, 1882, John W. Booker procured T. F. Dove to purchase the land in question for Nancy Booker, and that the administrator's deed to Dove, his quitclaim deed to Nancy Booker and her mortgage to Minerva Cooper were executed as alleged in the bill. The deed to Nancy was withheld from record by the directions of John W. Booker for some ulterior purpose which he does not explain. There is no dispute as to the fact of its delivery, and that it was the same day returned to Dove and remained in his possession until the hearing of the present cause. It is not claimed that Nancy Booker was at any **534** time in possession of the land. On March 20, 1894, T. F. Dove and wife executed and delivered to the appellant, Lettie C. Booker, a quitclaim deed for the same land, which was recorded two days later. Prior to the execution of the latter deed the land had been sold for taxes and a tax deed executed therefor to one William W. Hess, dated June 8, 1888, and filed for record on the day of its date, and on September 12, 1889, Hess and wife by quitclaim deed conveyed the same to Dove in consideration of seventy-five dollars, and that deed was also duly filed for record March 22, 1894. There also appears to have

been a tax deed to the same land executed to one Michael Montgomery, dated February 2, 1892, and filed for record the same day, but, so far as the evidence in this record shows, that title is outstanding. On March 20, 1894, the date of the deed from Dove and wife to the appellant, she borrowed of one D. C. Smith, through one John D. Millar, four hundred dollars for which she gave her promissory note and executed a mortgage upon the land to secure the same, due five years from date, with ten coupon interest notes for fourteen dollars each, due semi-annually, and that mortgage was recorded March 22, 1894. In order to obtain said loan she procured an abstract of title to the land, for which she paid nine dollars and fifty cents, and she also paid Millar ten dollars commission. The proceeds of the Smith loan were paid to Dove in consideration of the deed by him to her. Immediately upon receiving her deed she entered into and has remained in possession of the land from that time to the present. She has also paid the taxes thereon for the years 1894 to 1902, inclusive. Nancy Booker, through whom complainants claim title, died March 8, 1887, leaving two children: Jennie Booker, one of the complainants, born in 1878, and John Wesley Booker, who died before reaching his majority, and unmarried, about the year 1898, and his alleged interest in the land in question descended to his father, the said John W. Booker, his sister, Jennie Booker, the complainants Finley and Elbridge Booker, his half-brothers <sup>535</sup> by a former marriage of his father, and his infant half-brother, defendant Lincoln Booker. At the time the bill was filed the half-brothers Finley and Elbridge Booker were, respectively, about thirty-two and thirty-four years of age. The former has lived in the state of Kansas for the past three or four years, and the other complainants and the defendant, John W. Booker, have at all times resided in Shelby county, this state, in which the land is located.

Without reference to the tax title which he held at the time of his conveyance to the appellant, the title of record to said land was in T. F. Dove, and it is admitted by counsel for the complainants that unless the evidence shows that the appellant took her deed with actual or constructive notice of her grantor's prior conveyance to Nancy Booker, her title must prevail—and such is unquestionably the law of this state. As was said in *Grundy v. Reid*, 107 Ill. 304: "Our law protects the purchasers of real estate in their purchases of the same as the title appears of record, unless there be notice of something to the contrary." Many later decisions of this court are to the same effect.



The only evidence in this record tending to prove actual notice to the appellant of the unrecorded deed to Nancy Booker is the testimony of John W. Booker, nominally her codefendant and her husband. It is insisted on behalf of appellant that he was incompetent to testify for or against his wife, Lettie C. Booker. The litigation is "concerning the separate property of the wife," and the action is one "in which she would, if unmarried, be defendant." Therefore, under the exceptions to section 5 of chapter 51 (2 Starr & Curtis' Statutes, page 1837), he was competent to testify for or against her: *McNail v. Ziegler*, 68 Ill. 224; *Pain v. Farson*, 179 Ill. 185, 53 N. E. 579, and cases cited; *Cassem v. Heustis*, 201 Ill. 208, 94 Am. St. Rep. 160, 66 N. E. 283.

The credibility of the testimony of the said John W. Booker presents a different question. Though joined with <sup>536</sup> his wife as a defendant he was not only hostile to her in interest, but so manifested his hatred and prejudice against her upon the witness-stand that he was repeatedly rebuked by the court and admonished by his own counsel, and it is admitted now that no excuse can be offered for his misconduct as a witness. His testimony is to the effect that he told his wife all about the prior deed, and that she took her title with actual knowledge that Dove had previously conveyed the land, but in view of his unjustifiable conduct and his manifestation of bias against the appellant and partiality in favor of the complainants we cannot receive his testimony without at least some grains of allowance. He had not lived with his wife for several years, and she squarely contradicted him as to his having told her anything whatever about the condition of the title to the land or the deed to his former wife, Nancy, and she swears, without qualification, that she had no knowledge or information from him, or anyone else, that the title was in any way defective. He also swore positively that he himself paid off the Smith mortgage. He said: "I furnished every dollar of the money myself to pay off the Smith loan." The appellant swore directly to the contrary—that she paid that entire indebtedness—and in that she was corroborated by the testimony of John D. Millar, to whom the money was paid. On this proposition the chancellor must have disbelieved John W. Booker and given credit to the appellant, otherwise she would not have been given a first lien on the land for the amount of that loan and interest. She further testified that at the time she took her deed from Dove she inquired of him whether the title was good, and was told that it was, and she gives in detail a



conversation with him on that subject, to the effect that she was getting a perfect title, in which she was corroborated by her sister, who was present and heard the conversation. It is true that Dove did not remember the conversation. He testified: "I don't remember <sup>537</sup> seeing Lettie C. Booker about the time I made the deed to her. I don't remember the circumstance of Lettie C. Booker and her sister, Sylvia, coming to my office to inquire about the title to the land. I cannot say they didn't, because I have no recollection of it whatever. I don't remember any conversation with her until after suit was brought." When it is remembered that the conversation took place several years prior to his attention being called to it, and in all probability being one of many similar transactions which occur in an attorney's office, it cannot be fairly said that his evidence is at all contrary to, or inconsistent with, that of appellant and her sister. It is true the consideration paid for the land by appellant was much less than—perhaps not to exceed—one-third its actual value; and while inadequacy of consideration is not, of itself, a ground for relief, as contended by counsel for appellees, it is nevertheless a circumstance to be considered in determining the good faith of the purchaser. It cannot, however, be fairly said in this case, that because the appellant purchased the land for a grossly inadequate price she is chargeable with knowledge of the prior unrecorded deed, because, upon the same line of reasoning, it could be said she would not have paid five hundred dollars or more for a title which she knew to be absolutely worthless. She testified that she knew that she was purchasing the forty acres for less than it was worth, and was induced to buy it for that very reason. To hold that because she paid an inadequate consideration for the land she ought therefore to be held chargeable with notice of the defect in her title, would be to authorize the setting aside of every title obtained for a grossly inadequate price, which the law will not permit. The fact that the land had been sold for taxes and two tax deeds executed therefor must also be considered as affecting the market value of the land.

We have endeavored to carefully and impartially consider the testimony in this record, and have been forced <sup>538</sup> to the conclusion that the complainants failed to prove by that preponderance of testimony which the law imposes upon them, that the appellant had actual notice of the execution of the deed to Nancy Booker.

It is, however, earnestly insisted that the facts and circumstances surrounding the transaction and parties at the time of the execution of appellant's deed are sufficient, in law, to charge her with constructive notice of the deed to Nancy, and upon this ground, in all probability, the learned chancellor based his finding and decree. On this branch of the case it is first contended that the record of the mortgage executed by Nancy Booker to Minerva Cooper in January, 1882, was, in law, notice to the appellant of the unrecorded deed from T. F. Dove to said Nancy, and reliance in support of this position is placed upon the cases of *Ogden v. Haven*, 24 Ill. 57, and *Morrison v. Morrison*, 140 Ill. 560, 30 N. E. 768. We do not regard those cases in point. In the *Ogden* case, the mortgage from Tooley to Haven, the former owner, was duly recorded, and it was said (page 60): "We think the presumption of fact, as well as of law, is that *Ogden* at that time saw the record of that mortgage. Finding the title in fee in *Haven*, and subsequently a mortgage to him from a third person, was well calculated to excite suspicion that *Haven* must have conveyed the land to *Tooley* by some conveyance not of record"—and it was held that that mortgage was sufficient to arouse the suspicion of the subsequent purchaser. But the case did not turn upon that fact alone. There was there abundant evidence of actual notice. In the later case of *Morrison v. Morrison*, 140 Ill. 560, 30 N. E. 768, the mortgage, which was held to be constructive notice of the prior unrecorded deed, was given to the owner of the fee, as shown by the record, and we said (140 Ill. 576, 30 N. E. 772): "If plaintiff in error made such examination [i. e., of the record], she found, or if she had made examination she would have found, a title in fee in her grantor, and a subsequent mortgage on part of the north-west <sup>539</sup> quarter of section 9, made by her brother, while in possession, to *Abend*, as trustee, to secure a promissory note made by her brother and payable to the order of her grantor. It would seem that notice of the record of such a mortgage is sufficient to put a purchaser on inquiry as to any unrecorded conveyance"—citing *Ogden v. Haven*, 24 Ill. 57. The facts here are entirely different. The mortgage which it is claimed should, in law, charge the appellant with constructive notice of the unrecorded deed was not executed to her grantor, but to a third party. It cannot be seriously contended that in every case where the records show a conveyance from one party to another, third persons are chargeable with notice that the grantor had a title from some other person. To so hold would render nuga-

tory the statute relating to the registration of deeds of conveyance.

In *St. John v. Conger*, 40 Ill. 535, the action was ejectment, in which the plaintiff claimed title through a deed from one McNemomy to Peter H. Schenk, improperly recorded in Madison county, the land being situated in Knox county. There was a mortgage from McNemomy to Schenk, properly recorded, and a deed from Schenk to Whittemore, and a chain of conveyance from Whittemore to the plaintiff. The original deed from McNemomy to Schenk had never been recorded in Knox county. The defendant claimed under a deed from the heirs of McNemomy to one Lancaster, duly recorded. A judgment in favor of the plaintiff and against the defendant was reversed by this court, and it was said (page 537): "It is also urged that the subsequent deed from Schenk to Whittemore should have put the defendant, and those under whom he claims, upon inquiry as to whatever title Schenk had. This proposition, in effect, is, that if a person has made a deed of a tract of land having no recorded title, he must nevertheless be supposed to have some title, and subsequent purchasers must take notice of whatever title he had. Much as registry laws have been frittered <sup>540</sup> away by the doctrine of putting parties upon inquiry, we do not think any court has ever gone to the extent of adopting this rule. It would substantially defeat the object of registry laws. Their object is to provide a public record which shall furnish to all persons interested authentic information as to titles to real estate, and enable them to act on the information thus acquired. This rule would require a person purchasing from one who has the title on record, to take subject to the unrecorded deed of persons claiming under a chain of title having no connection of record with the true source of title. If such purchaser is to be held to notice of such a chain of title at all, he has the right to presume, in the absence of any other information, that whatever title the persons claiming under such chain have, is on record, as the law requires it to be, and that they have no title if the record shows none. Here the record shows that Schenk had a mortgage from the owner, and when the defendant purchased, he had a right to presume the grantees under Schenk had acquired only his interest as mortgagee. That was all the record disclosed, and any other construction would make the record a snare." The *Ogden* case is then referred to and distinguished.

In *Kerfoot v. Cronin*, 105 Ill. 609, where A, in whom the record showed no title, made a deed of trust to B for certain

real estate, which was recorded, and which recited that it was given to secure two notes of the grantor to C, in whom the record of deed showed the title for the purchase money of the property, and C indorsed and sold the notes, and after the record of the trust deed sold and conveyed the premises to innocent parties for value, who had no knowledge of any prior conveyance by him to A, or of the deed from A to B, or the recitals therein, it was insisted that the record of the deed from A to B was notice to such subsequent purchaser from C of the existence of the deed or of its recitals, but we held the contrary, on the ground that both A and B were strangers <sup>541</sup> to the chain of title acquired by the purchasers, and we said (page 617): "The principle contended for by appellant's counsel would, as we conceive, require every record that might possibly affect real estate to be thoroughly examined before a party could be protected in taking a title to or lien upon real estate, the expense and burden of which would practically put an end to all transactions of that kind. The law imposes no such burden. In the present instance the defendants were only required, in the absence of actual notice, to see whether the records showed any, and what, deeds by or judgments against Walker. They were not required to run through with the alphabet, and see if, by possibility, in some deed, no matter by or to whom, it is mentioned that the grantee is a trustee for Walker and that the deed is made to secure the payment of the purchase money."

We are unable to perceive upon what principle the appellant was chargeable with notice that Dove had conveyed the title to Nancy Booker because of her mortgage to Mrs. Cooper, and hold that the record of that mortgage was not, as a matter of law, sufficient to arouse her suspicion or put her upon inquiry.

Another position insisted upon by counsel for appellees is, that John W. Booker, in the purchase of the land by Lettie C. from Dove, was her agent, and that she is chargeable with notice of the facts known to him. In the first place, we do not think the evidence shows that he was her agent in that transaction. He was, at most, nothing more than a mere messenger: *Doyle v. Teas*, 4 Seam. 202. Generally, in order to create an agency there must be an appointment of the agent by the principal and an acceptance of such appointment. The agency may be implied as well as expressed, but the proof in either case must be clear and satisfactory in order to bind the principal. It is also true, as a general proposition, that notice to the agent of



facts learned by him while actually engaged in the business of his principal <sup>542</sup> is notice to the principal. Notice to the agent to be notice to the principal must, as a general rule, be given to the former while acting in the course of his employment. An exception to the rule, however, is, that the principal may be bound by knowledge of his agent obtained in a former transaction—that is, one not connected with his employment—provided the knowledge is so definite as that it is, or must be presumed to have been, present in the agent's mind and memory at the time of the performance of his duties for the principal. These rules are based upon the presumption that the agent has acquired knowledge which it is his duty to impart to his principal and upon the presumption that he has performed or will perform that duty, and hence, even where the agency is clearly established and his knowledge sufficiently proven, whenever it appears that the agent has a motive or interest in concealing the fact from his principal, the latter will not be bound. No one can read the evidence in this record without reaching the conclusion that John W. Booker had a fraudulent and selfish purpose in keeping the deed to his wife, Nancy, off of the records of the county, and also in his dealings with his present wife. If he acted as her agent it is clear that he was not seeking or desiring to protect her interests. In other words, the presumption that he would discharge his duty by disclosing to his wife the facts known to him is completely overcome by his conduct and personal interest in the matter. To say that she should be chargeable with the knowledge obtained by John W. Booker of the unrecorded deed in 1882, not communicated to her, is, it seems to us, unreasonable and grossly unjust.

We are further of the opinion that under the facts of this case the right of action in the complainants and the defendant John W. Booker is clearly barred both by the laches of Nancy Booker and those claiming under her. She obtained her deed in 1882. She died in 1887, some five years after she obtained the deed. The appellant <sup>543</sup> obtained her deed in 1891, and immediately took possession of the premises and has remained in such possession to the present time, paying all taxes assessed thereon. The complainants, except Elbridge Booker, have resided in the same county in which the land is situated during all this time, and he has only been absent three or four years. This bill was not filed until 1899—five years after the appellant placed her deed upon record and entered into possession of



the land. Under the repeated decisions of this court this delay, unexplained, is such laches as will defeat the right of recovery. In *Howe v. South Park Commrs.*, 119 Ill. 101, 7 N. E. 333, we said (119 Ill. 117, 7 N. E. 346): "The doctrine of laches, as understood by the court, has been often declared by its previous decisions (citing cases). The principle that lies at the foundation of all the cases in this court on this subject is, the party who challenges the title of his adversary to real property must be diligent in discovering that which will avoid the title or render it invalid, and diligent in his application for relief. Unreasonable delay, not explained by equitable circumstances, has always been declared evidence of acquiescence, and will bar relief." The only pretense of an excuse for the delay in this case is that the complainants were kept in ignorance of the facts by the false representations to them of John W. Booker, their father. He says: "I told this falsehood about this transaction to all my children. I have said to each of them—I will not say at one time—but I was asked this question, 'Is it true that Lettie has a deed to this land?' and I said, 'No.' I repeatedly said that. I intentionally and willfully made the statement. I deceived my children. I kept up that course until they found out better. I don't know whether they caught me in the lie or not, but it was a lie," etc. It can scarcely be seriously contended that such statements, if they were in fact made, would be a sufficient reason for the delay. The complainants themselves make no explanation whatever—in fact did not testify. Appellant's <sup>544</sup> deed to the land was a matter of public record, and she was in the open, exclusive possession of the same. Those seeking to challenge her title were bound to take notice of her claim and act with reasonable diligence. They had no right to rely on the false statement of their father that she had no deed.

On the whole record we are convinced that the court below was in error in granting the prayer of complainants' bill, and its decree will accordingly be reversed and the cause remanded, with directions to dismiss the bill.

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*A Purchaser of Realty*, acting in good faith, is protected by the public records, unless there is something to put a reasonable man on inquiry: *Lennartz v. Quilty*, 191 Ill. 174, 85 Am. St. Rep. 260, 60 N. E. 913; note to *Day v. Brenton*, 63 Am. St. Rep. 471; *Mulline v. Butte Hardware Co.*, 25 Mont. 525, 87 Am. St. Rep. 430, 65 Pac. 1004. If he buys without notice, actual or constructive, of an unrecorded deed, he acquires title as against those claiming under such deed:

Scotch Lumber Co. v. Sage, 132 Ala. 598, 32 South. 607, 90 Am. St. Rep. 932, and cases cited in the cross-reference note thereto. But an unrecorded deed is generally valid as between the parties thereto and as to all others who have notice of it: Noyes v. Crawford, 118 Iowa, 15, 96 Am. St. Rep. 363, 91 N. W. 799; McGhee v. Wells, 57 S. C. 280, 76 Am. St. Rep. 567, 35 S. E. 529. And actual notice is not necessary to give effect to it: Anthony v. Wheeler, 130 Ill. 128, 17 Am. St. Rep. 281, 22 N. E. 494. As to the burden of proof to show the good faith of a purchaser, see Parrish v. Mahany, 12 S. Dak. 278, 76 Am. St. Rep. 604, 81 N. W. 295.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**INDIANA.**

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**INDIANAPOLIS STREET RY. CO. v. WILSON.**

[161 Ind. 153, 66 N. E. 950, 67 N. E. 993.]

**CARRIERS.—A Ticket is Only the Evidence of the Contract** as made between the passenger and carrier; and if it fails to disclose the true contract, its infirmity must be charged to the carrier; and the latter is liable for the natural consequences flowing from the defects in the ticket due to the negligence of its agents. (p. 265.)

**CARRIERS—Correctness of Ticket.—A Passenger Has the Right to Presume** that the ticket furnished him is a correct expression of the contract made between him and the carrier. (p. 265.)

**CARRIERS—Defective Ticket.**—Where a passenger is aboard the cars of a carrier without the proper evidence of his right of passage, due to the mistake or fault of the carrier's agent, and not to the fault of the passenger, the carrier's agent in charge of the train must heed or accept the reasonable explanations of the passenger in respect to the ticket in dispute. (p. 266.)

**STREET RAILWAY—Wrong Transfer, Passenger's Rights Under.**—If a passenger on a street-car, when he calls for a transfer over a certain line, is given a transfer over a different line, the carrier is liable to him in damages if he is expelled, over his reasonable explanations, from the car when he tenders the transfer and refuses, on its rejection, to pay an additional fare. (pp. 273, 276.)

F. Winter, W. H. Latta, S. N. Chambers, S. O. Pickens and C. W. Moores, for the appellant.

W. A. Johnson and W. J. Beckett, for the appellee.

**153 JORDAN, J.** Action by appellee against appellant to recover damages for an unlawful expulsion from one of its street-cars. A trial by jury resulted in appellee being **154** awarded damages, and, over appellant's motion for a new trial, judgment was rendered on the verdict of the jury. From this judgment appellant appeals, and the sole question involved is Can the ex-

pulsion of appellee by appellant from its car, under the circumstances, be legally justified?

The following are facts material to the point in issue: Appellant is a corporation engaged as a common carrier in operating a street railway in the city of Indianapolis. By the provisions and terms of the franchise granted to it by said city, and under which it is operating its railroad therein, a passenger on the payment of the required fare is entitled to demand and receive, without extra charge, from the conductor of the car upon which he first takes passage, a transfer ticket, which entitles him to be carried as a passenger over the line to which he is transferred. Appellant's grant or franchise, which it obtained from the city of Indianapolis, under its terms and conditions not only imposes upon it the duty of granting to the passenger the privilege of transfer upon his request, but provides particularly that the line to which the passenger is transferred "shall be plainly indicated on said transfer ticket." It is shown that appellee, on the evening of September 23, 1899, took passage upon one of appellant's cars running on and over its College avenue line, and upon paying his fare he requested the conductor in charge of said car to give him a transfer ticket to the Virginia avenue line, his destination being a point on the latter line. Upon his taking passage on one of the cars running on and over the Virginia avenue line the conductor in charge of said car demanded fare of appellee, and the latter tendered to said conductor the transfer ticket which he had received from the College avenue conductor. Upon the tender of this ticket it appears that a controversy arose between appellee and the conductor on the Virginia avenue car in regard to said ticket, the conductor claiming that the ticket was a South East street transfer instead of a Virginia <sup>155</sup> avenue transfer, and demanded that appellee pay his fare or leave the car. He explained to the conductor that he had requested the College avenue conductor to give him a transfer ticket to the Virginia avenue line, and had received the ticket which he then tendered. The following is what appellee testified to as a witness upon the trial in respect to what took place between him and the conductor after he took passage on the Virginia avenue car: "The conductor asked me for my fare, and I handed him this transfer ticket, and he said it was not a Virginia avenue transfer. I said I got it from the College avenue conductor for a Virginia avenue, and I believe it is a Virginia avenue, and I examined it very closely, and I could hardly distinguish it then. That was the first time I examined

it very closely. I told him I received it from the College avenue conductor, and asked the College avenue conductor for a Virginia avenue transfer, and that is what he gave me for a Virginia avenue transfer. He said it was a South East street transfer, and I thought it was a Virginia avenue transfer." It appears it was dark when the appellee boarded the College avenue car, but the latter was illuminated with electric lights, and he is shown to have been on the car for about ten minutes before he alighted therefrom to take passage on the transfer line. The transfer ticket was of the usual form used by the company, and contained spaces or points where the conductor was to punch in order to indicate the line to which the passenger was to be transferred. Immediately at the left of the word "Virginia" was the word "avenue." The last five letters of the word "Virginia" ran through the dark space in which the conductor was to punch to indicate that the passenger had been transferred to the Virginia avenue line. Immediately below this space was one intended to be punched in the event the passenger was transferred to South East street, a line dividing the two spaces. In punching the transfer ticket in question it appears that <sup>156</sup> the College avenue conductor had awkwardly used the punch, and, instead of plainly indicating that appellee had been transferred to the Virginia avenue line, he punched out what might be said to be the entire space opposite South East street, and also a part of the Virginia avenue space, the puncture made extending across the line dividing the two spaces, and this, as it seems, gave rise to the controversy between appellee and the conductor of the Virginia avenue line; the latter insisting that the ticket indicated that the former had been transferred to the South East street line, while appellee, on the other hand, insisted that he had requested a transfer to the Virginia avenue line, and stated that he believed the ticket indicated such transfer. Upon appellee's refusal to pay the additional fare which the conductor on the Virginia avenue line demanded, he was forcibly ejected from the car by the conductor and motor-man.

Appellee, as the facts show, became a passenger upon one of appellant's street-cars, and paid the required fare, and thereupon requested, as he had a right to do, to be furnished a transfer ticket over the Virginia avenue line of appellant's road, in order that he might be carried to the end of his journey. Upon the payment of his fare and making the request which he did, the duty then rested upon appellant, under the provisions and condi-



tions of the franchise which it had obtained from the city of Indianapolis, to furnish or provide appellee, as such passenger, with a transfer ticket plainly indicating thereby the line of its railway to which he, in accordance with his request, had been transferred, and over which, under the circumstances, he had the right to be carried. It is possibly true, as counsel for appellant seemingly insist, that appellee had ample time and opportunity to inspect his transfer ticket, and thereby ascertain whether the conductor of the College avenue car had properly performed his duty by correctly indicating the line of transfer.

<sup>157</sup> The duty of inspection, under the circumstances, the law did not exact of him, for, in the absence of any notice to the contrary, he had the right to presume that appellant's conductor and agent had correctly discharged his duty in punching the ticket, and thereby indicating the transfer over the line in accordance with his request. Appellee had nothing to do with the preparation of the ticket, for appellant seems to have prescribed the form and contents thereof, and also the method or means to be employed to indicate or point out thereon the line of its railway over which a transferee was entitled to be carried. The many words, figures, spaces, and abbreviations which the ticket furnished by appellant to appellee, as exhibited by the record, contained, would *prima facie* be unintelligible to many persons, and certainly it would be an unreasonable imposition to require of a passenger, upon receiving one of these tickets, the duty to inspect the same in order to discover if the conductor had made a mistake in the performance of his duty. Appellee, a mere passenger, under the circumstances, was not, in the eye of the law, either presumed or bound to know the meaning of the various figures, abbreviations, punch marks, and other mystic symbols which the transfer ticket in question contained. These possibly could only be correctly interpreted or read in the light of the rules and regulations adopted by appellant company for the guidance of its conductors and employés. Neither was he presumed to know or required to take notice of these rules and regulations made by appellant for the aforesaid purposes. The above propositions are well and firmly established by the authorities. It may be said, it is true, that there is a sharp conflict between the authorities in respect to the question as to whether a ticket furnished by a common carrier for transportation shall be treated and regarded as conclusive evidence of the holder's right of passage.

**158** There is a line of decisions which affirms the rule that the ticket must be considered as conclusive evidence of the passenger's rights, although it may not, in its true sense, express or evidence the contract into which the passenger and the carrier entered. These cases hold that, in the event a ticket is defective, the defects of which are due to the negligence or carelessness of the agent or agents of the carrier, then, under the circumstances, the expulsion of the holder thereof, upon his refusal to pay the additional fare required, is justified. While, on the other hand, there is another long line of cases which rule to the contrary, and deny the conclusive force of a ticket furnished by the carrier to the passenger. The latter cases, in effect, affirm that the ticket is only the evidence of the contract as made between the passenger and the carrier, and if it fails to disclose the true contract, its infirmity or fault in this respect must be charged to the carrier, and the latter is liable for the natural consequences resulting by reason of the defects in the ticket due to the negligence of its agents. They affirm the rule that inasmuch as the passenger is neither required under the law, nor in fact permitted, to print, write, or stamp the ticket, or to have anything to do whatever with its preparation, this privilege or right being reserved by the carrier to itself, therefore the passenger has the right to believe or presume in the absence of notice to the contrary, that the ticket furnished and delivered to him is a correct expression of the contract as made between him and the carrier. The following authorities or cases decided by the higher courts of other states are adverse to the contention of counsel for appellant in the case at bar. Many of them directly, and others in effect indirectly, deny the conclusive force of a railroad ticket sold by the carrier to a passenger: *Trice v. Chesapeake etc. R. R. Co.*, 40 W. Va. 271, 21 S. E. 1022; *Northern Pac. R. R. Co. v. Pauson*, 70 Fed. 585, 17 C. C. A. 287; *Ray v. Courtland etc. Traction Co.*, 19 App. Div. 530, **159** 46 N. Y. Supp. 521; *Jenkins v. Brooklyn Heights Ry. Co.*, 29 App. Div. 8, 51 N. Y. Supp. 216; *Eddy v. Syracuse etc. Ry. Co.*, 50 App. Div. 109, 63 N. Y. Supp. 645; *New York etc. R. Co. v. Winters*, 143 U. S. 60, 12 Sup. Ct. Rep. 356; *Murdock v. Boston etc. R. R. Co.*, 137 Mass. 293, 50 Am. Rep. 307; *Gulf etc. Ry. Co. v. Rather*, 3 Tex. Civ. App. 72, 21 S. W. 951; *Gulf etc. Ry. Co. v. Copeland*, 17 Tex. Civ. App. 55, 42 S. W. 239; *Texas etc. R. R. Co. v. Dennis*, 4 Tex. Civ. App. 90, 23 S. W. 400; *St. Louis etc. R. Co. v. Mackie*, 71 Tex. 491, 10 Am. St. Rep. 766, 9 S. W. 451; *Missouri Pac. R. Co. v. Mar-*

tino, 2 Tex. Civ. App. 634, 18 S. W. 1066, 21 S. W. 781; Burnham v. Grand Trunk R. Co., 63 Me. 298, 18 Am. Rep. 220; Ellsworth v. Chicago etc. R. R. Co., 95 Iowa, 98, 63 N. W. 584; Yorton v. Milwaukee etc. R. Co., 62 Wis. 367, 21 N. W. 516, 23 N. W. 401; Philadelphia etc. R. R. Co. v. Rice, 64 Md. 63, 21 Atl. 97; Appleby v. St. Paul City R. Co., 54 Minn. 169, 40 Am. St. Rep. 308, 55 N. W. 1117; Laird v. Pittsburg Traction Co., 166 Pa. St. 4, 31 Atl. 51; Hot Springs R. R. Co. v. Deloney, 65 Ark. 177, 67 Am. St. Rep. 913, 45 S. W. 351; Head v. Georgia Pac. Ry. Co., 79 Ga. 358, 11 Am. St. Rep. 434, 7 S. E. 217; Georgia etc. R. R. Co. v. Olds, 77 Ga. 673; Hufford v. Grand Rapids etc. R. R. Co., 64 Mich. 631, 8 Am. St. Rep. 859, 31 N. W. 544; Georgia R. R. etc. Co. v. Dougherty, 86 Ga. 744, 22 Am. St. Rep. 499, 12 S. E. 747; Kansas City etc. R. R. Co. v. Riley, 68 Miss. 765, 24 Am. St. Rep. 309, 9 South. 443; Lawshe v. Tacoma Ry. etc. Co., 29 Wash. 681, 70 Pac. 118; O'Rourke v. Street Ry. Co., 103 Tenn. 124, 76 Am. St. Rep. 639, 52 S. W. 872; Wood on Railroads, 2d ed., sec. 349; 25 Am. & Eng. Ency. of Law, 1075, 1076. The following decisions of our own courts are in harmony with and support the doctrine affirmed by the decisions in the foregoing cases: Pittsburg etc. R. R. Co. v. Hennigh, 39 Ind. 509; Toledo etc. R. R. Co. v. McDonough, 53 Ind. 289; Lake Erie etc. R. R. Co. v. Fix, <sup>160</sup> 88 Ind. 381, 45 Am. Rep. 464; Pennsylvania Co. v. Bray, 125 Ind. 229, 25 N. E. 439; Louisville etc. R. R. Co. v. Conrad, 4 Ind. App. 83, 30 N. E. 406; Chicago etc. R. R. Co. v. Graham, 3 Ind. App. 28, 50 Am. St. Rep. 256, 29 N. E. 170; Cleveland etc. R. R. Co. v. Beckett, 11 Ind. App. 547, 39 N. E. 429; Evansville etc. R. R. Co. v. Cates, 14 Ind. App. 172, 41 N. E. 712; Cleveland etc. R. R. Co. v. Kinsley, 27 Ind. App. 135, 87 Am. St. Rep. 245, 60 N. E. 169.

The extent to which these cases support the doctrine in question and sustain appellee's right to a recovery in this case is that where the passenger is aboard the cars of the carrier without the proper evidence or token of his right of passage, which is due to the mistake or fault of the carrier's agent, and not to the fault of the passenger, then under such circumstances, the carrier's agent in charge of the train must heed or accept the reasonable explanations of the passenger in regard to the ticket in dispute.

An examination of the cases pro and con upon the question herein involved convinces us that the weight of authority and

the better reason are against the contention of counsel for appellant, and that the right of the appellee to recover under the facts in this appeal is well supported by the decisions of our own, as well as other courts.

We deem it useful specially to refer to some of the many decisions herein above cited several of which are virtually identical with the case before us, for consideration. In the appeal of *Pennsylvania Co. v. Bray*, 125 Ind. 229, 25 N. E. 439, it appears that the passenger presented to the conductor of the railroad company a going coupon of a round-trip ticket from Mooresville to Indianapolis as his fare from Indianapolis to Mooresville. This coupon the conductor refused to receive upon the ground that it was the wrong coupon. It is disclosed that this was the first knowledge that the passenger had that the coupon which he presented was the going instead of the returning part of the ticket, and he explained to the conductor that he had purchased the ticket a few days previous from the company, and <sup>161</sup> had presented it to a conductor in charge of one of the company's trains going from Mooresville to Indianapolis, and the conductor took up the returning coupon, and gave him back the going coupon. This statement or explanation upon the part of the passenger the conductor refused to accept or heed, but demanded fare, and upon refusal to pay the same he ejected the passenger from the car. This court held that the expulsion, under the circumstances, was wrongful, and that the passenger was entitled to recover damages therefor.

In the appeal of *Lawshe v. Tacoma Ry. etc. Co.*, 29 Wash. 681, 70 Pac. 118, recently decided by the supreme court of Washington, the facts are virtually identical with those in the case at bar. It is disclosed that the railway company in that case was a common carrier, engaged in operating a street-car line in the city of Tacoma, and issued transfer tickets to passengers, good for passage over the various connecting lines operated by the said company. The plaintiff in that case became a passenger on a street-car running over the Pacific avenue line, and requested a transfer to the I street line. By mistake it appears the conductor gave him a transfer ticket to a line other than the I street line. Not observing the mistake, the plaintiff took passage on a car running over the I street line, and presented the ticket to the conductor in charge thereof, who refused to accept it, and demanded fare, which the plaintiff declined to pay, and consequently he was ejected from the car. The court held, under the facts, that his expulsion was wrong-



ful, for which he was entitled to a recovery. In the course of the opinion the court said: "It seems to us that in accordance with the general principles of law the appellant should recover. It is too plain for argument that only the right to sue for the recovery of the fare or a portion of the fare received by the company will be totally inadequate, and, through the plain, every-day law governing agency, the company is responsible <sup>162</sup> for the acts of its agent and for his mistakes. This mistake it was the duty of the company to correct. It must necessarily correct it through its agents. It makes no difference, in reason, that the agent who was called upon to correct the mistake was another and different agent from the one who made the mistake. They were both agents of the company, and the act of the first conductor was in effect the act of the second conductor, because the acts of both were the acts of the company, the company having, for its own convenience, intrusted its business to two agents instead of one. The contract was made when the passenger paid the fare, and it was a contract, not with any particular agent of the company, but with the company through its agents. The first conductor, who made the mistake, was not the agent of the passenger, but was the agent of the company, and his mistake was therefore the mistake of the company. If any other rule prevailed, the result would be that the company would be allowed to deprive the passenger of part of the benefit of his contract on account of the mistake made by the company, and for which he was in nowise to blame, for he had a right to assume that the conductor furnished him with the transportation for which he asked and for which he paid."

In the case of *O'Rourke v. Citizens' Street Ry. Co.*, 103 Tenn. 124, 76 Am. St. Rep. 639, 52 S. W. 872, the plaintiff with his wife and three children took passage on a Beale and Lane avenue street-car of the defendant's road in the city of Memphis. Upon paying the proper fares, he requested to be furnished by the conductor in charge of the car with the requisite number of transfer tickets to a north-bound Main street-car of the same company. The conductor punched the tickets in such a manner as to indicate that the time of their issue was 1:40 P. M. when in fact they were issued nearly an hour later, and were fully within the time limit. The conductor in charge <sup>163</sup> of the transfer car, over the plaintiff's explanation showing that the first conductor, in punching the tickets, must have made a mistake in the time, refused to ac-



cept them, claiming that under the rules of the company the time limit of the tickets had expired, and, the plaintiff refusing to pay additional fare, he and his family were expelled from the car. The supreme court in that case on appeal held that the expulsion was wrongful and the plaintiff was entitled to recover damages therefor. In speaking in respect to the rules of law governing the case, the court said: "The ticket, whether for transfer, as in the present case, or for original passage, may well be called the carrier's written direction by one agent to another agent concerning the particular transportation in hand; and if the direction be contrary to the contract, and expulsion follow as a consequence, the carrier must be answerable for all proximate damages ensuing therefrom, just as any other principal is liable for the injurious result of misdirection to his agent. . . . The plaintiff had a right to believe the transfer ticket all it should be. With it he diligently sought and promptly entered the first transfer car, and, upon being challenged by the conductor of that car as too late to use the ticket, he made a fair and reasonable statement, showing that he had just left the first car and that the first conductor must have wrongly indicated the hour of issuance on the face of the ticket. On that statement the plaintiff should have been allowed to pursue his journey to its end. He owed the company no other duty, and his expulsion under such circumstances was a tortious breach of the contract, for which he became entitled to recover for all approximately resulting damages, including those for humiliation and mortification, if such were in fact sustained."

In the case of *Laird v. Pittsburg Traction Co.*, 166 Pa. St. 4, 31 Atl. 51, a conductor of the defendant's street-car issued a transfer ticket to the plaintiff. This ticket contained <sup>164</sup> two punch marks in respect to the time of its issue. One indicated 7:30 A. M. and the other 9 A. M. The conductor on the transfer car refused to accept it upon the ground that it was two hours old, and not within the time limit as provided by the rules of the company. The plaintiff explained to him that the ticket had been in fact issued at 9 A. M., just before he took passage on the transfer car. On his refusal to pay the fare demanded he was ejected from the car. The court in that appeal held that the company was liable for the wrongful expulsion of the plaintiff, for the reason that it was responsible for the defective or doubtful character of the transfer ticket.

In the case of *Hufford v. Grand Rapids etc. Ry. Co.*, 64 Mich. 631, 8 Am. St. Rep. 859, 31 N. W. 544, the agent of the railroad company sold and delivered to the plaintiff as a good ticket one which had been canceled. The conductor declined to receive it, and the plaintiff, in order to prevent his expulsion from the car, paid the fare which the conductor exacted. He instituted an action for damages, and the supreme court of Michigan, in the appeal cited, sustained his right to recover. The case appears to have been twice appealed to the supreme court, the first decision being reported in 53 Mich. 118, 18 N. W. 580, entitled *Hufford v. Grand Rapids etc. Ry. Co.*, and the decision in that appeal is cited by counsel for appellant in the case at bar in support of their contention. It is true that the court in the first appeal affirmed that, as between the passenger and the conductor, the ticket must be regarded as the conclusive evidence of the extent of the passenger's right to travel, but in the second appeal—64 Mich. 631, 8 Am. St. Rep. 859, 31 N. W. 544—the court seems to have modified its holding in the first appeal, saying: "When the plaintiff told the conductor on the train that he had paid his fare, and stated the amount he had paid to the agent who gave him the ticket he presented, and told him it was good, it was the duty of the conductor to accept the statement of <sup>165</sup> the plaintiff until he found out it was not true, no matter what the ticket contained in words, figures, or other marks."

In *Ellsworth v. Chicago etc. R. R. Co.*, 95 Iowa, 98, 63 N. W. 584, the ticket agent of the defendant sold the plaintiff a ticket which by mistake of the agent was antedated three days from the time of its purchase. The plaintiff presented it for passage on the day it was actually issued, but the conductor in charge of the train refused to accept it because on its face it disclosed that the time for using it had expired. The plaintiff refused to pay the fare, and was ejected. The court, under the facts, held that the railroad company was liable for damages by reason of the unlawful expulsion of the plaintiff.

In *Evansville etc. R. R. Co. v. Cates*, 14 Ind. App. 172, 41 N. E. 712, the passenger requested of the railroad company's agent at Evansville a ticket from the latter city to the city of Terre Haute, and paid therefor the regular price of the fare. By mistake the agent furnished and delivered to the passenger a ticket good only from Evansville to Vincennes, a station on the carrier's road between Evansville and Terre Haute. The passenger, without any fault on his part, believing the ticket so

furnished and delivered to him by the agent, under his request, was in compliance therewith, took passage on a train running from Evansville to Terre Haute, and surrendered the ticket in question to the conductor in charge of the train. After the train had passed beyond Vincennes, the conductor demanded of him additional fare on the ground that the ticket which he had surrendered was only good from Evansville to Vincennes. The passenger explained the situation in regard to the ticket to the conductor, informing him that the ticket which he had surrendered to him was one good from Evansville to Terre Haute, which he had purchased and paid for, and that he had no money with which to pay additional or extra fare <sup>166</sup> as the conductor demanded. The conductor refused to heed or accept his explanation, and upon the failure of the passenger to pay the fare demanded, he was ejected. It was held in that case, under the circumstances, that he was entitled to recover damages for the wrongful expulsion. In answering the contention of appellant in that appeal that it is impracticable for a conductor to investigate the explanations or statements of a passenger in regard to his ticket, for the reason that while so doing the passenger may reach his destination and depart from the train, and that the company cannot pursue him without inconvenience and expense, the court said, at page 178: "This is not much more impracticable than for a passenger to pay a second time who has no more money; nor is it, perhaps, much more inconvenient for the company to pursue the passenger for his fare than for the passenger to go to the expense and trouble of convincing the company that its official has made a mistake and compelling the return of the money improperly exacted. As a rule, the amount involved and the expense and trouble required would be widely disproportionate."

In Wood on Railroads, second edition, section 349, the author says: "Where the passenger asks and pays for a certain ticket, and the station agent by mistake gives him a different one, which does not entitle him to the passage desired, the conductor has no right to expel him, and the company is liable in damages if he is expelled. The passenger has a right to rely on the agent to give him the right ticket. There are authorities which hold the other way, but it seems that their views are indefensible."

In 25 American and English Encyclopedia of Law, 1076, the authors of this work, after stating that some of the authorities assert that a railroad company cannot be expected to listen to

the passenger's explanation in regard to the ticket in dispute; that the passenger should either pay the fare demanded by the conductor or leave the train, and then sue the company <sup>167</sup> for a breach of contract; otherwise, if he attempts to remain on the train without paying the fare, and is expelled therefrom, he can recover no damages for the expulsion—say: "Others hold that the conductor has no right to expel the passenger, and if he does so, the company is liable for damages therefor. The latter would seem to be the better doctrine—it certainly has the support of the more recent cases."

In *Hot Springs R. R. Co. v. Deloney*, 65 Ark. 177, 67 Am. St. Rep. 913, 45 S. W. 351, the passenger presented to the conductor of the defendant's train a ticket which he had purchased for passage to a certain point on the railroad. This ticket, by mistake or fault of the ticket agent, had not been properly made out so as to show that the passenger was entitled to passage to the place to which he had paid his fare. On his refusal to pay the additional fare demanded, he was ejected. It was held in that case that the expulsion was wrongful, and the company liable therefor in damages. The appellant in that appeal insisted that the conductor could only rely upon the face of the ticket to determine his duty in the premises, and was not required to heed the explanations of the passenger to the effect that the ticket agent had made a mistake in issuing the ticket. This contention was opposed by counsel for appellee. The court, after reviewing the authorities pro and con, said: "There is this much to be said, however, and that is that the tendency of more recent decisions is toward at least a conservative view of the principle contended for by appellee's counsel; and we adopt that in this case, to wit, that, notwithstanding the conductor has only carried out the company's rules and regulations, and these are reasonable, and he therefore may be exonerated from blame personally, yet, as the company, through its ticket agent acting for it, was guilty of doing that which produced all the injury the plaintiff may have suffered from being put off the train, it is liable for such, and cannot shield itself behind the <sup>168</sup> faithfulness of its servant, the conductor, for its negligence in not delivering a proper ticket to the plaintiff, and has not only injured the plaintiff, if indeed he was injured, but placed the conductor in the attitude of participating in the wrongdoing, while yet performing his duty personally, while of course ignorant of the wrong done to the plaintiff, if any was done."



Ordinarily, as the authorities affirm, a railroad ticket for passage is regarded as a mere token, voucher, or receipt adopted by the carrier for its convenience to show that the passenger to whom it has been issued or sold has paid the required fare for his right to be carried from one point on the railroad to another. It is merely evidence of such right and cannot be said, in its ordinary form, as such a token or voucher, to constitute the sole contract for passage between the carrier and the passenger. But where a railroad ticket, in addition to the ordinary and usual form, contains some reasonable stipulation, limitation, or condition to which the purchaser has assented, then it may be said as to such stipulation, limitation or condition, it constitutes a binding contract between the parties: 25 Am. & Eng. Ency. of Law, 1074, 1075, and authorities there cited; Elliott on Railroads, sec. 1593.

There can be no sound reason advanced for holding that such a voucher or token as is a passage ticket in its ordinary form must be regarded or considered as the exclusive evidence of the passenger's right to be carried, and that the agent of the carrier may, over the reasonable explanations or statements of the passenger in regard to his right to be carried thereon, expel him from the car on which he has taken passage unless he pays the extra fare demanded, without subjecting the carrier to damages by reason of such expulsion, where the latter, under the circumstances, as between the passenger and the carrier company, is shown to have been wrongful. When the case at bar, under the facts, is tested by the principles affirmed by the <sup>169</sup> authorities to which we have referred, the conclusion which we reach will be found to be amply sustained upon cogent and sound reason.

The fact that the wrong of which appellee complains may be said to be due to the combined faults of two of appellant's conductors or agents exerts no material influence over his right to recover, for, under the circumstances, appellant must be presumed to have been present and acting at the time through the agency of the conductor who issued the transfer ticket, and through the agency of the other, who, over the explanations of appellee in regard to the issue of the ticket, refused to accept it, and thereupon expelled him from the car upon which, as shown, he was entitled to be carried. The mistake which the first conductor made in failing plainly to point out or indicate upon the transfer ticket the line to which appellee had requested to be transferred, in the eye of the law, must be considered as



the mistake or fault of the appellant. And the latter must be treated or regarded as a wrongdoer in not honoring the ticket when it was presented by appellee to the second conductor and in expelling him from the car over his explanations in respect to the issue of the ticket. These explanations it should have accepted as true until the contrary was shown. It was certainly as much the duty of appellant to correct the mistake which it had made in punching the ticket in the first instance when the opportunity to do so was presented to it through the agency of the second conductor as would have been its duty to have rectified the same had the attention of the first conductor been called to the mistake by appellee before he left the College avenue car.

Consequently, there is no force or merit in the contention that he should have examined the transfer ticket which he received before leaving the car, and have presented it to the conductor who issued it, in order that the mistake made by him in punching the ticket might be corrected.

<sup>170</sup> We have given the propositions presented in this appeal a patient consideration. All of them lead up to the single question, Can the expulsion of appellee under the circumstances in this case be justified? As previously indicated we are constrained to answer this question in the negative.

Judgment affirmed.

Hadley, C. J., concurs with Jordan, J.

Dowling, J., concurs in the result.

Monks and Gillett, JJ., dissent.

#### ON PETITION FOR REHEARING.

JORDAN, J. Appellant, through its counsel, urges a rehearing in this case upon the claim that the decision is wrong, and that the court erred in basing its conclusion upon the assumption that there was upon the face of the transfer ticket an ambiguity. There is no ground apparent or real for the latter contention. What was said in our opinion in regard to the ticket herein involved, as it appeared in the record, being *prima facie* unintelligible to many persons, was merely asserted in answer to the contention of appellant's counsel that it was the duty of appellee to examine it when he received it, in order to discover if the conductor of the College avenue line had punched it in accordance with his request for a transfer, the argument being advanced apparently to the effect that his neglect to exer-

cise such caution would, under the circumstances, defeat a recovery in this case. What the court held was that the ticket furnished to appellee by appellant, as shown, could not be regarded as conclusive evidence between the parties; that, under the circumstances, it was open to the explanations made by appellee at the time he presented it for passage to the conductor in charge of the Virginia avenue car in regard to the mistake or fault of appellant's agent in punching the ticket; that appellee's expulsion from the car over his explanations or statements in relation <sup>171</sup> to the ticket was at the peril of appellant, in the event of its being unable to show that the same so made by him were false or untrue. Or, in other words, under the circumstances in the case, the burden was upon it to prove the falsity of these explanations. No attempt was made to establish at the trial that they were in any manner false. Appellant seemingly rested its case upon the claim which it made that the ticket in controversy was conclusive evidence between it and appellee of the contract in regard to the transfer, and that it was not open to his explanations in respect to the mistake made by its agent who issued the ticket to him, and that, on his refusal to pay the fare demanded by the conductor of the Virginia avenue car, his expulsion therefrom was justified.

We are not impressed with the insistence of counsel for appellant that it is the well-known disposition of many persons "to impose on public carriers whenever a safe opportunity arises," and that, therefore, in the future, passengers over appellant's lines, relying on the rule affirmed in this case, will be enabled to overthrow the entire transfer system of the city, by means of fraudulent claims made in relation to transfer tickets. A court ought not to hesitate to enforce the rule which we do in this case—a rule or principle which is so logically supported by many authorities—merely upon the assumption or naked assertion that some persons may be enabled thereby to perpetrate a fraud in the future. Regard must be had for the legal rights of passengers as well as for those of public carriers; and all doubts in respect to the rights of the former are not, as counsel for appellant seemingly argue, to be solved against the passenger and in favor of the carrier. In addition to the authorities cited in the original opinion to sustain our holding that the ticket in dispute did not afford conclusive evidence between appellant and appellee in respect to the contract of carriage or passage, we cite the following: Louisville etc. Ry. Co. v. Gaines, 99 Ky.

411, 59 Am. St. Rep. 465, 36 S. W. <sup>172</sup> 174; Baltimore etc. Ry. Co. v. Bambrey (Pa.), 16 Atl. 67.

We are satisfied with and adhere to the decision in this appeal, and the petition for a rehearing is therefore overruled.

**A Dissenting Opinion** was filed by Justice Gillett in which Justice Monks concurred. The material portion of this opinion reads as follows:

"I desire to say at the outset that I think there is a clear distinction between this case and cases where the ticket is not insufficient on its face, or where it is ambiguous, or denotes the fact of a mistake upon a mere inspection of it, or where the traveler enters the train with a proper ticket that is afterward taken up. The question in the case at bar is, Can the appellee, under the circumstances of this case, maintain tort for being ejected from a car while insisting upon the right to ride upon a ticket that was palpably insufficient?

"I agree with Jordan, J., that a transfer ticket is not a contract, but is a mere token. It is said by Mr. Wood in his work on Railroads, second edition, 1634: 'Tickets issued by a railway company to a passenger are prima facie evidence of a contract between the railway company and the passenger to transport the latter and his personal baggage from the station named therein as the place of departure, to the station named therein as the place of destination': See, also, Thompson on Carriers of Passengers, 65; Fetter on Carriers of Passengers, 711, and cases there cited. Back of the ordinary ticket is the contract of the parties. There is a breach of that contract when the agent with whom it is made delivers a wrong token to the passenger. For the violation of that contract the carrier is liable for damages. The contract is to carry, and the damages are to be admeasured with that fact in view. Consequently, the damages may in many cases be substantial, and include every element that might be recovered for in case of tort, saving damages for being ejected.

"In *Hobbs v. London etc. R. Co.*, 44 L. J. Q. B. 49, L. R. 10 Q. B. 111, 119, a case where the plaintiff had been negligently carried to the wrong station, Blackburn, J., said: 'This is in reality an action on the contract. It is commonly called a duty, but it arises out of contract.' In a subsequent portion of the opinion, in discussing the question of damages, it was said: 'The question of remoteness is left in great vagueness, and I cannot bring myself much nearer to a definition, though perhaps it is made a little more definite by saying that you may recover such damage as might be reasonably contemplated by the parties as likely to be the result of a breach of the contract between them. I think we can, without being able to define the line, very clearly see on which side of it each case is. I think the line must be left vague.'

“A rule requiring passengers who do not pay cash fare to manifest their right to be carried by the production of proper tokens is reasonable and valid: *Baltimore etc. R. R. Co. v. Blocher*, 27 Md. 277; *Chicago etc. R. R. Co. v. Boger*, 1 Ill. App. 472; *Pullman etc. Co. v. Reed*, 75 Ill. 125, 20 Am. Rep. 232; *Frederick v. Marquette etc. R. R. Co.*, 37 Mich. 342, 26 Am. Rep. 531; *Willetts v. Buffalo etc. R. R. Co.*, 14 Barb. 585; *Hibbard v. New York etc. R. R. Co.*, 15 N. Y. 455; *Townsend v. New York etc. R. R. Co.*, 56 N. Y. 295, 15 Am. Rep. 419; *Downs v. New York etc. R. R. Co.*, 36 Conn. 287, 4 Am. Rep. 77; *Shelton v. Lake Shore etc. R. R. Co.*, 29 Ohio St. 214. Moreover, such rule is so general with carriers that it may be affirmed not only that those who deal with them must take notice of it, but that every person of average intelligence does know of it.

“The rule, then, being reasonable, and one which the proposed traveler may be presumed to be advised of, it is pertinent to inquire, If the latter is deprived of the privilege of remaining upon the car, what was the inception of his right? Evidently it was the contract. What was the contract? That the carrier, for a consideration received, would transport the proposed traveler from one point to another, subject to the reasonable regulation that he should produce to the carrier's conductor the token of his right so to be transported. If the rule amounts to anything, it must become a component part of the contract. But if the passenger receives a wrong token? Then he may sue in contract for the breach in failing to deliver to him a proper evidence of his right to ride, and thereby depriving him of such right. But if he sues in tort for being ejected, the carrier may answer: You should not, by virtue of the contract, have expected to continue upon the car after you were advised that you had not obtained a proper token. I did not contract to carry you unless you manifested to my conductor, in the manner that you knew that my rule provided for, that you had a right to be carried. It does not follow that the rule should yield and the passenger be permitted to remain upon the car, because the carrier was to blame in delivering a wrong token; for, whatever the fault of the carrier, the conductor is not in fault, and the carrier cannot be charged with a tort committed by its servant unless the servant was also guilty of a tort.

“As the rights of the parties had their inception in contract, and as the court can in almost every case completely recompense the plaintiff for the damages that flow from the breach, I am unable to see how the plaintiff could recover more than he might have recovered had he voluntarily left the car, by defying the rule and thereby inviting the very violence which forms the gravamen of his action, if he is permitted to sue for being ejected.

“It is proper to look at the matter from a business point of view, the question arising as to which of two conflicting rights should

yield. The rule is reasonable. Its universal adoption is the best vindication of its necessity. A carrier would be warranted in enforcing it, even if it were compelled occasionally to respond in damages for breach of contract, as the only means by which it could maintain a proper auditing department of passenger accounts, and yet keep trespassers innumerable off its carriages; but if it were compelled to respond in large sums for assault and battery, based on invited attacks, the burden cast upon the carrier would be great, and its injustice manifest.

“Another reason for the enforcement of the doctrine I contend for is based on public policy, since the opposite doctrine would affect and impair the rights of third parties; but upon this subject I desire to let the authorities speak. The only rule that can reasonably be declared in a case of this kind is that, for the time being—or, in other words, as between the traveler and the conductor—the ticket must be accepted as conclusive. I now purpose to show what is the law upon this subject by the authorities, and the importance of the case, in my judgment, warrants me in exhibiting to some extent the language used relative to this question by courts and text-writers.

“The leading case upon this subject is *Frederick v. Marquette etc. R. Co.*, 37 Mich. 342, 26 Am. Rep. 531. The court’s opinion was written by Marston, J. It was there said: ‘How, then, is the conductor to ascertain the contract entered into between the passenger and the railroad company where a ticket is purchased and presented to him? Practically, there are but two ways—one, the evidence afforded by the ticket; the other, the statement of the passenger contradicted by the ticket. Which should govern? In judicial investigations we appreciate the necessity of an obligation of some kind and the benefit of a cross-examination. At common law parties interested were not competent witnesses, and even under our statute the witness is not permitted, in certain cases, to testify as to facts which, if true, were equally within the knowledge of the opposite party, and he cannot be procured. Yet here would be an investigation as to the terms of a contract, where no such safeguards could be thrown around it, and where the conductor, at his peril, would have to accept of the mere statement of the interested party. I seriously doubt the practical workings of such a method, except for the purpose of encouraging and developing fraud and falsehood, and I doubt if any system could be devised that would so much tend to the disturbance and annoyance of the traveling public generally. There is but one rule which can safely be tolerated with any decent regard to the rights of railroad companies and passengers generally. As between the conductor and passenger, and the right of the latter to travel, the ticket produced must be conclusive evidence, and he must produce it when called upon, as the evidence of his right to the seat he claims. Where a passenger



has purchased a ticket and the conductor does not carry him according to its terms, or if the company, through the mistake of its agent, has given him the wrong ticket, so that he has been compelled to relinquish his seat, or pay his fare the second time in order to retain it, he would have a remedy against the company for a breach of the contract, but he would have to adopt a declaration differing essentially from the one resorted to in this case.' Cooley, J., used language no less emphatic in *Hufford v. Grand Rapids etc. R. R. Co.*, 53 Mich. 118, 18 N. W. 580. In *Keen v. Detroit Electric Ry. Co.*, 123 Mich. 247, 81 N. W. 1084—a transfer case to some extent like this—the court held that the plaintiff could not recover for the act of the conductor in ejecting him.

“One of the clearest decisions of the subject is *Bradshaw v. South Boston R. R. Co.*, 135 Mass. 407, 46 Am. Rep. 481. The action was for tort in expelling a person from a street-car who insisted upon traveling on a wrong transfer that had been given him by mistake. In disposing of the case, the court said: ‘The conductor of a street railway car cannot reasonably be required to take the mere word of a passenger that he is entitled to be carried by reason of having paid a fare to the conductor of another car; or even to receive and decide upon the verbal statements of others as to the fact. The conductor has other duties to perform, and it would often be impossible for him to ascertain and decide upon the right of the passenger, except in the usual, simple and direct way. The checks used upon the defendant’s road were transferable, and a proper check, when given, might be lost or stolen, or delivered to some other person. It is no great hardship upon the passenger to put upon him the duty of seeing to it, in the first instance, that he receives and presents to the conductor the proper ticket or check; or, if he fails to do this, to leave him to his remedy against the company for a breach of its contract. Otherwise, the conductor must investigate and determine the question, as best he can, while the car is on its passage. The circumstances would not be favorable for a correct decision in a doubtful case. A wrong decision in favor of the passenger would usually leave the company without remedy for the fare. The passenger disappears at the end of the trip; and, even if it should be ascertained by subsequent inquiry that he had obtained his passage fraudulently, the legal remedy against him would be futile. A railroad company is not expected to give credit for the payment of a single fare. A wrong decision against the passenger, on the other hand, would subject the company to liability in an action at law, and perhaps with substantial damages. The practical result would be, either that the railroad company would find itself obliged in common prudence to carry every passenger who should claim a right to ride in its cars, and thus to submit to frequent frauds, or else, in order to avoid this wrong, to make such stringent rules as greatly to incommode the public, and

deprive them of the facilities of transfer from one line to another which they now enjoy. It is a reasonable practice to require a passenger to pay his fare, or to show a ticket, check, or pass; and, in view of the difficulties above alluded to, it would be unreasonable to hold that a passenger, without such evidence of his right to be carried, might forcibly retain his seat in a car, upon his mere statement that he is entitled to a passage. If the company has agreed to furnish him with a proper ticket, and has failed to do so, he is not at liberty to assert and maintain by force his rights under that contract; but he is bound to yield, for the time being, to the reasonable practice and requirements of the company, and enforce his rights in a more appropriate way. It is easy to perceive that in a moment of irritation and excitement it may be unpleasant to a passenger who has once paid to submit to an additional exaction. But, unless the law holds him to do this, there arises at once a conflict of rights. His right to transportation is no greater than the right and duty of the conductor to enforce reasonable rules, and to conform to reasonable and settled customs and practices, in order to prevent the company from being defrauded; and a forcible collision might ensue. The two supposed rights are in fact inconsistent with each other. If the passenger has an absolute right to be carried, the conductor can have no right to require the production of a ticket or the payment of fare. It is more reasonable to hold that, for the time being, the passenger must bear the burden which results from his failure to have a proper ticket. It follows that the plaintiff was where he had no right to be, after his refusal to pay a fare, and that he might properly be ejected from the car. This decision is in accordance with the principle of the decisions in several other states, as shown by the cases cited for the defendant; and no case has been brought to our attention holding the contrary.'

'Townsend v. New York etc. R. R. Co., 56 N. Y. 295, 15 Am. Rep. 419, is a case somewhat different from this in its facts, but which strongly points out some of the practical reasons why a passenger cannot recover for being ejected if he is without a proper ticket. In that case the plaintiff's ticket had been wrongfully taken from him by the first conductor, and he was seeking to travel upon his explanation. The conductor notified him that he must pay his fare or leave the train. The court said: 'If, after this notice, he waits for the application of force to remove him, he does so in his own wrong; he invites the use of the force necessary to remove him; and if no more is applied than is necessary to effect the object, he can neither recover against the conductor or company therefor. This is the rule deducible from the analogies of the law. No one has a right to resort to force to compel the performance of a contract made with him by another. He must avail himself of the remedies the law provides in such case. This rule will prevent breaches of the peace instead of producing them; it will leave the company re-

sponsible for the wrong done by its servant without aggravating it by a liability to pay thousands of dollars for injuries received by an assault and battery, caused by the faithful efforts of its servants to enforce its lawful regulations.'

"The element of the public interest is particularly brought out in *Pennsylvania R. R. Co. v. Connell*, 112 Ill. 295, 304, 306, 54 Am. Rep. 238. 'Had appellee paid the fare demanded,' said the court in that case 'he might have sued the company and recovered for a breach of the contract. Had he left the train when the conductor refused to receive the ticket and ordered him to leave, he might have sued and recovered for all damages sustained in consequence of the act of the conductor expelling him from the train. . . . A train crowded with passengers—often women and children—is no place for a quarrel or a fight between a conductor and a passenger, and it would be unwise, and dangerous to the traveling public, to adopt any rule which might encourage a resort to violence on a train of cars.'

"A case containing somewhat the same course of reasoning is *Southern etc. R. R. Co. v. Rice*, 38 Kan. 398, 403, 5 Am. St. Rep. 766, 16 Pac. 817, where it was said: 'For any breach of contract or gross negligence on the part of the conductor or other employés of a railroad company, redress must be sought in the courts, rather than by the strong arm of the person who thinks himself about to be deprived of his rights. A passenger should not be permitted to invite a wrong and then complain of it.'

"Where a traveler, who desired to stop en route, had asked for a stopover check, but by mistake was given a trip check, it was held by the supreme court of Wisconsin that he was not entitled to ride upon another train upon presenting the trip check and making the explanation. In the course of the opinion it was said by the court: 'Here, the plaintiff was not entitled, upon anything he showed the second conductor, to ride on his train. That conductor, therefore, had the lawful right to eject him from it; nay, he was bound to do so, in obedience to the reasonable rules of the company, which required a passenger to obtain from his conductor a stopover check when he desired to stop before reaching the place to which he had purchased a ticket; and the mistake or fault of the conductor in not giving him, on request, such a check would not give him a lawful right to ride on the second train, though he might recover damages against the company for the wrongful act of the first conductor': *Yorton v. Milwaukee etc. R. R. Co.*, 54 Wis. 234, 41 Am. Rep. 23, 11 N. W. 482.

"In Minnesota it was declared that: 'If the passenger accepts a transfer plainly marked for a particular line, he is not entitled to take a car of another and different line': *Pine v. St. Paul City R. Co.*, 50 Minn. 144, 148, 52 N. W. 392.

“*McKay v. Ohio River R. Co.*, 34 W. Va. 65, 26 Am. St. Rep. 913, 11 S. E. 737, is a case which clearly indicates that the traveler can only maintain tort if he is ejected while rightfully upon the train in view of the company's rule that a proper token must be produced. I therefore quote from the case: ‘Here the plaintiff had a ticket not good for the trip he was making, and declined to pay fare. He cannot maintain an action for ejection or a threatened ejection from the train, but must look to the breach of contract, or the act of receiving money for the round trip and giving a wrong ticket. If the passenger have a ticket good for the passage and the conductor should refuse to recognize it, and expel the passenger, the act would be a tort; and an action as for a tort could be maintained. Judge Cooley said in *Hufford v. Grand Rapids etc. R. R. Co.*, 53 Mich. 118, 18 N. W. 580, that all the judges of the Michigan supreme court agreed that if the ticket was apparently good the passenger need not leave the car. But here the ticket was very apparently not good. Therefore the motion of the defendant to reject plaintiff's evidence as not sustaining his action should have been sustained, not overruled.’

“In *Peabody v. Oregon R. R. etc. Co.*, 21 Or. 121, 133, 26 Pac. 1053, where the plaintiff had produced an unstamped ticket and sued for being ejected, Lord, J., speaking for that court, after a careful review of the authorities, said: ‘It seems to us that the weight of authority and reason as applicable to the facts as disclosed by the record, is that it is the duty of the passenger to pay his fare or quietly leave the train when requested, if he has not the proper ticket, and resort to his appropriate remedy for the damages he has sustained.’

“In *Mosher v. St. Louis etc. R. R. Co.*, 127 U. S. 390, 396, 8 Sup. Ct. Rep. 1324, the ticket was a contract, rather than a token, but the language used and the authorities cited, show that the supreme court of the United States is in accord with the cases from which I have quoted. It was there said: ‘The conductor of the defendant's train, upon the plaintiff's presenting a ticket bearing no stamp of the agent at Hot Springs, had no authority to waive any condition of the contract, to dispense with the want of such stamp, to inquire into the previous circumstances, or to permit him to travel on the train. It would be inconsistent alike with the express terms of the contract of the parties, and with the proper performance of the duties of the conductor, in examining the tickets of other passengers, and in conducting his train with due regard to speed and safety, that he should undertake to determine, from oral statements of the passenger or other evidence, facts alleged to have taken place before the beginning of the return trip, and as to which the contract on the face of the ticket made the stamp of the agent of the Hot Springs Railroad Company at Hot Springs the only and conclusive proof. The necessary conclusion is that the plaintiff cannot maintain this action against the defendant for the act of its



conductor in putting him off the train: *Townsend v. New York etc. R. R. Co.*, 56 N. Y. 295, 15 Am. Rep. 419; *Shelton v. Lake Shore etc. R. R. Co.*, 29 Ohio St. 214; *Frederick v. Marquette etc. R. R. Co.*, 37 Mich. 342, 26 Am. Rep. 513; *Bradshaw v. South Boston R. R. Co.*, 135 Mass. 407, 46 Am. Rep. 481; *Murdock v. Boston etc. R. R. Co.*, 137 Mass. 293, 299, 50 Am. Rep. 307; *Louisville etc. R. R. Co. v. Fleming*, 14 Lea (Tenn.), 128.'

"Space will not permit a further quotation from the cases, but I cite as in point upon the proposition that the ticket is conclusive for the time being: *Dixon v. New England R. R. Co.*, 179 Mass. 242, 60 N. E. 581; *New York etc. R. R. Co. v. Bennett*, 1 C. C. A. 544, 50 Fed. 496; *Poulin v. Canadian Pac. R. R. Co.*, 3 C. C. A. 23, 52 Fed. 197; *Chicago etc. R. R. Co. v. Griffin*, 68 Ill. 499; *Thorp v. Concord R. R. Co.*, 61 Vt. 378, 17 Atl. 791; *West Maryland R. R. Co. v. Stocksedale*, 83 Md. 245, 34 Atl. 880; *McGhee v. Reynolds*, 117 Ala. 413, 23 South. 68; *Woods v. Metropolitan St. Ry. Co.*, 48 Mo. App. 125.

"I must, however, give space to a few quotations from text-writers. Mr. Hutchinson, in his work on Carriers, second edition, section 580h, says: 'So where the passenger, having paid fare to the point of destination, is, by the mistake of the company's agent, furnished with a ticket which upon its face entitles him to a ride only to a point short of his destination, or the like, the passenger, having accepted the ticket, cannot insist on riding upon that ticket beyond the point to which by its terms it entitles him. He must, therefore, pay fare to his destination or get off and continue his journey by other means, and, if he refuses, the conductor may eject him; but he may recover of the carrier damages for the injury he has sustained by reason of its breach of contract. Here, too, however, the action will be for the breach of the contract, and not for the ejection. And he may not aggravate his injury by resisting ejection under otherwise proper conditions. There is in these cases an element of negligence in the passenger in not seeing that he obtains and presents a ticket which is at least apparently regular.'

"Judge Freeman, the learned annotator, in the course of a long note on carriers' rules and tickets, says: 'Although the cases on this subject are not entirely consistent with each other, the doctrine deducible from them, and the correct doctrine as it seems to us, is that when one has paid his fare to a certain destination on a railway, to the officer appointed by the company to receive it, the contract for carriage is complete, and he has a right to be carried in accordance with that contract, which cannot be infringed or impaired by any rule of the company or by any mistake or default of its servants. If by a mistake of one of the officers of the company, he is not furnished with a proper ticket or check evidencing his right to be carried to his destination, his right nevertheless remains, and if for want of the requisite evidence of that right, another servant of the company refuses to carry him without another



payment of fare, the contract is broken, and he has a complete right of action for all damages resulting from such breach. But as the rule requiring him to show a proper ticket or to pay his fare, if demanded, is a reasonable one, he will not be justified in refusing compliance with it, and in remaining in the car until forcibly expelled, merely for the purpose of heaping up damages. He should either pay the fare demanded or quit the train; and in either case we think he ought to recover, as a part of his damages, reasonable compensation for the indignity put upon him by the company through the default of its servant. But he can add nothing to his claim by remaining in the car until forcibly ejected, for the rule under which he is ejected, being reasonable, is a complete protection to the company and its servants against the recovery of any damages, directly or indirectly for an assault made necessary by his own obstinacy, if no more violence than is required for his ejection is used. Such a case stands upon an entirely different ground from that of a passenger who has a proper ticket and is nevertheless expelled': *Commonwealth v. Power*, 41 Am. Dec. 475, note.

"In *Elliott on Railroads*, section 1594, the authors say: 'Whether the action be in contract or in tort, for the breach of a contract or for the violation of a duty imposed by law, the gist of the action cannot well be the expulsion of the traveler, where there is no unnecessary force, in accordance with the rules of the company, where he has no ticket or evidence of his right to transportation valid on its face, or such as the rules reasonably require, and refuses to pay his fare. The wrong lies back of that, and it is well settled that a complaint proceeding upon one theory will not authorize a recovery upon another and entirely distinct and independent theory.'

"I shall now examine the cases decided by this court that are cited by *Jordan, J. Pittsburgh etc. R. R. Co. v. Hennigh*, 39 Ind. 509, is not in point, because the plaintiff in that case had a proper ticket, of which he was deprived by a conductor while en route. In *Toledo etc. R. R. Co. v. McDonough*, 53 Ind. 289, the plaintiff had, by the direction of the conductor of a mixed train on which he was riding, taken passage, in the same direction, on a passenger train, and had presented a card, given him by said conductor, that had written upon it the number of the station to which the plaintiff was traveling and the initials of such conductor. It was held that the answers of the jury to interrogatories were not in conflict with the general verdict, as the jury might have found that the first conductor had assured the plaintiff that the card was a sufficient ticket. The case can be disposed of on the theory that the plaintiff had a token that purported to be sufficient. The cases of *Lake Erie etc. R. R. Co. v. Fix*, 88 Ind. 381, 45 Am. Rep. 464, and *Pennsylvania Co. v. Bray*, 125 Ind. 229, 25 N. E. 439, are cases where travelers were seeking to return on going coupons, the return coupons having been wrongfully detached. In the *Fix* case, the court distinguished the cases of *Chicago etc. R. R. Co. v. Griffin*, 68 Ill. 499,

Frederick v. Marquette etc. R. R. Co., 37 Mich. 342, 26 Am. Rep. 531, and Townsend v. New York etc. R. R. Co., 56 N. Y. 295, 15 Am. Rep. 419, as cases where the ticket agent had given the passenger a ticket to the wrong station, and stated that in the case before the court the passenger 'was not without evidence of his right to transportation.' In the Bray case, which was decided by a divided court, it was said that as the rule was a mere technical one, the first conductor had a right to and did waive it by taking up the return coupon. There would be something of reason in the position that the possession of the going coupon was prima facie evidence of a mistake, since it would appear that the company had not discharged its entire obligation to the passenger. There would be still more of reason in the position that the conduct of the first conductor was calculated to lead the traveler to suppose that it was a matter of indifference to the company on which coupon he journeyed, thereby leading him to contest the right to eject him. That the latter view must have to some extent influenced the court is evidenced by the fact that in the intermediate case of Godfrey v. Ohio etc. R. R. Co., 116 Ind. 30, 18 N. E. 61, it was held that a person who entered a railroad train with knowledge that he had the wrong coupon of a round-trip ticket, and refused to pay fare, was properly ejected. In disposing of the case the court said: 'Railroad companies have the undoubted right to make reasonable regulations for the conduct of their business. It is certainly a reasonable requirement that a passenger, having the opportunity, should purchase his ticket to the place of his destination, and not in the opposite direction. To compel railroad companies to receive unused tickets, without regard to the direction which the holder wishes to go, would introduce inextricable confusion into their business and be of no benefit to any person possessed of sufficient intelligence to go upon a train.' I am not prepared to say that the cases of Lake Erie etc. R. R. Co. v. Fix, 88 Ind. 381, 45 Am. Rep. 464, and Pennsylvania Co. v. Bray, 125 Ind. 229, 25 N. E. 439, were decided correctly. However, the Bray case, rests largely on the Fix case, and I contend that the latter case shall not now be treated as a precedent for the case at bar, since the Fix case expressly distinguishes the class of cases to which this one belongs.

"As to the cases cited by Jordan, J., from without this state: In New York etc. R. R. Co. v. Winters, 143 U. S. 60, 12 Sup. Ct. Rep. 356, Murdock v. Boston etc. R. R. Co., 137 Mass. 293, 50 Am. Rep. 307, Ray v. Courtland etc. Traction Co., 19 App. Div. 530, 46 N. Y. Supp. 521, Ellsworth v. Chicago etc. R. R. Co., 95 Iowa, 98, 63 N. W. 584, Philadelphia etc. R. R. Co. v. Rice, 64 Md. 63, 21 Atl. 97, and Hufford v. Grand Rapids etc. R. R. Co., 64 Mich. 63, 8 Am. St. Rep. 859, 31 N. W. 544, the tickets were good on their face. Of the latter case it was said in Heffron v. Detroit City R. R. Co., 92 Mich. 406, 411, 31 Am. St. Rep. 601, 52 N. W. 802: 'The case of Hufford v. Grand Rapids etc. R. R. Co., 64 Mich. 631, 8 Am. St. Rep. 859, 31

N. W. 544, is distinguishable in this: There the ticket was one purporting, on its face, to cover the distance to be traveled by Hufford. He paid the usual fare between the two places, and the ticket contained no printed exceptions or conditions restricting Hufford from using it at the time he presented it to the conductor. Its infirmity, if any, was not open to Hufford's plain observation, so that he was informed on its face that it was not good.' In *Trice v. Chesapeake etc. R. R. Co.*, 40 W. Va. 271, 21 S. E. 1022, the court expressly affirmed the case of *McKay v. Ohio River R. R. Co.*, 34 W. Va. 65, 11 S. E. 737, 26 Am. St. Rep. 913, the court adding that 'the passenger could not ask passage where the ticket did not carry him.' *Jenkins v. Brooklyn Heights R. R. Co.*, 29 App. Div. 8, 51 N. Y. Supp. 216, turned on the ruling that a regulation was unreasonable. *Eddy v. Syracuse Rapid Transit Co.*, 50 App. Div. 109, 63 N. Y. Supp. 645, while it affirms the right to sue in tort, does not have in it the element of an assault and battery, as the plaintiff voluntarily left the car. The same may be said of *Yorton v. Milwaukee etc. R. R. Co.*, 62 Wis. 367, 21 N. W. 516, 23 N. W. 401. In *Appleby v. St. Paul City Ry. Co.*, 54 Minn. 169, 40 Am. St. Rep. 308, 55 N. W. 1117, the facts were that the street-car on which the plaintiff was riding was taken off, the conductor disappeared, without giving plaintiff a transfer, and an agent of the company directed him to take the next car. The case was decided on the ground that, as it was the duty of the company to provide for such an emergency, the plaintiff had a right to rely on the direction of such agent. The case of *Kansas City etc. R. R. Co. v. Riley*, 68 Miss. 765, 24 Am. St. Rep. 309, 9 South. 443, was decided upon facts analogous to the case of *Lake Erie etc. R. R. Co. v. Fix*, 88 Ind. 381, 45 Am. Rep. 464, and cannot be said to be in point either way. In *Laird v. Pittsburg Traction Co.*, 166 Pa. St. 4, 31 Atl. 51, the ticket was ambiguous.

"As shown above, there are some cases affirming the right to sue in tort that do not recognize the right to resist the conductor. As to the latter proposition, the ninth circuit court of appeals, and the courts of Maine, Texas, Arkansas, Georgia, Washington, and Tennessee, of the cases cited by Jordan, J., support his view; while, to recapitulate, the supreme court of the United States, the sixth circuit court of appeals, and the courts of New York, Massachusetts, West Virginia, Michigan, Illinois, Vermont, Maryland, Missouri, Kansas, Minnesota, Oregon, and Alabama uphold the position that there can be no recovery for the ejection. I admit that the question as to the right to sue in tort is more in doubt upon the authorities, but in my judgment the suit should be on the contract. I think that the judgment should be reversed, with a direction to the court below to sustain the demurrer to the complaint."

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*The Doctrine of the Principal Case*, while in our opinion eminently just and sound, is not, when judged by the decisions in other jurisdictions, entirely free from doubt as a universal rule of law: See *Memphis St. Ry. Co. v. Graves*, 110 Tenn. 232, post, p. 803, 75 S. W.

729; Kiley v. Chicago City Ry. Co., 189 Ill. 384, 82 Am. St. Rep. 460, 59 N. E. 794; O'Rourke v. Citizens' St. Ry. Co., 103 Tenn. 124, 76 Am. St. Rep. 639, 52 S. W. 872; Kansas City etc. Ry. Co. v. Foster, 134 Ala. 244, 92 Am. St. Rep. 25, 32 South. 773; Garrison v. United Ry. etc. Co., 97 Md. 347, 99 Am. St. Rep. 452, 55 Atl. 371; Monnier v. New York Cent. etc. R. R. Co., 175 N. Y. 281, 96 Am. St. Rep. 619, 67 N. E. 569; Harp v. Southern Ry. Co., 119 Ga. 927, ante, p. 212, 47 S. E. 206.

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## PATE v. BUSHONG.

[161 Ind. 533, 69 N. E. 291.]

**WILLS.**—Only a Life Estate Passes to a Devisee, in Indiana, unless it affirmatively appears that a greater estate was intended. (p. 290.)

**WILLS, When Pass Only a Life Estate.**—A devise by a man to his wife which does not in express terms give her the fee, nor expressly or impliedly give her power to dispose of the property, and which gives the property to his son after her death, passes only a life estate to her. (p. 291.)

**WILLS—Partial Intestacy.**—The Presumption is, when one makes a will, that he intends to dispose of his entire estate. (p. 291.)

**WILLS.**—The Intention of the Testator governs the construction of a will, and to ascertain the intention, the court may hear evidence of the circumstances, situation and surroundings of the testator when the will was made and the state and description of his property. (p. 291.)

**WILLS—Extrinsic Evidence.**—When a Latent ambiguity is disclosed by extrinsic evidence, it may be removed by extrinsic evidence. (p. 292.)

**WILLS—Errors in Description.**—However many errors there may be in the description in a will, either of the devisee or the subject of the devise, it will not avoid the gift, if, after rejecting the errors or false words, enough remains to show with reasonable certainty, what was intended when considered from the position of the testator. (p. 292.)

**WILLS—False Description may be Rejected.**—A devise of lands by a description partly false, as where the wrong section number is given, may be effective if what remains, after rejecting the false, reasonably corresponds with real estate indicated by extrinsic evidence. (p. 303.)

I. N. Addison, W. A. Brown, M. E. Forkner and G. D. Forkner, for the appellants.

E. H. Bundy, J. M. Morris and D. W. Chambers, for the appellee.

**534** MONKS, J. Jackson Bushong died testate in Henry county, Indiana, in 1898, leaving his widow, Lydia Bushong,



his son, Peter P. Bushong (the appellee), and his five grandchildren, Minerva A. Pate, Phœbe T. Thompson, Hannah N. Addison, Cora C. Warrington and Lila L. Ellison, children of a deceased daughter of the testator. Said will was legally probated. After the death of said widow, appellants brought this action against appellee for partition of the lands devised to the widow, upon the theory that she took the same in fee simple under said will.

The will, omitting the codicil which is not necessary to a determination of this cause, reads as follows: "First, I give, will, and bequeath to my beloved wife, Lydia Bushong, after my death, should she be living, all of my real estate and personal property that may be left of my estate after my death, except such as may be necessary to pay the expenses of my last sickness and funeral, which I direct to be promptly paid out of my estate, and also such amount of money as may be necessary to pay for a suitable monument for myself and wife, not exceeding four hundred dollars, at the discretion of my executor. Article 2. I hereby appoint my son, Peter P. Bushong, my executor, with full power and authority to execute the provisions of my will, and <sup>535</sup> make all settlements with each of the hereinafter mentioned heirs, without bond or security. Article 3. After the death of my dear wife, should she outlive me, and after all expenses of her last sickness and funeral, and all other debts, if any, be paid out of the then remaining estate, I then will and direct as follows: Article 4. I will, give, and bequeath to my only son, Peter P. Bushong, the following real estate in Henry county, state of Indiana: The northeast quarter of section 29, township 18, range 9, containing one hundred and sixty acres, and also twenty acres off the northwest quarter of section 29, town 18, range 9; and also thirty acres of land off the south end of the east half of south quarter of section 29, town 18, range 9, in fee simple, and then direct him to pay the following amounts out of the estate, to wit: Article 5. To my granddaughter or heirs, Minerva A. Karens, the sum of \$150. Section 6. To my granddaughter and children, Phœbe T. Estell, the sum of \$225. Article 7. To my granddaughter and her children, Hannah N. Addison, the sum of \$225. Article 8. To my granddaughter, Cora C. Reddick, the sum of \$225. Article 9. To my granddaughter, Lila L. Ellison, the sum of \$500. Making a total amount of \$1,625 to be paid to my five granddaughters, as named in the above sections, by



my son, Peter P. Bushong, in the following order, to wit: Section 10. Three months after the death of my wife, P. P. Bushong shall pay to my granddaughter, Lila L. Ellison, or her heirs, if any, the sum of \$100; and one year later the sum of \$500 to be equally divided between the five heirs, \$100 each, and to continue each succeeding year at the same ratio until each heir shall have received three full payments as stated above, provided, however, that there is to be no interest computed on any payment. Article 11. I further direct, give and bequeath to my son, Peter P. Bushong, after the death of my wife, and after all expenses of her last sickness and funeral expenses <sup>536</sup> are paid, all of the farming utensils, grain, hay, and stock of all kinds that may remain on the farm. Article 12. I further give and bequeath to my son, Peter P. Bushong, and my five grandchildren, all of the household goods to be divided equally among the six heirs, and should any of my granddaughters die intestate with no heirs living, I direct that the amounts be divided among those that are living. Given under my hand and seal this seventeenth day of August, 1893."

At the time the testator made said will, and at the time of his death, he was the owner in fee simple and in the possession of the following described real estate in Henry county, Indiana, and he was not the owner of any other lands from the date of his will until the time of his death: The northeast quarter of section 29, township 18 north, of range 9 east; also thirty acres off the south end of the east half of the southwest quarter of section 29, township 18 north, of range 9 east; also twenty acres off the west side of the following described lands, to wit: Commencing sixteen rods south of the northwest corner of the northwest quarter of section 28, township 18 north, of range 9 east, and running thence east ninety-six rods, thence south to the south line of said northwest quarter of said section, township, and range; thence west on the said line ninety-six rods to the section line; thence north to the place of beginning. The testator and his wife lived on the one hundred and sixty acres described in the will, and the twenty-acre tract adjoined the same on the east. Appellee also lived on said tract in a house near his father's house, and continued to live thereon after his father's death. After the death of the testator, Peter P. Bushong (appellee) was appointed and qualified as executor of said will, and paid over to appellants, Cora C. Warrington and Phoebe T. Thompson,

the legacies given them by items 6 and 8 of the will, taking receipts therefor as executor.

**537** The questions presented by the record are: 1. Did Lydia Bushong, the widow, take said real estate for life only under said will? 2. Was there a mistake in describing the twenty and thirty acre tracts of land named in the will, and, if so, can the same be corrected, or so interpreted as to apply to the twenty and thirty acre tracts owned by the testator at the time he made the will and at the time of his death? 3. Were Cora C. Warrington and Phoebe T. Thompson estopped from claiming a share in the lands as heirs of Lydia Bushong if she took a fee, by accepting of the executor the legacies given them by the will? The trial court decided these questions in the affirmative, and rendered judgment in favor of appellee. If questions 1 and 2 are answered in the affirmative, it will not be necessary to determine the third.

The purpose of construing a will is to ascertain the intent of the testator, which must be given effect when ascertained, unless in violation of some rule of law. To ascertain such intention the whole will must be considered, and no word or clause in the will is to be rejected to which a reasonable effect can be given. In this state only a life estate will pass to a devisee unless it affirmatively appears a greater estate was intended: Burns' Rev. Stats. 1901, sec. 2737; Rev. Stats. 1881, sec. 2567 (Horner's Rev. Stats. 1901); Fenstermaker v. Holman, 158 Ind. 71, 74, 62 N. E. 699, and cases cited. It will be observed that the testator has not said in express terms that he devised said real estate to his widow in "fee simple," either in apt words or by the use of legal words of inheritance. Neither has he given his widow the power of disposing of said real estate in express terms, nor do we think such power can be implied from the language of the will. The will gives to Peter P. Bushong in fee simple two hundred and ten acres of real estate, all the real estate the testator owned when he made the will and at the time of his death, and not what remained undisposed of or unexpended at the death of **538** his wife. It is clear, therefore, that the power of the widow to dispose of said real estate cannot be inferred from items 3 and 4. Item 11 describes a kind of personal property which is consumed or destroyed by use, and the language thereof shows that it was the intention of the testator that the expenses of his widow's last sickness and her funeral expenses should be paid out of the property described therein. It is evident that

the power of the widow to sell the real estate devised to her cannot be inferred from that item.

Having reached the conclusion that the widow was not given by implication or express words the power to dispose of said real estate, it is clear that, so far as the question of what interest she took in the real estate devised to her is concerned, the same is ruled by the case of *Fenstermaker v. Holman*, 158 Ind. 71, 62 N. E. 699, and that she took only a life estate therein.

Appellants claim that appellee took no title to the twenty and thirty acre tracts of land in controversy under the will of the testator, because said tracts are not described in the will. It will be observed that the twenty-acre tract is described as in section 29, while the twenty-acre tract owned by the testator when the will was made and at the time of his death was in section 28, adjoining the one hundred and sixty acres described in the will. The thirty-acre tract is definitely described in the will, except that the words "south quarter," instead of "southwest" quarter, are written in the will.

When a person makes a will the presumption is that he intends to dispose of his whole estate, unless it is rebutted by the provisions of the will, or other evidence to the contrary: 2 Redfield on Wills, 3d ed., \*116; *Cate v. Cranor*, 30 Ind. 292, 295, 296; *Roy v. Rowe*, 90 Ind. 54, 59, 60; *Mills v. Franklin*, 128 Ind. 444, 446, 28 N. E. 60; *Groves v. Culph*, 132 Ind. 186, 188, 31 N. E. 569; *Borgner v. Brown*, 133 Ind. 539 391, 396, 33 N. E. 92; *Korf v. Gerichs*, 145 Ind. 134, 136, 44 N. E. 24; *Woman's Union etc. Soc. v. Mead*, 131 Ill. 338, 357, 358, 23 N. E. 603; *Vestal v. Garrett*, 197 Ill. 398, 404, 406, 64 N. E. 345. There is nothing in the will in this case or in the evidence to rebut this presumption. When the will was executed, and at the time of his death, the testator owned two hundred and ten acres of land, and no more. This he devised to his wife for life, and attempted to devise two hundred and ten acres in fee simple to appellee—all the land owned by him. While it is clear that the testator intended to dispose of all the lands he owned, the language used in describing the twenty and thirty acre tracts, if construed literally, would defeat this intention, at least as to the twenty-acre tract. As we have already said, the intention of a testator must in all cases govern the construction of a will, unless in violation of some rule of law. To ascertain such intention, the court may hear evidence of the circumstances, sit-

uation, and surroundings of the testator when the will was made, and the state and description of his property: 2 Underhill on Law of Wills, secs. 909-911, 914; Wigram on Wills, 2d Am. ed., 56, 161; Schouler on Wills, sec. 579; 1 Jarman on Wills, 5th Am. ed., 733-762; Page on Wills, secs. 816, 817; Whiteman v. Whiteman, 152 Ind. 263, 273, 274, 53 N. E. 225; Patch v. White, 117 U. S. 210, 217, 6 Sup. Ct. Rep. 617; Black v. Richards, 95 Ind. 184, 189-191; Daugherty v. Rogers, 119 Ind. 254, 258-261, 20 N. E. 779; Dennis v. Holsapple, 148 Ind. 297, 62 Am. St. Rep. 526, 47 N. E. 631; Price v. Price, 89 Ind. 90, 91. If by thus putting itself in the testator's place, the court is able to understand and apply the language of the will, it may give effect to the same although containing errors or repugnancies, so far as the intention of the testator can be determined, and will pronounce judgment with such repugnancies removed or errors corrected. It is well settled that when a latent ambiguity is disclosed by extrinsic evidence, it may be removed by extrinsic evidence: Whiteman v. Whiteman, 152 Ind. 263, 53 N. E. 225; Patch v. White, 117 U. S. 210, 6 Sup. Ct. Rep. 617.

**540** It is true that extrinsic evidence will not be resorted to for the purpose of changing or varying the words of a will, but courts for a long period of years have felt compelled to deal with descriptions in such a manner as to reach the intent of the testator, when that seemed practicable, and by construction and by the admission of oral evidence to remove latent ambiguities. It is well established that however many errors there may be in a description, either of the devisee or the subject of the devise, it will not avoid the bequest if after rejecting the errors or false words enough remains to show with reasonable certainty what was intended when considered from the position of the testator: 1 Redfield on Wills, 4th ed., 580 et seq.; 2 Underhill on Law of Wills, secs. 909-914; O'Hara on Wills, 369, 374; Wigram on Wills, 2d Am. ed., 52-54, 144-147; Page on Wills, secs. 473, 487, 819; 3 Albany Law Journal, 263-267; Trustees etc. v. Peaslee, 15 N. H. 317; Winkley v. Kaime, 32 N. H. 268; Allen v. Lyons, 2 Wash. C. C. 475, Fed. Cas. No. 227; Patch v. White, 117 U. S. 210, 6 Sup. Ct. Rep. 617; Roman Catholic Orphan Asylum v. Emmons, 3 Brad. Surr. 111; Cleveland v. Carson, 37 N. J. Eq. 377, 18 Cent. L. J. 68, and note pp. 69-71; Willard v. Darrah, 168 Mo. 660, 90 Am. St. Rep. 468, 68 S. W. 1023; Judge Redfield's note to Kurtz v. Hibner, 10 Am. Law Reg.,



N. S., 97-101; *Riggs v. Myers*, 20 Mo. 239; *Gaston's Estate*, 188 Pa. St. 374, 68 Am. St. Rep. 874, 41 Atl. 529; *Black v. Richards*, 95 Ind. 184; *Jackson v. Hoover*, 26 Ind. 511; *Whiteman v. Whiteman*, 152 Ind. 263, 53 N. E. 225; *Miller v. Coulter*, 156 Ind. 290, 293, 59 N. E. 853; *Groves v. Culph*, 132 Ind. 186, 31 N. E. 569; *Skinner v. Harrison Tp.*, 116 Ind. 139, 18 N. E. 529; *Elliott v. Elliott*, 117 Ind. 380, 10 Am. St. Rep. 54, 20 N. E. 264; *Chappell v. Missionary Soc. etc.*, 3 Ind. App. 356, 50 Am. St. Rep. 276, 29 N. E. 924.

In *Patch v. White*, 117 U. S. 210, 6 Sup. Ct. Rep. 617, the testator devised certain specific lots to each of his near relatives, and, among others, to his brother Henry a lot described as "lot number six in square 403, together with the improvements thereon erected." The court said: "Now, the parol evidence discloses the fact that there was an evident misdescription of <sup>541</sup> the lot intended to be devised. It shows, first, as before stated, that the testator, at the time of making his will, and at the time of his death, did not, and never did, own lot 6, in square 403, but did own lot 3, in square 406; secondly, that the former lot had no improvements on it at all, and was located on Ninth street, between I and K streets, whilst the latter, which he did own, was located on E street, between Eighth and Ninth streets, and had a dwelling-house on it, and was occupied by the testator's tenants—a circumstance which precludes the idea that he could have overlooked it. It seems to us that this evidence, taken in connection with the whole tenor of the will, amounts to demonstration as to which lot was in the testator's mind. It raises a latent ambiguity. The question is one of identification between two lots, to determine which was in the testator's mind, whether lot 3, square 406, which he owned, and which had improvements erected thereon, and thus corresponded with the implications of the will, and with part of the description of the lot, and rendered the devise effective; or lot six, square 403, which he did not own, which had no improvements thereon, and which rendered the devise ineffective. . . . What he meant to devise was a lot that he owned; a lot with improvements on it; a lot that he did not specifically devise to any other of his devisees. Did such a lot exist? If so, what lot was it? We know that such a lot did exist, and only one such lot in the world, and that this lot was the lot in question in this cause, namely, lot No. 3, in square 406. Then, is it not clear that the words of the will, 'lot No. 6, in square 403,' contained a



false description? . . . . It is settled doctrine that, as a latent ambiguity is only disclosed by extrinsic evidence, it may be removed by extrinsic evidence. Such an ambiguity may arise upon a will, either when it names a person as the object of a gift, or a thing as the subject of it, and there are two persons or things <sup>542</sup> that answer such name or description; or, secondly, it may arise when the will contains a misdescription of the object or subject; as where there is no such person or thing in existence, or, if in existence, the person is not the one intended, or the thing does not belong to the testator. The first kind of ambiguity, where there are two persons or things equally answering the description, may be removed by any evidence that will have that effect, either circumstances, or declarations of the testator: 1 Jarman on Wills, 370; Hawkins on Wills, 9, 10. Where it consists of a misdescription, as before stated, if the misdescription can be struck out, and enough remain in the will to identify the person or thing, the court will deal with it in that way; or, if it is an obvious mistake, will read it as if corrected. The ambiguity in the latter case consists in the repugnancy between the manifest intent of the will and the misdescription of the donee or the subject of the gift. In such a case evidence is always admissible to show the condition of the testator's family and estate, and the circumstances by which he was surrounded at the time of making his will: 1 Jarman on Wills, 364, 365; 1 Roper on Legacies, 4th ed., 297; 2 Williams on Executors, 988, 1032. Mr. Williams (afterward Mr. Justice Williams) says: 'Where the name or description of a legatee is erroneous, and there is no reasonable doubt as to the person who was intended to be named or described, the mistake shall not disappoint the bequest. The error may be rectified: . . . . 1. By the context of the will; 2. To a certain extent by parol evidence. . . . . A court may inquire into every material fact relating to the person who claims to be interested under the will, and to the circumstances of the testator, and of his family and affairs, for the purpose of enabling the court to identify the person intended by the testator.' Again he says, on page 1032: 'Mistakes in the description of legacies, like those in the description of legatees, may be rectified by reference to the terms of the gift, and evidence <sup>543</sup> of extrinsic circumstances, taken together. The error of the testator, says Swinburne, in the proper name of the thing bequeathed, doth not hurt the validity of the legacy, so that the body or substance of the thing bequeathed

is certain: As, for instance, the testator bequeaths his horse Cripple, when the name of the horse was Tulip; this mistake shall not make the legacy void; for the legatory may have the horse by the last denomination; for the testator's meaning was certain that he should have the horse; if, therefore, he hath the thing devised, it is not material if he hath it by the right or the wrong name': See, also, Roper on Legacies, 297."

In *Allen v. Lyons*, 2 Wash. C. C. 475, Fed. Cas. No. 227, the devise was of a "house and lot in Fourth street, Philadelphia," but it appeared on oral proof that the testator had no such property in Fourth street, but did own a house and lot in Third street, and it was held to pass under the devise.

In *Winkley v. Kaime*, 32 N. H. 268, the devise was of "thirty-six acres, more or less, of lot 37 in the second division of Barnstead"; and it appearing that there was no such lot in that division, but that the testator owned land in lot 97 in that division, it was held to pass under will.

In *Decker v. Decker*, 121 Ill. 341, 12 N. E. 750, the testator, by the terms of his will, devised twenty acres off the west half of the northeast quarter of the northeast quarter of section 33, township 18 north, of range 11 west. The evidence showed that the testator never owned the northeast quarter of the northeast quarter of section 33, or any part of it, but did own the northwest quarter of the northeast quarter of the section. It was held that there was a latent ambiguity in the devise, the words describing the land being in part false, and that the false description might be stricken out, and the devise sustained as embracing the land owned by the testator.

<sup>544</sup> In *Whitecomb v. Rodman*, 156 Ill. 116, 47 Am. St. Rep. 181, 40 N. E. 553, the testator devised parcels of land aggregating one hundred and eighty acres (all that he owned), but in devises to two sons, respectively, described two forties in the southeast quarter of section 22, adjoining those really owned by him in the northeast quarter of said section, leaving the latter undisposed of, and it was held the devise covered the forties owned by the testator in the northeast quarter of said section. The court said at page 125, 156 Ill. page 555, 40 N. E. and page 181, 47 Am. St. Rep.: "While words cannot be added to a will, yet, in arriving at the intention of the testator as has been shown by the authorities, so much as is false in the description of the premises devised may be stricken out, and, after striking out the false description, if enough remains to identify the premises intended to be devised, the will may be read and con-

strued with the false words eliminated therefrom. Adopting that rule here, the second and third clauses will read as follows: 'Second. To my son, Joseph L. Rodman, I will and bequeath one hundred acres of land—sixty acres off of the west side of the southeast quarter of section 22, forty acres being the . . . . quarter of the . . . . quarter of section 22. Third. To my son, Edward L. Rodman, I will and bequeath forty acres of land, being the . . . . quarter of the . . . . quarter of section 22.' Bearing in mind that the testator owned two forty-acre tracts in the northeast quarter of section 22, and reading the two clauses of the will in the light of surrounding circumstances, we think all difficulty is removed in regard to the lands devised by these two provisions of the will. The testator, owning two quarters of a quarter of section 22, devised one quarter to his son Joseph and the other quarter to his son Edward, and the two sons took and held the two tracts undivided."

In *Stewart v. Stewart*, 96 Iowa, 620, 65 N. W. 976, <sup>545</sup> the testator gave to his son, Fred D. Stewart, "the south half of the northeast quarter of section 30 in township 76 north, of range 7 west." This tract did not belong to the testator when the will was made or at the time of his death, but he owned at said times the south half of the southeast quarter of that section, which was not described in the will. The court disregarded the word "north" in the will and held that the will gave said devisee said south half of the southeast quarter of said section thirty. The court said at page 627: "The evidence shows that the description of the land in question is in part wrong. After rejecting the erroneous portion, the remainder describes 'the south half of the east quarter of section No. 30,' etc. The section contains two tracts which may be properly spoken of as 'the east quarters,' and, under the rules of interpretation cited [*Jordan v. Woodin*, 93 Iowa, 453, 61 N. W. 948; *Patch v. White*, 117 U. S. 210, 6 Sup. Ct. Rep. 617; *Eckford v. Eckford*, 91 Iowa, 54, 58 N. W. 1093], we are of the opinion that extrinsic evidence may be received to show what quarter was intended by the testator."

In *Huffman v. Young*, 170 Ill. 290, 49 N. E. 570, the language of the will was: "Item 3. I give and devise to my son, Noah Young, . . . . sixty-two and one-half acres off of the east side of the northeast quarter of section No. 20, township 21 north, of range 11 west." The testator did not own sixty-two and one-half acres off the east side, but did own sixty-two and one-half acres in the east half of said quarter section. The

court said: "Striking out the words 'off of the east side,' the third item of the will will read: ' . . . also sixty-two and one-half acres of the northeast quarter of section No. 20, township 21 north, range 11 west.' This description is sufficiently definite to include the land in dispute."

<sup>546</sup> In *Merrick v. Merrick*, 37 Ohio St. 126-132, 41 Am. Rep. 493, the land devised was described as "the east half of the southeast quarter of said section 28," which testator did not own, but he did own "the east half of the northeast quarter of section 28." The court said: "The evidence fully supports the claim that, while the will on its face is free from ambiguity, the word 'south,' in its third item, was inserted by mere mistake of the scrivener, the testator intending that the word 'north' should be used. The sole question, therefore, is whether, on proof of such fact, it is competent for the court to declare that the east half of the northeast quarter of section 28 passed by the will. . . . Rejecting the erroneous description, the word 'south,' sufficient appears on the face of the will, in the light of the facts here disclosed, to warrant us in saying that by the will of Adam Merrick the other moiety, the east half of the northeast quarter of section 28, . . . passed to Adam R. Merrick on the death of his mother. And thus the case is determined by a just and proper application of the maxim, '*Falsa demonstratio non nocet.*'"

In *Case v. Young*, 3 Minn. 209, the testator gave to his wife "the one-third of all real estate"; to his son David, "the north half of the real estate"; to his son Jacob, "the south half of the real estate." There was no other description of the real estate contained in the will. The court, at page 215, said: "It is insisted that it does not describe any real estate whatsoever. Had the language used been 'of my real estate,' or 'of the real estate I now own,' or 'the real estate of which I shall die seised,' it is admitted that it would have been sufficiently certain. . . . But are we to suppose that the testator here intended to devise or referred to the real estate of any other person? We ought not to presume that he intended an impossibility, but should ascertain, if possible, what his intention was and give effect to it. We held in the case of *Winslow* <sup>547</sup> *v. Baldwin*, 2 Minn. 174, \*213, that where the meaning of an instrument is certain and intelligible, the subject or object to which it is to be applied may be ascertained by extrinsic evidence, if it can be done without a departure from the rational meaning of the words actually used; and that if the meaning is involved in uncertainty,



the intention may be ascertained by extrinsic testimony, and when so ascertained, will be taken as the meaning of the parties, if such meaning can be distinctly derived from a fair and rational interpretation of the language employed. Applying this test to the case at bar, we find no difficulty in ascertaining from the will itself that it was the intention of the testator to devise lands to his sons; and extrinsic evidence, if indeed that would be necessary, would be admitted to identify his own lands, as the subject or object to which the term 'the real estate,' as used in the will, applied."

In *Moreland v. Brady*, 8 Or. 303, 34 Am. Rep. 581, the testator devised to Margaret McGill "a certain parcel of ground or lots in the city of Portland and numbered as follows, to wit: No. block 187, lot No. 2"; to Esther Brady, "that lot or parcel of ground, in the city of Portland, lot 1, in block 187." The testator did not own or claim any interest in said lots when he made his will or at the time of his death, but did own lots 3 and 4 in said block. The court, at page 313, said: "Then we apprehend there can be no question of the admissibility of extraneous oral evidence to show the state and extent of the testator's property, in order to place the court in the same position the testator was in at the time he made the will in question. This, we think, is unquestionably the rule established by the decided cases. This being done, it appears that the testator had no such lots as those described as lots 1 and 2 in the particular block named. This renders it certain that the lots named were erroneous, and the words describing them can have no possible operation, and must be <sup>548</sup> rejected. The devise is the same as if the numbers of the lots had not been mentioned at all or had been named and the numbers left blank. We are then compelled to fall back upon the remaining portion of the description, to wit: 'A certain parcel of ground or lots in the city of Portland in block 187'; also 'that lot or parcel of ground in the city of Portland in block 187.' And by thus placing ourselves in the position of the testator, by oral evidence, at the time of the execution of his will, we find that there were two lots or parcels of ground in the city of Portland, and in block 187, belonging to the testator at that time and also at the time of his death. This renders the devise entirely certain from the language of the will as to the intention of the testator. The description would have been sufficient by merely naming the block and city in which the lots or land lay without specifying the numbers of them. The testator could not have intended to de-



wise lots to which he never had any title, but must have intended to devise those which did belong to him. He had two just such lots or pieces of land as he names, and every way described as these are, with the single exception of this one false particular, and this is the very kind of case to which the maxim '*Falsa demonstratio non nocet*' applies."

In *Cruse v. Cunningham*, 79 Ind. 402, the land was described in the will as follows: "Part of the donation lot No. 158, in township No. 3 north, of range 8 west, containing two hundred acres." It was claimed by the heirs of the testator that the description was so uncertain that the devise was void. The court said, at page 405: "In the case at bar, the testator had no heirs except his father and one brother. He bequeathed nearly all his real estate, including the land in controversy, to Charity Lodge No. 30, of Free and Accepted Masons in Washington, Daviess county, for the purpose of building a Masonic lodge on certain specified lots, with power to sell all the other lots. The parol evidence, which was admitted over <sup>549</sup> appellants' objection, showed that donation lot No. 158, in town 3 north, of range 8 west, was estimated to contain about four hundred acres, in fact it contained four hundred and eighteen acres, of which ten acres were in the river; but it appeared that one-half of it was called two hundred acres, and one-fourth of it one hundred acres, and that Joseph Cruse, in his lifetime, was in possession of two hundred acres of said donation lot 158, claiming to own it. Some of the witnesses said he claimed two hundred acres, or, perhaps, one-half of the donation lot; one witness said Joseph never claimed more than one-half the lot, and the evidence showed that the half claimed by Joseph, and of which he was in possession, was the same half for the recovery of which this suit is brought, and of which said Joseph died seised, as both parties admitted on the trial. The evidence also showed that the other two quarters of said donation lot were owned by other parties. Under the authority of the case hereinbefore cited, the parol evidence was properly admitted, and it showed very clearly that the property devised by Joseph Cruse to Charity Lodge No. 30 was the same half of said donation lot which is sought to be recovered in this suit. The court committed no error in admitting the will in evidence, nor in admitting the parol evidence in explanation of it."

In *Groves v. Culph*, 132 Ind. 186, 31 N. E. 569, the third item of the will gave to the widow "the house and lot on which I now reside, being parts of lots Nos. 15 and 16 in the city of

Rising Sun," for life. The fourth item was as follows: "I further will, give and devise the same lot No. 15 so devised to my said wife during her lifetime, together with all the appurtenances thereto belonging, to my youngest daughter, Eliza Jane Carpenter, and to her heirs in fee simple forever." There was no other reference made to lot 16 in the will, except in the item designated. This court held that extrinsic evidence was admissible, and that the testator intended to devise to his daughter in fee what he devised to his wife for life, and **550** that the same passed to the daughter under the devise to her, although lot 16 was not named in the devise to her.

From the many other cases to the same effect we cite the following: *Seebrook v. Fedawa*, 33 Neb. 413, 29 Am. St. Rep. 488, 50 N. W. 270; *Vestal v. Garrett*, 197 Ill. 398-406, 64 N. E. 345; *Hawkins v. Garland*, 76 Va. 149, 44 Am. Rep. 158; *Willard v. Darrah*, 168 Mo. 660, 90 Am. St. Rep. 468, 68 S. W. 1023; *Wood v. White*, 32 Me. 340, 52 Am. Dec. 654; *Howard v. American Peace Soc.*, 49 Me. 288; *Flynn v. Holman*, 119 Iowa, 731, 94 N. W. 447; *Chambers v. Watson*, 60 Iowa, 339, 46 Am. Rep. 70, 14 N. W. 336; *Severson v. Severson*, 68 Iowa, 656, 27 N. W. 811; *Button v. American Tract Soc.*, 23 Vt. 336; *Black v. Hill*, 32 Ohio St. 313; *Peters v. Porter*, 60 How. Pr. (N. Y.) 422; *Smith v. Smith*, 4 Paige (N. Y.), 271; *Pond v. Bergh*, 10 Paige (N. Y.), 140, 152; *Trustees etc. v. Colgrove*, 4 Hun (N. Y.), 362; *Dubois v. Ray*, 35 N. Y. 162; *Taylor v. Tolen*, 38 N. J. Eq. 91; *Mitchell v. Donohue*, 100 Cal. 202, 38 Am. St. Rep. 279, 34 Pac. 614; *Lutz v. Lutz*, 2 Blackf. 72; 3 Albany Law Journal, 263-267; note by Judge Redfield to *Kurtz v. Hibner*, 10 Am. Law Reg., N. S., 97-101.

The rule is thus stated in Wigram on Wills, second American edition, 144, 147: "If the description in the will is incorrect, evidence that a subject—having such marks upon it—exists, must be admissible, that the court may determine whether such subject, though incorrectly described in the will, be that which the testator intended. . . . So a description, though false in part, may, with reference to extrinsic circumstances, be absolutely certain, or, at least, sufficiently so as to enable a court to identify the subject intended; as where a false description is superadded to one which by itself would have been correct. Thus, if a testator devise his black horse, having only a white one, or devise his freehold houses, having only leasehold houses, the white horse in the one case, and the leasehold houses in the other, would clearly pass. In these cases the substance of the

subject intended is certain, and if there be but one such substance, <sup>551</sup> the superadded description, though false, introduces no ambiguity; and as by the supposition the rejected words are inapplicable to any subject, the court does not alter, vary or add to the effect of the will by rejecting them. To such cases, the maxim, '*Falsa demonstratio non nocet*,' may, with propriety, be applied." By the words, "inapplicable to any subject," the author means inapplicable because the subject is not in existence or does not belong to the testator.

It is said in Page on Wills, section 819: "Where testator describes the property devised by township, range, section and quarter section, but does not locate it in the correct section or range or the like, the weight of authority is that extrinsic evidence is admissible to show exactly what real estate the testator owned. Under this view if he owns any real estate which corresponds in part to the description in the will, the court will reject the incorrect part of the description and will pass the realty conveyed by the correct description."

The cases of *Moreland v. Brady*, 8 Or. 303, 34 Am. Rep. 581, *Riggs v. Myers*, 20 Mo. 239, referred to above, were cited with approval by this court in *Black v. Richards*, 95 Ind. 184, 190. The court said at page 190: "From the earliest period in the history of testamentary law, there has been manifested a disposition to apply a more favorable construction to wills than to ordinary legal instruments. Regret has sometimes been expressed at the disposition thus manifested, but the courts have nevertheless continued to countenance that line of judicial policy. It must, therefore, be accepted and acted upon as an established rule of construction at the present time: *Riggs v. Myers*, 20 Mo. 239; *Wilkins v. Allen*, 18 How. 385; *Cleveland v. Spilman*, 25 Ind. 95; *Brownfield v. Brownfield*, 12 Pa. St. 136, 51 Am. Dec. 590; *Moreland v. Brady*, 8 Or. 303, 34 Am. Rep. 581."

There are some cases which seem to hold that when the evidence of the circumstances, situation, surroundings, and property owned by the testator at the time he made <sup>552</sup> his will show that the testator did not own the land as described in his will, but owned other land to which a part of the description might properly apply, no latent ambiguity was disclosed, unless the words "my land," or other words stating in effect that the testator owned the land devised, are contained in the will. The rule established by the weight of the authorities and the better reason, however, is that such evidence does disclose a latent

ambiguity, whether words stating, in effect, that the testator owned the lands devised are used or not; and if, by rejecting the false description or the false part thereof, sufficient remains, when considered from the position of the testator, to identify the land intended with reasonable certainty, the same will pass under the will to the devisee. It is true that after rejecting the false description or the false part thereof, the words "my real estate," or words of like import, if used by the testator in making the devise, would be of great force in identifying the land intended, and might, alone or in connection with the true part of the description, if any, pass the land to the devisee in cases where, if the words were not used, the devise would fail for want of a description sufficient to identify the land. The enforcement of this rule does not reform or add any words to a will, for this cannot be done, but enables the court to construe the will after rejecting the false part of the description and thus carry into effect the intention of the testator as expressed therein.

The thirty-acre tract is described in the will as follows: Thirty acres of land off the south end of the east half of the south quarter of section 29, town 18, range 9, in Henry county, Indiana. Said section 29 contains two parts which answer to the description "south quarter"—the southeast quarter and the southwest quarter. When there are two things equally answering the description in a will, the ambiguity may be removed by evidence: 1 Jarman on Wills, 6th ed., 434, 435; 2 Underhill <sup>553</sup> on Law of Wills, sec. 910; Black v. Richards, 95 Ind. 184, 189, 190; Cruse v. Cunningham, 79 Ind. 402; Skinner v. Harrison Tp., 116 Ind. 139, 141, 18 N. E. 529; White v. Patch, 117 U. S. 217, 6 Sup. Ct. Rep. 617. The agreed statement of facts in this case shows that the testator owned thirty acres off the south end of the southwest quarter of said section, and owned no other real estate in either of said quarter sections. The presumption is that the testator intended to devise his own real estate, and not real estate owned by another: 2 Underhill on Law of Wills, 1008; 2 Redfield on Law of Wills, 3d ed., \*123; Patch v. White, 117 U. S. 210, 216, 220, 6 Sup. Ct. Rep. 617; Moreland v. Brady, 8 Or. 303, 314, 34 Am. Rep. 581; Stewart v. Stewart, 96 Iowa, 620, 625, 65 N. W. 976; Flynn v. Holman, 119 Iowa, 731, 94 N. W. 447, 448; Decker v. Decker, 121 Ill. 341, 355, 12 N. E. 750; Huffman v. Young, 170 Ill. 290, 296, 49 N. E. 570; Lindgren v. Lindgren, 9 Beav. 358, 361.



Applying the rules applicable to such descriptions, there can be no doubt of the identity of the thirty acres devised to appellee.

The twenty-acre tract in controversy is described: Twenty acres off the northwest quarter of section 29, town 18, range 9, in Henry county, Indiana. The agreed statement of facts shows that the testator owned no land in the northwest quarter of said section, but did own twenty acres off the northwest quarter of section 28, town 18, range 9, adjoining the one hundred and sixty acres in the northeast quarter of section 29 devised to appellee. The testator did not own any other twenty-acre tract of land. This tract is correctly described in the will as twenty acres. The quarter section, town, and range are correctly given in the will. The only false description is the number of the section, given as 29, when it should have been 28. Rejecting the number of the section, as we are required to do, because it is false, the will devises to appellee twenty acres off the northwest quarter of section ———, town 18, range 19, in Henry county, Indiana.

<sup>554</sup> It is clear from the authorities cited that while courts of equity have no power to reform a will or add words thereto, yet a devise of real estate by a description partly false may be effective if what remains after rejecting the false reasonably corresponds with real estate indicated by the extrinsic evidence. Keeping in view the foregoing rules of construction, and the presumption that the testator intended to devise his own property and not the property of another, and reading the will in light of the surrounding circumstances, it is evident that said testator intended to devise the twenty acres owned by him in the northwest quarter of section 28, and that appellee took the same in fee simple under said will. By rejecting the false number of the section, and giving effect to that part of the description of the twenty acres which is true, we add nothing to the terms of the will, and violate no positive rule of law or canon of construction. So far as *Funk v. Davis*, 103 Ind. 281, 2 N. E. 739, *Sturgis v. Work*, 122 Ind. 134, 17 Am. St. Rep. 349, 22 N. E. 996, and *Judy v. Gilbert*, 77 Ind. 96, are in conflict with this opinion they are overruled.

The conclusion we have reached renders the determination of the question of the estoppel of Warrington and Thompson unnecessary.

Judgment affirmed.



*The Identification by Extrinsic Evidence* of devised land is discussed in the monographic note to *Chappell v. Missionary Society*, 50 Am. St. Rep. 289-294. The decision of the principal case on the question of misdescription finds support in *Whitecomb v. Rodman*, 156 Ill. 116, 47 Am. St. Rep. 181, 40 N. E. 553; *Bingel v. Volz*, 142 Ill. 214, 34 Am. St. Rep. 64, 31 N. E. 13. See, too, *Dennis v. Holsapple*, 148 Ind. 297, 62 Am. St. Rep. 526, 41 N. E. 631; *Willard v. Darrah*, 168 Mo. 660, 90 Am. St. Rep. 468, 68 S. W. 1023; *Gaston's Estate*, 188 Pa. St. 374, 68 Am. St. Rep. 874, 41 Atl. 529. A will purporting to devise "my real estate, to wit, the southeast quarter of the southwest quarter of section 8" operates as a devise of the northeast quarter of the southeast quarter of that section, if that was the only land owned by the testator: *Rook v. Wilson*, 142 Ind. 24, 51 Am. St. Rep. 163, 41 N. E. 311. In a recent Georgia case it is held that a mere error in the number of a lot in a mortgage does not vitiate the instrument, when there is a general description therein from which the property can be identified: *Johnson v. McKay*, 119 Ga. 196, ante, p. 166, 45 S. E. 992.

*In Construing a Will* the intention of the testator should control, and to ascertain such intention the entire will should be considered in the light of all the circumstances surrounding the testator at the time the will was made: *Blinn v. Gillett*, 208 Ill. 473, ante, p. 234, 70 N. E. 704.

*The Presumption is Against Partial Intestacy*, when a will is made: *Willard v. Darrah*, 168 Mo. 660, 90 Am. St. Rep. 468, 68 S. W. 1023; *In re Donge's Estate*, 103 Wis. 497, 74 Am. St. Rep. 885, 79 N. W. 786; *Phillips' Estate (No. 1)*, 205 Pa. St. 504, 97 Am. St. Rep. 743, 55 Atl. 210.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**IOWA.**

**SPINNEY v. CHAPMAN.**

[121 Iowa, 38, 95 N. W. 230.]

**FOREIGN BUILDING AND LOAN ASSOCIATIONS—Insolvency—Conflict of Laws.**—If upon the insolvency of a foreign building and loan association its bonds and securities are assigned to a stranger, the rights of an association member must be determined by the law of his domicile, if no place of payment is named and a local treasurer of the association is designated in the application as the person to whom payments shall be made, and this although the association by law requires payments to be made at the home office, from which the loan is approved and the money sent. (p. 307.)

**FOREIGN LOAN ASSOCIATIONS—Insolvency—Rights of Members.**—Although the by-laws of a going foreign building and loan association must be resorted to, to determine the conditions of performance of all contracts made by it, yet when its insolvency has intervened and its affairs have passed into the hands of a receiver, there is then no association, no by-laws, and no home office, and a borrowing member is entitled to have his rights according to the law of his domicile. (p. 309.)

**FOREIGN BUILDING AND LOAN ASSOCIATIONS—Insolvency—Rights of Borrowing Member.**—If a foreign building and loan association has become insolvent and its affairs have passed into the hands of a receiver, they are no longer governed by its by-laws, and a borrowing member has a right to have his liability determined by the law of his domicile. He is entitled to credit for interest paid, premiums paid as of the time paid and to the actual value of his shares of stock, being liable for the balance due with interest from the date of the appointment of the receiver. (p. 309.)

Dudley & Coffin, for the appellant.

E. R. Sayles and T. H. Chapman, for the appellees.

**39 BISHOP, C. J.** The defendants Chapman and Murphy are, and at all times in question were, shareholders in the Interstate Building and Loan Association, organized and exist-

ing under the laws of the state of Illinois, and having its principal place of business at Bloomington, in that state. Each of said defendants has at all times resided in Guthrie county, this state. During the year 1892 said defendants each obtained a loan in the sum of five hundred dollars from said association, in evidence of which they executed and delivered the respective bonds upon which these actions are brought. By the terms thereof, the bonds are made payable in monthly installments as follows: three dollars as dues on stock; two dollars and fifty cents as monthly interest, and two dollars and ninety-two cents as monthly premiums; all such payments to continue until the principal sum, with interest and premiums, shall have become liquidated by the shares of stock held by defendants having matured or reached their par value in accordance with the provisions of the charter and by-laws of said association. At the time of the execution and delivery of such bonds, and as security therefor, the defendants pledged their respective shares of stock, and executed and delivered the respective mortgages in suit, each of such mortgages covering a separate tract of land in Guthrie county. It is conceded that both Chapman and Murphy continued to make their payments until June 6, 1898, when the said association, having become insolvent, was taken in charge by a receiver appointed therefor under proceedings brought for that purpose in the courts of the state of Illinois. On November 7, 1898, the receiver, having obtained authority from the court by which he was appointed, sold and transferred the bonds and securities in question to this plaintiff, E. C. Spinney.

<sup>40</sup> The defense of usury, as made in each of the cases, was predicated upon substantially the same grounds relied upon in the case of *Tootle v. Singer*, 118 Iowa, 533, 88 N. W. 416, a petition for rehearing in which case was overruled at the January, 1903, term of this court. In that case it was said that section 1898 of the Code, as amended by chapter 48, Acts 27th General Assembly, applies to foreign as well as domestic building and loan associations. As to the question of usury, therefore, the instant cases may be disposed of by simple reference to our holding in the case referred to.

With the defense of usury thus disposed of, it is clear—and, indeed, this is not disputed—that the loans have not been paid in full. What are the amounts for which defendants are entitled to credit is a matter of, and must be determined by, computation. Whether such computation shall be made ac-

according to the rules adopted in this state, or according to the rules in force in the state of Illinois, is the remaining matter of contention between the parties. On behalf of plaintiff it is contended that these are Illinois contracts, and that they should be construed and enforced as such. On the other hand, the defendants make the contention that such are Iowa contracts, and should be governed by the laws of this state. The contention of plaintiff is based particularly upon the provisions of a by-law of the association introduced in evidence, and which provides that all payments shall be made and contracts performed at the home office of the association, at Bloomington, in the state of Illinois. Reliance is also placed upon the fact that the applications for loans were sent to and approved at the home office of the association, at Bloomington, and the moneys representing the loans were forwarded from such home office to the respective applicants. On behalf of the defendants it is pointed out that the bonds are not, in terms, made payable at any particular place; that the <sup>41</sup> execution of all papers by defendants took place in Guthrie county, this state, and that upon the written application for the loan made by each of the defendants there was indorsed a special provision designating the local treasurer of the association at Bagley, in Guthrie county, as the person to whom all payments upon the loan might be made. That a local treasurer was appointed at Bagley, and that to him all payments were made, and by him received for, are facts conceded in the record.

Taking the situation as a whole, we are disposed to regard the obligations as now existing against the defendants as performable in Iowa, and that they are therefore to be construed and enforced according to the laws of this state. Counsel for appellant presents many very cogent reasons why the contracts of a building and loan association should be construed and enforced according to the law of the domicile of the association, and cite many authorities upon the subject. But as we think, there is no occasion to consider such in the disposition of the cases before us. While it may be true that the involved character of building and loan contracts, and the general interests of the contracting associations, require that such contracts shall be referable to the law of the domicile of such associations, to the end that certainty and uniformity may result, still it must be manifest that, as applied to the mere matter of payment of a debt, such doctrine ceases to have force of application when it is made to appear not only that the association is no longer

a going concern, but that all interest formerly held by it in the contract has been transferred over without recourse to a stranger. When a building and loan association becomes insolvent and passes into the hands of a receiver, the loan contracts made by it cease ipso facto, and by force of law, to have many, if not all, the characteristics which differentiated them from loan contracts in general form and use. Of necessity, the fact of insolvency works a radical change in <sup>42</sup> the relation of the parties, and makes impossible of accomplishment the special results featured by the contract as originally made. Accordingly, it has been determined that an equitable adjustment of the rights of the parties can be most fairly accomplished by regarding the borrower's obligation as a simple loan, upon which shall be credited payments actually made, not counting stock payments, and the balance, as an entirety, to be a debt at once due and payable. This is not only the law of this state, but it is the rule in the state of Illinois: *Sullivan v. Spaniol*, 78 Ill. App. 126; *Choisser v. Young*, 69 Ill. App. 252; *Hale v. Kline*, 113 Iowa, 523, 85 N. W. 814.

Granting, then, that the by-laws of a going concern must be resorted to for the purpose of determining the conditions of performance of all contracts made by it, still it is manifest that such rule cannot be applied where insolvency has intervened, and all the affairs of the association have passed into the hands of a receiver. In the material sense necessary here to be considered, there is then no longer any association, there are no by-laws, and there is no home office. So if it be conceded that had the association continued in its operation, and retained its ability to perform upon its part, the contracts of these defendants would have been performable in the state of Illinois, because of the by-law provision, and notwithstanding the stipulation in the loan applications, still we are called upon to take note of the new, or, rather, changed, obligation which the law supplies when insolvency intervenes, and determine what are the rights of the parties in view of the change which has taken place. Undoubtedly the debtor is, so to speak, the innocent party, and the law ought to, and will, favor him where it can. It will take away from him no more of the abstract rights for which he stipulated than may be strictly necessary to protect the individual rights of all the other shareholders, and accomplish a winding up <sup>43</sup> of the affairs of the association. Called upon to perform his new or modified obligation, we see no reason why he should not be permitted to urge in our courts,



through the medium of which enforcement is sought, that the place of performance is in this state, and that his right to here pay his debt be conceded to him, and the measure of his liability fixed as provided for by the rules here in force. While no case has been called to our attention, presenting the precise state of facts found in this record, still the conclusion we have reached finds support in principle, at least, in the following authorities: *Knutson v. Northwestern etc. Assn.*, 67 Minn. 201, 64 Am. St. Rep. 410, 69 N. W. 889; *Falls v. United States Sav. etc. Assn.*, 97 Ala. 417, 38 Am. St. Rep. 194, 13 South. 25; *Washington etc. Assn. v. Stanley*, 38 Or. 319, 84 Am. St. Rep. 793, 63 Pac. 489; *Rowland v. Old Dominion etc. Assn.*, 115 N. C. 825, 18 S. E. 965; *Meroney v. Atlanta etc. Assn.*, 116 N. C. 882, 47 Am. St. Rep. 841, 21 S. E. 924; *Story on Conflict of Laws*, sec. 296; 4 Am. & Eng. Ency. of Law, 2d ed., 1072.

Accordingly, we are disposed to hold that the rights of these parties are solvable under the rules adopted in this state; and, so holding, we have need only to add that defendants are entitled to have credited upon their respective loans the interest as paid, and the amount of the premiums paid as of the time paid. Upon the balance, computing from the time when the receiver was appointed, the defendants are chargeable with interest at the rate of six per cent per annum. They are also entitled to credit for the actual value, as such may be ascertained, of the shares of stock held by them: *Hale v. Kline*, 113 Iowa, 523, 85 N. W. 814; *Spinney v. Miller*, 114 Iowa, 210, 89 Am. St. Rep. 351, 86 N. W. 317. As we have no sufficient data upon which to make computations, the causes will be remanded to the district court for that purpose, and where such further proceedings may be had as provided for by law.

Reversed and remanded.

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*The Insolvency of Building and Loan Associations* as affecting the liability of members is the subject of a monographic note to *Curtis v. Granite State Provident Assn.*, 61 Am. St. Rep. 24-30. The settlement with borrowers prescribed by statute for solvent associations does not apply to insolvent ones: *Spinney v. Miller*, 114 Iowa, 210, 89 Am. St. Rep. 351, 86 N. W. 317. As to the right of borrowing members to credits for dues and premiums paid by them, upon the liquidation or insolvency of the association, see *People's Bldg. etc. Assn. v. McPhilamy*, 81 Miss. 61, 32 South. 1001, 95 Am. St. Rep. 454, and cases cited in the cross-reference note thereto; *Globe Bldg. etc. Assn. v. Wood*, 110 Ky. 4, 96 Am. St. Rep. 417, 60 S. W. 858. And as to preference of stockholders upon the insolvency of a foreign association, see *MacMurray v. Sidwell*, 155 Ind. 560, 80 Am. St. Rep. 255, 58 N. E. 722.

*A Loan by a Foreign Building and Loan Association* to a citizen of this state is solvable by its laws, notwithstanding the loan is stipulated to be paid at the domicile of the association, when such stipulation is designed to evade the usury laws of this state: *Pacific States etc. Bldg. Assn. v. Hill*, 40 Or. 280, 91 Am. St. Rep. 477, 67 Pac. 103. See, too, *People's Bldg. etc. Assn. v. Berlin*, 201 Pa. St. 1, 88 Am. St. Rep. 764, 50 Atl. 308; *Floyd v. National Loan etc. Co.*, 49 W. Va. 327, 87 Am. St. Rep. 805, 38 S. E. 653.

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## GRANT v. SAUNDERS.

[121 Iowa, 80, 95 N. W. 411.]

**CHARITY** must be a Gift to a general public use. (p. 310.)

**WILLS—Charitable Bequests.**—A bequest in trust for the benefit of the poor, to be given to such objects as the trustee named shall deem worthy, is a charitable bequest. (p. 311.)

**WILLS—Charitable Bequests—Uncertainty.**—A specific bequest in trust specially for the benefit of the poor, as a class, remaining uncertain only as to the selection of the beneficiaries by the trustee named, is not so uncertain as to render the bequest invalid, and the trustee may designate the beneficiaries without confining himself in their selection to any particular locality. (p. 314.)

**WILLS—Charitable Bequests—Failure for Want of Trustee.**—A specific bequest in trust for the benefit of the poor, otherwise valid, will not fail because the will fails to provide for the appointment of a successor in case of the death, failure, or inability of the trustee named to act. A trust never fails for want of a trustee. (p. 315.)

Palmer & Kopp, for the appellant.

W. A. Saunders, for the appellees.

<sup>81</sup> SHERWIN, J. The appellant contends that the bequest under consideration cannot be upheld for two principal reasons: 1. Because it is too vague and uncertain as to the beneficiaries; and 2. Because it is not a charitable bequest. We shall discuss these propositions in their inverse order.

Charitable gifts have been considered by the courts from the earliest recorded judicial proceedings, and many definitions thereof have been given. Lord Camden defined a charity as "a gift to a general public use, which extends to the poor as well as to the rich": *Amb.* 651; *Franklin v. Armfield*, 2 Sneed, 305. This definition is at once concise and comprehensive, and has been adopted by the supreme court of the United States: *Perin v. Carey*, 24 How. 465. It was also approved by Chancellor

Kent in *Coggeshall v. Pelton*, 7 Johns. Ch. 292, 11 Am. Dec. 471.

Starting, then, with the proposition that a charity must be a gift for a public use, let us analyze the language of the bequest before us for the purpose of determining <sup>82</sup> whether it limits the testator's bounty to such use alone. Had he given the remainder of his estate to Miss Fouche, in trust "for the benefit of the poor," without further direction, it could hardly be contended that the bequest was not charitable, whatever might be said as to its validity in other respects; for the relief of the poor and unfortunate has afforded an almost unlimited field for charitable donations, and trusts created for their benefit have almost universally been held to be charitable and valid: *Tappan's Appeal*, 52 Conn. 412; *Williams v. Pearson*, 38 Ala. 299; *Clement v. Hyde*, 50 Vt. 716, 28 Am. Rep. 522; *Suter v. Hilliard*, 132 Mass. 412, 42 Am. Rep. 444; *Jones v. Habersham*, 107 U. S. 174, 2 Sup. Ct. Rep. 336, 27 L. ed. 401; *Phillips v. Harrow*, 93 Iowa, 92, 61 N. W. 434. It is contended, however, that the authority given the trustees to distribute the fund "to such objects as in her judgment" are worthy of assistance, and "at such times" and to such "persons as she thinks best to help," left it optional with her to select anyone as the recipient of the testator's bounty, whether within the class designated as "the poor" or not. But to so hold would require a strained and unnatural construction of the language used, and it would further require us to disconnect it from the remaining language of the clause, and construe it without reference thereto. The bequest is specifically stated to be for the benefit of the poor, and the discretion given the trustee to select such objects as are worthy must relate back to the subject of the bequest. The objects which the testator had in mind may have been individuals among the general class named, or some institution or association having for its object the benefit of the poor. It is possible that the latter thought was in the mind of the testator in view of the discretion given as to persons. But, however this may be, it is clear that the dominant thought and intent was that the fund should be devoted to the help of the poor. The further direction <sup>83</sup> that assistance be given to the persons whom she might think it best to help must also be held to mean those selected from the class designated as "the poor." If we are correct in this conclusion, the bequest is purely a charitable one, and it only re-

mains to determine whether it is so vague and uncertain as to beneficiaries as to render it void.

Counsel for the appellant have explored the entire field of charitable uses and trusts, and have favored us with an historical review of the subject full of interest and instruction. They have argued at length the doctrines of *cy pres* and *parens patriæ*, and contend that the bequest herein cannot be sustained except by the adoption of the rule *cy pres*. But, however interesting the subject may be, a review of its history in England and in this country, and an extended notice of the many cases in which the rule has been discussed, is precluded by the proper limits of this opinion, and, in our judgment, not necessary to the determination of the case. We may, however, briefly state in a general way the rule *cy pres* as applied in the English chancery courts. It is applied to sustain bequests "where charity is the general substantial intention" and no object is mentioned, or, if mentioned, fails for any reason, or where the mode provided for the execution of the charity is uncertain and impracticable: 2 Pomeroy's Equity Jurisprudence, 595; Boyle on Charities, 147, 155; Attorney General v. Minshull, 4 Ves. 14; Fisk v. Attorney General, L. R. 4 Eq. 521; 2 Perry on Trusts, 4th ed., sec. 718. After an exhaustive examination of the cases both in England and in this country, which are collected and reviewed by Mr. Justice Gray in his opinion in Jackson v. Phillips, 14 Allen, 574-594, the learned justice states that in England there are two distinct powers exercised by the chancellor in charity cases under the doctrine of *cy pres*; "the one derived from the royal prerogative, and the other in the <sup>84</sup> exercise of judicial authority." He notices the cases where the disposition of the charity was made by chancery under the royal prerogative, and states that the power so exercised by the English chancery "does not exist in any court in this country." The cases are also reviewed which have applied the doctrine in the exercise of a general equity jurisdiction, without reference to the royal prerogative, and the learned judge states that such application stands upon very different grounds, and is favored both in England and in this country.

In Vidal v. Girard, 2 How. 194, Mr. Justice Story reached the conclusion, after an examination of some fifty of the very early English cases, many of them decided long before the statute of 43 Elizabeth, that charitable uses had been enforced in chancery upon the general jurisdiction of the court independently of the statute of 43 Elizabeth, and was, therefore, a

part of the common law independently of that statute. It may be said, then, that wherever the *cy pres* power has been used by the courts of this country in enforcing charitable bequests, its exercise has been placed upon the ground of general chancery power, entirely separate and distinct from any thought of prerogative power, and for the purpose of carrying out as nearly as possible the true intention of the donor. This distinction may not have been clearly expressed in all of the judicial utterances on the subject, but we think it will be found to be the basis of most, if not of all, of the decisions wherein the doctrine is recognized. In 2 *Perry on Trusts*, section 724, it is said that, "when the *cy pres* doctrine is reduced to its elements, it becomes a very simple judicial rule of construction; and, as such, courts in all of the states can and do apply it without usurping any prerogative powers." But to sustain the charity in this case we need not go to the extent of recognizing the doctrine, if, indeed, we might do so without conflicting with our own cases. Having <sup>85</sup> determined that the bequest is a charitable gift to the trustee for the benefit of the poor as a class, what is in fact the uncertainty as to the intended beneficiaries; and there can be no other uncertainty unless it be as to locality, because the trustee is named, and she is ready and willing to execute the trust. The title of the fund has been placed in her for the purpose of carrying out the trust, and she has been given the power to select those of the particular class named who shall receive it. The fund, the trustee, and the class are then definite and certain. All that remains to be done to administer the trust is the selection of the beneficiaries from the designated class, and the only uncertainty is as to who they shall be. The bequest could not well have been more specific as to the persons or objects of the testator's bounty without destroying its character as a charity, because uncertainty is one of the elements of a charitable gift: 1 *Perry on Trusts*, sec. 66; *Phillips v. Harrow*, 93 Iowa, 92, 61 N. W. 434. And it is settled in this state that the trustee may legally select the beneficiaries: *Quinn v. Shields*, 62 Iowa, 129, 49 Am. Rep. 141, 17 N. W. 437; *Phillips v. Harrow*, 93 Iowa, 92, 61 N. W. 434.

It is argued, however, that the beneficiaries may be selected from the whole world, and, being thus unlimited as to locality, the bequest is void. We are unable to see why this should be so. If the testator saw fit to extend his charity beyond the limits of his own city or state, why should the courts say that he had no right so to do, and divert his property into other



channels? During his life he could have given it to whom and wherever he chose. No charitable object was so distant that he might not have given to it, or selected it as the beneficiary under his will. Why, then, should we say that after his death his clearly expressed charity shall not be carried out because not limited to a certain locality, or to be dispensed within geographical lines approved by us or dictated by his heirs? We are of the opinion that no legal <sup>86</sup> reason exists why we should so hold. The trustee has the power of selection, and by exercising this power she makes the beneficiaries certain, and carries out the true intention of the testator, and we hold that the object or persons selected by her need be confined to no particular locality, and that the bequest in this respect is valid: *Quinn v. Shields*, 62 Iowa, 129 49 Am. Rep. 141, 17 N. W.

1; *Phillips v. Harrow*, 93 Iowa, 92, 61 N. W. 434; *Claypool v. Norcross*, 42 N. J. Eq. 545, 9 Atl. 112; *Board of Commrs. v. Dinwiddie*, 139 Ind. 128, 37 N. E. 795; *Woodruff v. Marsh*, 63 Conn. 125, 38 Am. St. Rep. 346, 26 Atl. 816. In the *Quinn* case the charity was institutional, but there can be no difference in principle. In the *Phillips* case the bequest was for the building and maintenance of a foundling hospital, "with the special view and purpose of relieving unfortunate females, and for protecting and caring for their offspring," and it is said: "The provision for a foundling hospital is not so specific, in that the beneficiaries are not limited to residents of any designated locality; but that was not necessary. The persons who are intended to be benefited are described with sufficient certainty to enable the trustees to distribute the fund according to the real intent of the testator." *Lepage v. McNamara*, 5 Iowa, 124, was an action brought by the heirs of *Lepage*, deceased, for the recovery of real estate deeded to the defendant by Bishop *Loras* under the following devise: "I direct and authorize the Right Reverend Bishop *Loras*, or his successors, to dispose of my real estate, and apply so much thereof to the church or to the education and maintenance of poor children, as he in his wisdom may think proper and legal." The action was not one to enforce a charitable gift, and does not present facts so similar to those involved in this case as to make the language therein used controlling here. In fact, in that case there was no charitable bequest, because the will left it optional with the bishop whether the fund should be given to the church or to the poor. In <sup>87</sup> *Moran v. Moran*, 104 Iowa, 216, 65 Am. St. Rep. 443, 73 N. W. 617, the bequest was "to be divided among

the Sisters of Charity," without limitation as to locality, and without giving the trustees the power to select the beneficiaries from among that class. It is there said: "We do not question the rule that it is competent for a testator to bestow a charity on a person or institution to be chosen by a trustee or executor, and that such bequests will be upheld"; and the decision rests upon the fact that no power of selection was given in the will.

The contention that the trust must fail because the court cannot appoint trustees to act in the place of the one named in the will is not sound, in our judgment. Such a contingency has not yet arisen, nor may it ever arise; and why should we anticipate imaginary difficulties for the purpose of defeating that sweet charity, which "in thought, speech, and deed challenges the admiration and affection of mankind." Christianity teaches it as its crowning grace and glory: Chief Justice Ryan in *Dodge v. Williams*, 46 Wis. 91, 50 N. W. 1104. The will provides that the entire fund shall be used as directed without limit as to time, and we may presume that it will be so expended during the life of the present trustee: *Quinn v. Shields*, 62 Iowa 129, 49 Am. Rep. 141, 17 N. W. 437. Moreover, the general rule is that a trust shall never fail for the want of a trustee: 1 *Perry on Trusts*, sec. 38; *Seda v. Huble*, 75 Iowa, 429, 9 Am. St. Rep. 495, 39 N. W. 685. And if it should ever become necessary for the court to appoint another trustee, we see no insurmountable obstacle in the way of its so doing. True, whatever remained of the fund would necessarily have to be distributed as the judgment of the appointed trustee might dictate; but the worthy poor "we have always with us," and they, as a class, were the objects of the testator's charity. The selection of the individuals from among their number must necessarily be left to the judgment of some one. To Miss Fouché is given the right to first execute the charitable purpose, and, although the testator<sup>88</sup> does not expressly provide for the appointment of others by whom the objects shall be selected and the fund distributed when she shall de cease, or for any other reason be incapable of acting, it cannot be that he intended his gift to fail. He created it for a specific charitable purpose, and he might well suppose, if his attention were called to the matter, that proper means of executing his purpose could be provided through the medium of the courts, if in any matter of detail his provision therefor was insufficient. "If the general object of the bequest is pointed out, or if the testator has fixed the means of doing so by the appointment of trustees

with power of selection vested in them, then the gift must be treated as sufficiently definite for judicial cognizance, and will be carried into effect": *White v. Ditson*, 140 Mass. 351, 54 Am. Rep. 473, 4 N. E. 606; *Bullard v. Chandler*, 149 Mass. 532, 21 N. E. 951; *Minot v. Baker*, 147 Mass. 348, 9 Am. St. Rep. 713, 17 N. E. 839; *Hoeffer v. Clogan*, 171 Ill. 462, 63 Am. St. Rep. 241, 49 N. E. 527; *Dodge v. Williams*, 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103; *Harrington v. Pier*, 105 Wis. 485, 76 Am. St. Rep. 924, 82 N. W. 345; 1 *Perry on Trusts*, secs. 248, 249; *Miller v. Chittenden*, 2 Iowa, 315; *Quinn v. Shields*, 62 Iowa, 129, 48 Am. Rep. 141, 17 N. W. 437; *Phillips v. Harrow*, 93 Iowa, 92, 61 N. W. 434; *Seda v. Huble*, 75 Iowa, 429, 9 Am. St. Rep. 495, 39 N. W. 685; *Johnson v. Mayne*, 4 Iowa, 180.

We have not overlooked the fact that many of the states have statutes designed to prevent the failure of charitable bequests, and that the courts of those states have carried out the spirit of such legislation whenever it has been found to be in harmony with the testator's intent. But the courts are bound to sustain all lawful testamentary bequests, if possible, regardless of statutory enactment on the subject; and the rule we herein announce seems to us so manifestly just and right that we do not hesitate to adopt it for the purpose of giving full effect to the testator's plainly expressed purpose and intent.

The judgment of the district court is affirmed.

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*On Charitable Uses* in general, see the monographic note to *Dashiell v. Attorney General*, 9 Am. Dec. 577-588. A gift for the benefit of the poor in general is a valid charity: See the monographic note to *Hoeffer v. Clogan*, 63 Am. St. Rep. 263, on what are charitable trusts and uses. Indefiniteness in such trusts and uses does not necessarily militate against them: *Harrington v. Pier*, 105 Wis. 485, 76 Am. St. Rep. 924, 82 N. W. 345; *Clayton v. Hallett*, 30 Colo. 231, 97 Am. St. Rep. 117, 70 Pac. 429. A bequest to a charity unnamed, to be selected by the trustee, may be valid: *St. James' Orphan Asylum v. Shelby*, 60 Neb. 796, 83 Am. St. Rep. 553, 84 N. W. 273. See the monographic note to *Fifield v. Van Wyck*, 64 Am. St. Rep. 756-772, on the certainty and definiteness required in charitable uses and trusts. A gift for a charitable purpose will not be allowed to fail for want of a trustee: *Sears v. Chapman*, 158 Mass. 400, 33 N. E. 601, 35 Am. St. Rep. 502, and cases cited in the cross-reference note thereto.

THORNILY *v.* PRENTICE.

[121 Iowa, 89, 96 N. W. 728.]

**JUDGMENTS—Collateral Attack.**—A judgment without jurisdiction is absolutely void, and may be denied or contested in any proceeding, direct or collateral, in which a person seeks to assert a right under such pretended adjudication. (p. 319.)

**JUDGMENTS—Collateral Attack—Defective Notice.**—A judgment entered on a defective notice is not, for that reason alone, subject to collateral attack. (p. 319.)

**JUDGMENTS—Collateral Attack—Want of Notice.**—A judgment without notice, either by personal or substituted service, is void and subject to collateral attack. (p. 319.)

**JUDGMENTS—Trusts and Trustee—Want of Notice.**—Service upon the trustee holding the legal title, while it may be sufficient to sustain a decree of foreclosure of the mortgage does not authorize the trustee to appear for the cestui que trust, so that a binding personal judgment can be rendered against him. (p. 320.)

**JUDGMENTS—Idem Sonans.**—Judgment against William M. T., upon substituted service upon W. M. T., while the true name of the defendant is Willis H. T., is void as to him and not within the rule of idem sonans. (p. 320.)

**JUDGMENTS—Idem Sonans.**—If the record of a judgment entered upon substituted service or notice presents the use of a name other and different than that borne by the person against whom judgment is sought to be enforced, the rule of idem sonans is not applicable, and the adjudication is of no validity against such person. (p. 321.)

Mitchell, Sloan & McBeth, J. H. Anderson and J. W. Williams, for the appellant.

Wherry & Walker, for the appellee.

**90** **WEAVER, J.** The question at issue under the pleadings turns upon the validity or invalidity of a judgment entered by the district court of Van Buren county, which judgment defendant alleges to be a lien upon the land described in the petition. The circumstances material to be stated are as follows: In the year 1887 one J. W. Scott was the owner of a grist-mill, in which he desired to place new and improved machinery. To aid him in this enterprise, plaintiff with other neighbors, signed Scott's promissory notes for a considerable sum, and in the name of a trustee took a mortgage on the mill property to secure themselves from loss thereon.

In 1892 Scott found himself unable to pay the notes, and at the request of his sureties made a deed of the mill to a trustee for their benefit. The conveyance was made by an ordinary warranty deed, but excepted from its covenants the lien of a first

mortgage for sixteen hundred dollars held by Luke P. Prentice, the defendant herein. On March 12, 1892, the plaintiff, having rented his farm to his son, removed to Ohio, where he has ever <sup>91</sup> since resided. On September 14, 1893, Prentice began an action to foreclose his mortgage, naming among the defendants the trustee, Edmundson, who held the legal title to the property; also "W. M. Thornily" and others, who were supposed to be the persons for whose benefit the deed was taken. In such foreclosure petition it was alleged that as a part of the consideration upon which Scott made said deed said "W. H. Thornily" and the others for whose benefit the deed was made promised and undertook to pay the mortgage debt to Prentice. Proof of service of original notice as to Thornily was made by sheriff's return as follows: "This notice came into my hands for service. September 15, 1893, and I certify that on the twenty-fifth day of September, 1893, I personally served the same on the foregoing defendants as follows: On W. M. Thornily by leaving a copy of notice with Paul Thornily, over fifteen years of age, his son. All done in Van Buren county, Iowa, the twenty-sixth day of September, 1893. James Elerick, Sheriff." Edmundson, trustee, appeared to said action, and filed an answer "for himself and for the other defendants" except Scott and wife. Scott filed a cross-petition against his codefendants, alleging their promise to pay the debt to Prentice. Edmundson, trustee, again assumed to answer this pleading both for himself and for his codefendants; but upon the trial, and before judgment was entered, Edmundson and the other resident defendants, together with their attorneys of record, filed a written disclaimer of any right or authority to represent Thornily. Notwithstanding this disclaimer, the court proceeded to render personal judgment against "Wm. M. Thornily" and J. W. Scott for eighteen hundred and thirteen dollars and sixty-six cents and costs. On special execution the mortgaged property was sold to Prentice for sixteen hundred dollars, leaving the remainder of said judgment and costs still unpaid.

1. Appellee raises the question that the evidence has never been certified by the trial court. It is to be admitted that the abstract fails to make it clear whether <sup>92</sup> such certification was within the statutory time, or, indeed, at any time; but, in view of the conclusion we have reached upon the merits we have not gone to the transcript to determine the question thus raised. Moreover, there is no such denial by appellee as is required to put the sufficiency or completeness of the record in issue.



2. Appellant's first proposition is that the validity of the judgment cannot be questioned in a collateral proceeding. Assuming for the purposes of argument that this action is a collateral attack upon the judgment, we have to say that this court is fully committed to the doctrine that a judgment without jurisdiction is not merely voidable, but absolutely void and may be denied or contested in any proceeding, direct or collateral, in which a party seeks to assert a right under such pretended adjudication. In other words, a void judgment is no judgment, and its record does not estop the defendant therein from denying its binding force or effect whenever and wherever it may be asserted against him: *Kitsmiller v. Kitchen*, 24 Iowa, 163; *Lyon v. Vanatta*, 35 Iowa, 521; *Jordan v. Brown*, 71 Iowa, 421, 32 N. W. 450; *Hubner v. Reickhoff*, 103 Iowa, 368, 64 Am. St. Rep. 191, 72 N. W. 540; *McAllister v. Johnson*, 108 Iowa, 42, 78 N. W. 790. This rule does not apply where service of notice is merely informal or defective, for in such case the court has jurisdiction to pass upon its sufficiency, and relief from a judgment rendered thereon must be sought by appeal or direct attack: *Cooper v. Sunderland*, 3 Iowa, 114, 66 Am. Dec. 52; *Boker v. Chapline*, 12 Iowa, 204; *Shawhan v. Loffer*, 24 Iowa, 217; *Rotch v. College*, 89 Iowa, 480, 56 N. W. 658; *Day v. Goodwin*, 104 Iowa, 374, 65 Am. St. Rep. 465, 73 N. W. 864.

None of the cases upon which appellant relies goes further than the proposition last stated. If there were no service of original notice upon the appellee and no authorized appearance in his behalf in the appellant's foreclosure proceedings, he may, in this action, rightfully deny the validity of the <sup>93</sup> judgment there rendered against him, and contest the alleged judgment lien against his land. That there was in fact no service of notice subjecting his person to the jurisdiction of the court is made very clear. Appellee had for more than a year been, and has ever since remained, a resident of Ohio. The sheriff's return makes no pretense of personal service, nor even of substituted service. Its statement that a copy was left with the son, unsupported by any allegation that it was left with a member of his family, or at his usual place of residence, or that he was not to be found in the county of his residence, does not show even a defective or informal service, but no service, and gave the court no jurisdiction over him.

So, also, as to the appearance made in his behalf. The service of notice upon the trustee, who held the legal title to the mortgaged property, was perhaps sufficient to authorize this

court to enter a decree of foreclosure which would bind the appellee herein as a cestui que trust, but the trustee as such had no authority to appear for appellee as to any personal demand against him, or subject him to the hazard of a personal judgment in appellant's favor. No attempt is made to show such authority, and both trustee and counsel entered an express disclaimer of right to speak or act for the appellee before the judgment was entered. Upon such a state of facts the court below had no other alternative than to hold the judgment void.

3. The discussion in the preceding paragraph has been upon the assumption that the judgment in controversy is a judgment against appellee. It is apparent, however, that such is not the case. The appellee's name is Willis H. Thornily. The so-called "service of notice" was made, according to the sheriff's return, by leaving a copy with "Paul Thornily" for "W. M. Thornily." The judgment is entered against "Wm. M. Thornily." Now, it may be conceded for the <sup>91</sup> purposes of this case that, if this notice had been personally served upon appellee, or if he actually appeared in response to such service, a confusion or mistake in the name by which he was designated would not necessarily be fatal to the judgment, and that in the present proceeding his identity with the person sued could be established by parol evidence; but where reliance is had upon the constructive notice given by publication or by substituted service—a notice which the party to be charged may never in fact see or hear of—greater strictness must be observed: *Fanning v. Krapfl*, 61 Iowa, 417, 14 N. W. 727, 16 N. W. 293. A judgment rendered upon such service will bind no one not properly named in the record. This does not mean that the name must be correctly spelled, but it must be so nearly correct as to come within the rule of *idem sonans*; that is, if the name as spelled or written in the record, when pronounced according to commonly accepted methods, conveys to the ear a sound practically identical with the sound of the correct name as commonly pronounced, the designation is sufficient, and no advantage can be taken of the clerical error: 21 Am. & Eng. Ency. of Law, 2d ed., 313. Where, however, the record of a judgment entered upon a notice of this kind presents not a mere discrepancy or variation in the spelling of a defendant's name, but the use of a name other and different than that borne by the person against whom such judgment is sought to be enforced, the rule of *idem sonans* is not applicable, and the adjudication is of no validity against such person. In the *Fanning* case,

above cited, we held that a decree entered upon publication of notice directed to "P. F. B. Hopkins" gave the court no jurisdiction over "F. P. B. Hopkins." In the case before us appellant attempts to assert against Willis H. Thornily a judgment which he has obtained against William M. Thornily on a substituted service supposed to have been made on W. M. Thornily. That "Willis H." is not identical in sound or in fact with <sup>95</sup> "William M." or "Wm. M." hardly requires argument or illustration, but a few instances in which the rule has been applied may not be out of place. "Helen" and "Ellen" are distinct names: *Thomas v. Desney*, 57 Iowa, 61, 10 N. W. 315. So, also, "Furman" and "Freeman" (*Howe v. Thayer*, 49 Iowa, 154); "Henry" and "Harry" (*Garrison v. People*, 21 Ill. 535); "May" and "Mary" (*Kennedy v. Merriam*, 70 Ill. 228); "McCarver" and "McCravey" (*McCravey v. Cox*, 24 Ark. 574); "Griffin" and "Griffith" (*Henderson v. Cargill*, 31 Miss. 367); "Matthew" and "Mather" (*Robson v. Thomas*, 55 Mo. 581). Nor is this a mere technicality.

When the rights of a person are to be concluded by a notice which is merely constructive, not actual, it is right and just that the party who wishes to avail himself of its benefits be held to follow the forms provided by statute. *Adams, J.*, in *Fanning v. Krapfl*, 61 Iowa, 417, 14 N. W. 727, 16 N. W. 293, speaking of notice by publication says: "Notice by publication, even where there is no misnomer, does not afford a very strong natural presumption that the fact of the pending of the action will be brought to the defendant's actual knowledge. Notice by this mode is allowable only out of necessity. It must often happen that great injustice is done and great hardship suffered. We are not disposed to open the door any wider than necessity requires. Whoever undertakes to give notice by publication, and misnames the defendant, is without excuse." These remarks are equally pertinent to a case of substituted service, and particularly where, as in this case it appears to be an attempt to obtain personal jurisdiction of one who is admittedly a non-resident.

4. Appellant, by way of counterclaim, sets up the alleged promise by appellee to pay the mortgage debt of Scott, and asks that, if the judgment in controversy be found void, he may now recover the amount remaining unpaid on said obligation. The testimony upon this issue is very conflicting. Scott, with other members of his family, testify very positively that such was the agreement; <sup>96</sup> while appellee and other witnesses strenuously

deny it. The burden of establishing the promise is upon appellant, and we are inclined to agree with the trial court that the proof offered is insufficient to justify a finding in his favor.

The judgment of the district court is affirmed.

### IDEM SONANS.

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- II. Rules of Pronunciation Applicable.
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    3. Where Final "s" is Added or Omitted.
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- VIII. Alphabetical List of Names Held not to be Idem Sonans.

#### I. In General.

The term "idem sonans" means sounding the same. On account of the arbitrary orthography and pronunciation given to proper names and on account of the variant spelling of names resulting from ignorance as to the correct way of doing so, the courts have formulated the doctrine of idem sonans. In *Tibbets v. Kiah*, 2 N. H. 558, the court said: "The use of a name is merely to designate the person intended; and that object is fully accomplished when the name given to him has the same sound with his true name." Hence, the courts hold that the orthography of names is not important if the sound is the same: *Semon v. Hill*, 7 Ark. 73; *Marr v. Wetzel*, 3 Colo. 5; *Moore v. Allen*, 26 Colo. 202, 77 Am. St. Rep. 255, 57 Pac. 698; *Commonwealth v. Stone*, 103 Mass. 421. And in the pronunciation



of proper names a greater latitude is indulged than in any other class of words: *Ward v. State*, 28 Ala. 60; *Miltonvale State Bank v. Kuhnle*, 50 Kan. 422, 34 Am. St. Rep. 129, 31 Pac. 1057; *Ogden v. Bosse*, 86 Tex. 342, 24 S. W. 798. The court, in *Ward v. State*, 28 Ala. 60, has stated "the true rule to be that if the names may be sounded alike without doing violence to the power of the letters found in the variant orthography, then the variance is immaterial," and the names are idem sonans. This language has also been quoted in *Rooks v. State*, 83 Ala. 80, 3 South. 720; *Moore v. Allen*, 26 Colo. 202, 77 Am. St. Rep. 255, 57 Pac. 698; *Springer v. Hutchinson*, 59 Ill. App. 83; *Henry v. State*, 7 Tex. App. 392; *Walker v. State*, 13 Tex. App. 641. The Missouri courts have said that names are idem sonans if the attentive ear finds difficulty in distinguishing them when pronounced or if common and long-continued usage has by corruption or abbreviation made them identical in pronunciation: *State v. Havely*, 21 Mo. 498; *Robson v. Thomas*, 55 Mo. 581; *Whelen v. Weaver*, 93 Mo. 432, 6 S. W. 220. The doctrine of idem sonans is based on the idea that the variance is so slight that the person would be readily known by the variant name: *Aaron v. State*, 37 Ala. 116. The doctrine of idem sonans is, however, distinct from the doctrine of interchangeability of names by which it appears a person is as well known by one name as by the other: *State v. Williams*, 68 Ark. 243, 82 Am. St. Rep. 288, 57 S. W. 792.

## II. Rules of Pronunciation Applicable.

### a. In General.

1. **No General Rule Deducible.**—It is a difficult matter to fix the line which separates the cases of mere mistake in spelling the same name from those variations in the spelling which constitute different names; hence, no general rule can be laid down for deciding when names sound alike: *State v. Patterson*, 24 N. C. 346, 38 Am. Dec. 699; *Bull v. Franklin*, 2 Speers (S. C.), 46.

2. **Where First Letter is Variant.**—In *Hiel and Lauers' Appeal*, 40 Pa. St. 453, 80 Am. Dec. 590, it was held that the principle of idem sonans was not applicable to judgments entered in different initial letters from the usual form in which the name was written and spelled in the English language, although the pronunciation was the same. In that case the court held that a judgment indexed against one Joest was no lien against the real property of the identical party standing in the name of Yoest. The doctrine of idem sonans, as applied to records and constructive service of process, will be treated more fully later on in this note. As a general rule, names having variant initial letters have a decidedly variant sound. Hence, the courts have merely held such names to be not idem sonans without stating any general rule on the subject, as was done in the following cases where the names were held variant: *Catherine and Ratherine*, in *Swails v. State*, 7 Blackf. (Ind.) 324; *Sedbetter* and



Ledbetter, in *Zellers v. State*, 7 Ind. 659; Lymour and Seymour, in *Porter v. State*, 17 Ind. 415; Saunders and Lauenders, in *Jenne v. Jenne*, 7 Mass. 94; Lamon and Aaron, in *Barnes v. Simms*, 40 N. C. 392, 49 Am. Dec. 435; Lemuel and Samuel, in *Jennings v. Wood*, 20 Ohio, 261; Brison and Prison, in *State v. Huffman*, Add. (Pa.) 141; Hall and Wall, in *Henderson v. State*, 37 Tex. Cr. 79, 38 S. W. 618; Trios and Darius, in *Regina v. Davis*, 5 Cox C. C. (Eng.) 237, although the court said in this case that in the Dorset dialect the names might be idem sonans. In a few instances, however, names commencing with variant letters have been held to be idem sonans, as was done in *Kreitz v. Behrensmeyer*, 125 Ill. 141, 8 Am. St. Rep. 349, 17 N. E. 232, where Kritz and Critz were held idem sonans; also in *Commonwealth v. Jennings*, 121 Mass. 47, 23 Am. Rep. 249, where Gigger, Jiger and Jigr were held idem sonans; and also in *Galveston etc. Ry. v. Sanchez* (Tex. Civ.), 65 S. W. 893, where Selia and Celia were held idem sonans. In *Commonwealth v. Jennings*, 121 Mass. 47, 23 Am. Rep. 249, which was a bigamy prosecution, the name of defendant's first wife was spelled Gigger in the indictment but at the trial the correct way of spelling her name was stated to be either Jiger or Jigr, and there was evidence to the effect that the name was pronounced so that the first "G" in Gigger had the soft sound, while the subsequent "gg" had the hard sound. The mode of pronunciation was left to the jury and the appellate court refused to interfere.

3. **Where Final "s" is Added or Omitted.**—As a general rule, the addition or omission of a final "s" to a name creates such a change in the sound of the name that the variant names cannot be said to be idem sonans. The court, in *Semon v. Hill*, 7 Ark. 73, in holding Semon and Semons not idem sonans, answered the argument that the names were idem sonans in the following language: "If the final 's' in our language were wholly silent as is the case in many others, there would be much force in the argument but such is not the fact, but, on the contrary, its sound is as full and distinct as that of any letter preceding it." The names Cobb and Cobbs were held not idem sonans in *Jacobs v. State*, 61 Ala. 448; so were David and Davids, in *Davids v. People*, 192 Ill. 176, 61 N. E. 537; and Faver and Favers, in *Faver v. Robinson*, 46 Tex. 206. So, also, Frank and Franks in *Parchman v. State*, 2 Tex. App. 241, 27 Am. Rep. 435; also Humphrey and Humphreys, in *Humphrey v. Whitten*, 17 Ala. 31; Rodger and Rodgers, in *McDonald v. Rodger*, 9 Grant Ch. (Eng.) 75; Wilkin and Wilkins, in *Brown v. State*, 28 Tex. App. 65, 11 S. W. 1022; and Wood and Woods in *Neiderluck v. State*, 21 Tex. App. 327, 17 S. W. 467. But in *Stevens v. Stebbins*, 4 Ill. (3 Scam.) 25, the court held Steven Stebbins and Stevens Stebbins not a fatal variance, though the court based its ruling on the ground that if two names are taken promiscuously to be the

same, in common use, there is no variance even though they differ in sound. So, also, *William and Williams* was held an immaterial variance in *Williams v. State*, 5 Tex. App. 231; as also was *Owen and Owens* in *State v. Havely*, 21 Mo. 502; and *Meyer and Meyers* in *Smurr v. State*, 88 Ind. 504. The decisions just mentioned may be reconciled with the weight of authority, which holds such a variance to be fatal by basing the grounds therefor upon the grounds mentioned in the case of *Stevens v. Stebbins*, 4 Ill. (3 Scam.) 25.

**4. Where Final "e" is Added or Omitted.**—There are, of course, many names, the sound of which would not be affected by the addition or omission of a final "e." Such names would be idem sonans with or without the final "e." For instance, *Booth* and *Boothe* were held idem sonans in *Jackson v. State*, 74 Ala. 26; as also were *Hearn* and *Hearne* in *Coster v. Thomason*, 19 Ala. 717, and *Keen* and *Keene* in *Commonwealth v. Riley*, Thach. C. C. (Mass.) 67.

**5. Where Sounded Final Letter is Omitted or Added.**—It would seem that where the final letter of a name is given a decided pronunciation, the addition or elimination of such letter would make the names fatally variant, but where the final letter is rather slurred, that such changes make such an immaterial variance as would bring the names within the rule of idem sonans. As illustrating a fatal variance caused by the omission or addition of a pronounced final letter, we would call attention to the holding that *Brow* and *Brown* were different names, so held in *Brown v. Marqueze*, 30 Tex. 77; and to a similar holding as to *Bryan* and *Bryant*, in *Weidenmeyer v. Bryan*, 21 Tex. Civ. 421, 53 S. W. 353, and also to a similar holding as to *Donald* and *Donnel* in *Donnel v. United States*, 1 Morris (Iowa), 141, 39 Am. Dec. 457. The following cases will, however, show that a slight slurring of the final letter, and especially when that letter is "d," will render the names idem sonans, viz.: *Arnall* and *Arnold*, in *Arnall v. Newcom*, 29 Tex. Civ. 521, 69 S. W. 92; *Dugal* and *Dugald*, in *Barnes v. People*, 8 Peck. (18 Ill.) 52, 65 Am. Dec. 699; *McDonald* and *McDonell*, in *McDonald v. People*, 47 Ill. 533; *Noland* and *Nolen*, in *Burks v. State* (Tex. Cr.), 35 S. W. 173.

**6. Where Letters with Similar Sound are Used Interchangeably.**—The rule as to the exchangeability of "d" and "t" has been stated in *State v. Williams*, 68 Ark. 241, 82 Am. St. Rep. 288, 57 S. W. 792, in the following language: "The letter 'd' and the letter 't' are both dentals, but have not necessarily the same sound by any means. The 'd' has a broader and, we may say, a more lengthened sound, ordinarily, than 't,' which has a sharp, shorter sound, and yet the difference grows less according to the places in a word or name. Thus, *Wadkins* and *Watkins* have been held to be idem sonans, because in casual pronunciation there is scarcely any difference in the sounds. But this similarity of sound does not appear in the words 'ride' and 'rite,' because there is a prominence given to the two letters which brings out their nominal difference in sound. So it

is in the names involved in this case. There is not the same sound in Hyde and Hite as there is in Hyde and Hide, where the play is upon 'y' and 'i,' two letters which have identically the same sound where used in such a connection." And also in this connection, see *Lyon v. Kain*, 36 Ill. 568, where the court, in holding *Emonds*, *Emmens* and *Emmons* idem sonans, said: "Whilst there is a difference in the orthography, and may be a slight variance in the sound, it is so slight as not to be substantial. It will be readily perceived that the difference in the sound is more seeming than real. By a slight effort, or from slight negligence, in pronouncing the name as differently spelled, the same sound may be produced. When pronounced by the most accurate speaker, there might be a slight difference perceived, but it is believed that the greater number of persons would sound them alike." The similarity of "d" and "t" is illustrated in the following cases holding the names stated as idem sonans: *Hudson* and *Hutson*, in *Chapman v. State*, 18 Ga. 736, *Cato v. Hutson*, 7 Mo. 142, and *State v. Hutson*, 15 Mo. 512; *Watford* and *Wadford*, in *Hayes v. State*, 58 Ga. 35; *Watkins* and *Wadkins*, in *Bennett v. State*, 62 Ark. 516, 36 S. W. 947; and *Witt* and *Wid*, in *Veal v. State*, 116 Ga. 589, 42 S. E. 705. The letter "e" is often pronounced broad like "a," and the two names when spoken by the majority of ordinary men in common and rapid conversation are pronounced alike, as in *Patterson* and *Petterson*; *Jackson v. Cody*, 9 Cow. (N. Y.) 147; *State v. Bean*, 19 Vt. 532. In *O'Meara v. North American Min. Co.*, 2 Nev. 121, a deed was offered in evidence; the appellate court in reviewing its rejection said: "The other objection to this deed we can hardly treat seriously. The signature to the deed is spelled O'Mara. The plaintiff in his complaint spells his name O'Meara, the notary in the certificate spells it O'Mera. Here we have three spellings of the name. But any English scholar knows that 'a,' 'ea' and 'e' have in many words the same sound. Especially is it so in proper names and in many foreign words. Both 'e' and 'ea' frequently have the same sound as 'a' in 'fame' and many other English words. Then, even according to the strictest rules of pleading, these names would be considered and treated as the same. They are idem sonans." So, also, the letter "o" frequently has the sound of "u," and to give to it this sound in the name *Bosse* is not at all strained and does no violence to the letter. Especially is this the case in pronouncing a name and considering that our population is made up of descendants of many nationalities and the pronunciation of their names not always governed by the rules of either language: *Ogden v. Bosse*, 86 Tex. 336, 24 S. W. 798. See, also, *Myer v. Fegaly*, 39 Pa. St. 429, 80 Am. Dec. 534, where *Bobb* and *Bubb* were held idem sonans. And the court in *Jockisch v. Hardtke*, 50 Ill. App. 204, in holding *Alwin* and *Alvin* idem sonans, said: "In many languages and dialects the letter 'w' has the sound of 'v' and vice versa, and the doctrine of idem sonans is clearly applicable," so also the letters "y" and "i"

are two letters which often have the same sound as in Hyde and Hide: *State v. Williams*, 68 Ark. 241, 82 Am. St. Rep. 288, 57 S. W. 792. The terminals "les" and "els" are sometimes exchanged so as to give forth the same sound, as in Battles and Battels, which were held idem sonans in *Leath v. State* (Ala.), 31 South. 108.

**7. Where Vowels of a Diphthong are Transposed.**—In *Selby v. State* (Ind.), 69 N. E. 463, the court, in holding Veike and Vieke idem sonans, as against an argument that the transposition of the vowels effected a change of sound said: "To do this we must judicially know in some way that a transposition of the vowels 'ei' in proper names changes the fixed pronunciation of the name. We have no such knowledge, either judicial or personal. The spelling and pronunciation of proper names is usually arbitrary, and it is a matter of common notoriety that many families spell their names differently, but pronounce them the same. We see much less reason for assuming, in considering the motion to quash, that when these particular letters are combined in a proper name, the correct and arbitrary pronunciation places the accent on the first vowel without reference to which one it is, than we have for assuming that the diphthong in popular usage often has the same sound without reference to which is the initial or which the final vowel as in receive, believe, perceive, achieve, deceive, retrieve and so on." The case of *Boren v. State*, 32 Tex. Cr. 657, 25 S. W. 775, holding Isreal and Israel idem sonans furnishes another illustration of the rule.

**8. Where Name Terminates with "Son."**—The addition or suppression of the letter "t" or other consonants, in surnames ending with "son," is not a material variance. It was so held in *Elbertson v. Richards*, 42 N. J. L. 70, where Elbertson and Elbersen were held idem sonans. The rule is also illustrated by the holding in *Miltonvale State Bank v. Kuhnle*, 50 Kan. 423, 34 Am. St. Rep. 129, 31 Pac. 1057, *State v. Jones*, 55 Minn. 329, 56 N. W. 1068, and *Truslow v. State*, 95 Tenn. 196, 31 S. W. 987, where Johnson and Johnston were held idem sonans. The terminating syllable "son" may be exchanged for "sen" without destroying the idem sonans of the name. The reason for the rule is stated in *Gustavenson v. State*, 10 Wyo. 300, 68 Pac. 1006, as follows: "The name of the deceased is variously given in the information as Larson and Larsen, and it is urged that this is a fatal repugnacy. Such names are usually pronounced by omitting or slurring over the last vowel, and we think the two spellings are very clearly within the rule of idem sonans." Another illustration of the above rule will be found in *Pane v. Johnson*, 9 Phila. (Pa.) 32, where Johnson and Johnsen were held idem sonans.

**9. Where Variants have Different Number of Syllables.**—Where one name is spelled with two syllables and the other with three syllables, they cannot be idem sonans, as Siemson and Simonson: *Simonson v. Dolan*, 114 Mo. 179, 21 S. W. 510.



**10. Effect of Variant Accentuation.**—It seems reasonable that it would not be allowable to place much stress upon the accentuation given to a name by the owner of the name, for, as was said by the court in *Gahan v. People*, 58 Ill. 161, in holding *Danner* and *Dannaher* idem sonans, “owing to the difference in placing the accent in pronouncing almost any name, as great or a greater change can be made, than could be by the ordinary pronunciation of this, as differently spelled. The rule is, that unless it appears that the difference in sound in the two names is apparent, the incorrect spelling will be disregarded.” The case of *Edmundson v. State*, 17 Ala. 180, 52 Am. Dec. 169, offers an illustration of the difference in sound which could arise from a slow or quick accentuation of an intermediate syllable. There the court held *Edmindson* and *Edmundson* idem sonans. As also does the case of *Rivard v. Gardner*, 39 Ill. 126, where the court in holding *Sinclair* and *St. Clair* idem sonans said: “When spoken with ordinary rapidity of utterance, an unobservant ear would not mark the difference between them. A difference of sound there undoubtedly is, when the words are carefully enunciated, as there is in very many instances which courts regard as idem sonans. But it is to an ordinary and familiar utterance that the rule applies and not to one carefully intended to discriminate the difference of sound.”

**11. Effect of Local Pronunciation.**—“Pronunciations of the same word differ also in different sections of the same country; and a man’s identity by his name must to most of the people of his neighborhood depend solely upon the customary pronunciation of it”: *Tibbets v. Kiah*, 2 N. H. 558. That the local pronunciation, amounting to even a dialect, may be considered in determining whether two names are idem sonans, was held in *Myer v. Fegaly*, 39 Pa. St. 429, 80 Am. Dec. 534. In that case the controversy arose as to whether a judgment against *John Bobb* was a lien against property owned by *John Bubb*. The court said: “Courts cannot administer justice properly by a strict adherence to general customs, and by overlooking the modification or limitations of them by special or local customs. Even the language of a people, usually the most universal of its customs, is subject to local differences which must be respected in the ascertainment of rights. The language spoken in some of the old German parts of this state is a special custom of this sort. It is neither correct German nor correct English; and yet it is the means of verbal intercourse among a very large portion of our people. It has a *norma loquendi* of its own, and is not to be tested by the rules of either good German or good English. In its vowel, and in its consonant sounds, it differs from both; and of course this difference shows itself in the spelling of the names of persons. *Bubb* is the name here, as the party owning it spells it; but in the judgment docket it is, in this case, written *Bobb*. According to our German mode of pronunciation prevailing in Lan-



caster county, the sounds of both forms are identical, and the latter form of spelling is doubtless the most usual in analogous cases; as in that of Pott pronounced Putt, and as in other instances given by the learned judge of the common pleas. We cannot disregard such anomalies, without doing great injustice; and people having relations with the people in the localities where they prevail are bound to take notice of them. Persons searching the judgment docket for liens ought to know the different forms in which the same name may be spelled and to make their searches accordingly; unless, indeed, where a spelling is so entirely unusual that persons cannot be expected to think of it." It seems to us, however, that in such cases the matter should be submitted to the jury to ascertain whether the local pronunciation is well enough established so that a person mingling among the people in the community would be charged with knowledge of it. This view obtained in *Regina v. Davis*, 2 Den. C. C. (Eng.) 231, which was a prosecution on an indictment for larceny, the stolen property was alleged as belonging to Darius Christopher. The prosecutor, when called to testify, said that his name was Trius. The trial court was of the opinion that the name Darius, being pronounced in the Dorset dialect as D'rius, was idem sonans with Trius, as a matter of law, but the judges decided that under those circumstances it was a question for the jury. So, also, in *Munkers v. State*, 87 Ala. 94, 6 South. 357, where it was said that "if by local usage the names have same pronunciation it was a question of fact for the jury."

The effect of local pronunciation on the doctrine of idem sonans is very closely allied to the pronunciation of foreign names, which we will treat in the next section.

**b. Foreign Names.**—Inasmuch as the sound constitutes the name of an individual, it would seem that any combination of English letters which will approximately produce that sound ought to be sufficient to bring the variant names within the rule of idem sonans. In *Beneux v. State*, 20 Ark. 97, the court, in holding Beneux and Bennaux idem sonans, said: "It is insisted by counsel that Beneux is a French name and that according to the rules of orthography and pronunciation in the French language is widely different in sound from Bennaux. It may be replied, that however that might be to the ears and understanding of a Frenchman, the names would seem to be idem sonans according to our language." And in *Galveston etc. Ry. v. Sanchez* (Tex. Civ.), 65 S. W. 893, the court, in holding Celia Sanchez and Selia Sanchez idem sonans, used the following language: "The names were idem sonans from the standpoint of the English language, and it does not matter whether they were so or not in a foreign language. Nor was there any evidence offered as to the Spanish pronunciation of the names, and the court would not judicially know that such pronunciation was different from our own." So, also, in *Chiniquy v. Catholic Bishop*, 41 Ill. 153, the court, in holding that the French name Michael Allaine was idem

sonans with Mitchell Allen, said: "When we consider the great influx of foreign population into our country and the great difficulty existing on the part of those courts as well as the people generally who are not familiar with the language of the country from which it comes, to understand the names, whether written or spoken, by which they are severally distinguished, we should be slow to pronounce that a variance in the name of any one of them, unless it is palpable, which may only be a misspelling or a mispronunciation of it, and that by persons ignorant of the language in which the name is written." So in *Petrie v. Woodworth*, 3 Caines (N. Y.), 219, the court held the French name *Petris* and its English equivalent *Petrie idem sonans*. The court in *State v. Timmens*, 4 Minn. 325, took the view that if the English spelling could be pronounced in the French language so as to give the same sound as the French name that it was not a misnomer. In that case, which was a prosecution for seduction, the name of the prosecutrix was alleged in the indictment as *Forest*, while the evidence showed it to be *Fourai*. The defendant was familiar with the French language. The court said: "The name *Forest* is pronounced in French as if it was spelled *Foray*, which is almost identical in sound with the name of the girl as proven at the trial, which was *Fourai*; and the Christian name being the same, the defendant could not have been misled or in any manner prejudiced by the misspelling." And in *Metz v. McAvoy Brew. Co.*, 98 Ill. App. 592, the court, while holding *Metz* and *Meetz idem sonans*, said: "They are German names and in pronunciation are very similar in sound, the letter 'e' in *Metz* having very much the same sound as the letter 'a' in such English words as 'pate,' 'rate' or 'fate.' The sound of the letter 'e' in *Meetz* being doubled, is merely prolonged." See, also, *Gorman v. Dierkes*, 37 Mo. 576, where the German name *Doerges* was held *idem sonans* with *Dierkes* and *Dierges*. And *Rape v. State*, 34 Tex. Cr. 615, 31 S. W. 652, where the Mexican name *Garzia* was held *idem sonans* with *Garcia*. Also, see *Brown v. Quinland*, 75 Mich. 289, 42 N. W. 940, where *Che-gaw-go-quay*, and *Che-gaw-ge-quay* were held *idem sonans*. In *People v. Fick*, 89 Cal. 144, 26 Pac. 759, the court refused to say, as a matter of law, whether *Toy Fong* and *Choy Fong* were *idem sonans*, but said that it was a question for the jury. So, also, in *Boyce v. Danz*, 29 Mich. 148, the court said that the question whether *Boyce* and *Bice* were commonly pronounced alike was a question for the jury.

We shall treat the question of when the application of the doctrine becomes a question for the jury in a subsequent section.

### III. Application of the Doctrine.

a. **In General.** The doctrine of *idem sonans* is applied to both proper names and ordinary words, and to both civil and criminal cases. The general rule, however, is that the variance to which the doctrine is applied must be as to a matter which is material to

the case or proceeding: *Collin v. Farmers' Alliance etc.* (Colo. App.), 70 Pac. 698; *Stevens v. Stebbins*, 3 Scam. (4 Ill.) 25; *Belton v. Fisher*, 44 Ill. 32; *State v. Framnes*, 43 Minn. 491, 45 N. W. 1098; *Salinas v. State*, 39 Tex. Cr. 319, 45 S. W. 900. As to the effect of variance between an execution and the judgment in regard to the name of the judgment debtor, see *Freeman on Executions* 3d ed., sec. 43.

**b. To Default Judgments and Decrees.**

**1. Where Personal Service was Obtained.**—The doctrine of *idem sonans* applies to default judgments rendered upon personal service. In the following cases default judgments rendered upon personal service of process were sustained. In *Galliano v. Kilfoy*, 94 Cal. 88, 29 Pac. 416, where service was upon Rose Kilfoy although sued as Rosa Kilfoy; in *Rivard v. Gardner*, 39 Ill. 126, where the bill was filed against Sinclair while the process and return showed service on St. Clair; in *Holman v. Goslin*, 63 App. Div. (N. Y.) 204, 71 N. Y. Supp. 197, a default judgment was upheld although the copy of the summons served upon defendant set forth his name as Goslin, whereas, his name was Joslin and was correctly set forth in the original summons. The defendant at the same time was served with an order of arrest. The court based its decision on the ground that the defendant was not misled and that he did not claim to have been misled. The court cited, as the authority for its decision, the case of *Stuyvesant v. Weil*, 167 N. Y. 425, 60 N. E. 738, wherein the court had allowed the plaintiff to amend the summons and complaint so as to show that defendant's name was Mary J. Stockton instead of Emma J. Stockton, as alleged, the service of process having been made personally on Mary J. Stockton. So in *Townsend v. Rateliff*, 50 Tex. 152, the court sustained a default judgment against one Townsend, although the sheriff's return showed service on one Townsen. The citation, however, commanded service upon Townsend and the return referred to said Townsen as "the within named defendant." The court said: "While it may be true that the name Townsend, when distinctly and correctly enunciated, cannot be said to be *idem sonans* with that of Townsen, yet it is a matter of every-day knowledge that the name Townsend is often thus inaccurately written and spoken; and we think that the court was not warranted in concluding in this case that the defect in the service of citation is not by reason of service upon a different person than the defendant named in the petition, but is merely a mistake of the sheriff in the correct spelling of the defendant's name. This being the case the objection to the judgment cannot be maintained." If it appears by the record on appeal that the name of the person on whom service of process was made differs from that of the defendant, against whom judgment was taken by default, and there is nothing to show that he was in fact served with process, doubtless the judgment must be reversed when the names cannot be regarded as the same within the rules herein stated: *Bates v. State Bank*, 7

Ark. 394, 46 Am. Dec. 293; *McCravey v. Cox*, 24 Ark. 574; *Brown v. Marqueeze*, 30 Tex. 77. There are, indeed, decisions proclaiming in general terms that a judgment by default is void though based on the personal service of process, when it is shown that the person for (Ex parte Cheatham, 6 Ark. 532, 4 Am. Dec. 525), or against (*Atwood v. Landis*, 22 Minn. 558) whom the judgment was rendered is not correctly named in the process or in the return of its service. These decisions, overlook the well-established principle that jurisdiction depends on the actual service of process, and not on the accurate statement of the names of the parties. "The persons who are directly parties to a judgment can generally be ascertained by an inspection of the record; but this is not always the case. It may happen that the name of some of the parties is incorrectly stated. The weight of authority is, that if the writ is served on the party by a wrong name, intended to be sued, and he fails to appear and plead the misnomer in abatement, and suffers judgment to be obtained, he is concluded, and in all future litigation may be connected with the suit or judgment by proper averments; and when such averments are made and proved, the party intended to be named in the judgment is affected as though he were properly named therein": *Freeman on Judgments*, sec. 154; *Guinard v. Heysinger*, 15 Ill. 288; *Walsh v. Kirkpatrick*, 30 Cal. 202, 89 Am. Dec. 85; *Bloomfield R. R. Co. v. Burress*, 82 Ind. 83; *Peterson v. Little*, 74 Iowa, 223; *Fitzgerald v. Salentine*, 10 Met. 436; *Hoffield v. Board of Education*, 33 Kan. 644; *National Bank v. Jagggers*, 31 Md. 38, 100 Am. Dec. 53; *Smith v. Bowker*, 1 Mass. 76; *Barry v. Carothers*, 6 Rich. 331; *Waldrop v. Leonard*, 22 S. C. 18; *Parry v. Woodson*, 53 Mo. 347, 84 Am. Dec. 51; *Robertson v. Winchester*, 85 Tenn. 171; *Insurance Co. v. French*, 18 How. 409; *Oakley v. Giles*, 3 East, 168; *Smith v. Patten*, 6 Taunt. 115; *Crawford v. Satchwell*, 2 Strange, 1218.

**2. Where Substituted or Constructive Service was had.**—It seems that the rule of *idem sonans* applies to default judgments obtained by substituted or constructive service by publication. The decision in the principal case, *Thornily v. Prentice*, 121 Iowa, 89, ante, p. 317, 96 N. W. 728, which was rendered on substituted service, is based upon the test whether the actual name of the defendant and the name by which he was described in the proceedings, come within the rule of *idem sonans*. The conclusion of the court, as we have seen, was that the names were not *idem sonans*. In *McKee v. Brown*, 45 Tex. 506, it was sought to sustain a default judgment rendered upon constructive service; the court refused, saying: "If there is a mere immaterial discrepancy in the manner of writing or spelling the name of the defendant in the citation and the judgment, the doctrine of *idem sonans* may be invoked to sustain the judgment because, in such case, it is manifest to the court that the party against whom the judgment is rendered is in fact the same person upon whom the citation was served, and when personal service is had on the proper party though he has failed to appear, there may be more reason in



holding him bound, notwithstanding an error in the citation, than when notice is given merely by publication. In support of a judgment against a nonresident on constructive service, evidently the court should indulge in no presumptions not strictly and clearly warranted by the record. Certainly the names, McKee and McRee, neither to the eye nor ear convey the idea that they refer or apply to the same person. There may be some sort of euphony in their pronunciation but there is no more similarity of sound between them than there is between Doe and Roe; and from reading them it would not be supposed that the same person was referred to more readily than would we come to a like conclusion from reading the names of these celebrated legal entities." In *Seaver v. Fitzgerald*, 23 Cal. 93, the court sustained a default judgment against one Seaver upon service by publication against Seavers, on the ground that the names were substantially the same. In *Rowe v. Palmer*, 29 Kan. 338, a default judgment against Joseph Shaffer quieting title to certain piece of land was held valid and binding as against the owner of the land whose name was Joseph Shafer, although the service was by publication only. In *Lane v. Innes*, 43 Minn. 143, 45 N. W. 4, the summons which was served by publication was directed to Berlah M. Plimpton while defendant's name was Beulah M. Plimpton. The court sustained the judgment on the ground that the names were sufficiently alike not to be misleading. The chief justice, however, dissented on the ground that the names were not idem sonans. So, also, in *Kuhn v. Kelineer*, 16 Neb. 699, 21 N. W. 443, the court sustained a rule under an execution issued against Rosina Coons, although the right name of the defendant was Rosina Kuhns. The name Coons was used in the published notice of sale. The question as to the validity of the sale arose on an appeal from the order confirming it. And in *Buchanan v. Roy's Lessee*, 2 Ohio St. 265, the court sustained a judgment obtained on a notice by publication to Sarah Roy, when the party's name was Sarah Ray. Although the court intimated that Roy and Ray were not idem sonans, it based its decision on the ground that the notice described the party as a widow and as the sole daughter of William Trimble, deceased, a brother of Timothy Trimble, and as a resident of the state of New Jersey, all of which were correctly descriptive of her; besides it gave the names and residences of her near relatives. This decision was disapproved arguendo in *Fanning v. Krapf*, 61 Iowa, 419, 14 N. W. 727, 16 N. W. 293. And in *Bigelow v. Chatterton*, 51 Fed. 614, the court held that a default judgment in an attachment suit in which the name of the defendant, who was a nonresident, was set out in the published notice as Biglow, was valid although his name was correctly spelled Bigelow, since the variance was so slight as to amount to a mere irregularity, not affecting the jurisdiction. In the very recent case of *Grober v. Clements*, 71 Ark. 568, 76 S. W. 555, the court in holding a decree for divorce obtained on constructive service void, said: "First, as to the decree for divorce



which the court declared to be void. Now, in considering this question it must be remembered that no actual service was had on the defendant in that case, the decree being based on service by publication only. She had, therefore, no opportunity to appear and object to defects in the proceedings. In such cases the law is very much more strict than in cases where the defendant had actual service of notice, though the notice be defective on account of mistake or otherwise. The affidavit for the warning order did not follow the statute, and to say the least, was very irregular, but we need not notice that point for the reason that we are of the opinion that the decree for divorce was void on account of a mistake in the name of the defendant as given in the decree and the proceedings upon which it was founded. Her name at the time was Wilhelmina Grober, though by members of her family and intimate friends she was generally called Mena, as an abbreviation of the name Wilhelmina. But in the action for divorce of which we are speaking she was sued as Minnie Grober, and the decree was rendered against her by that name. Now, the name Minnie is not the same as Wilhelmina or Mena, nor, to our minds, does it have the same sound. It differs substantially both in the spelling and in sound from the name Mena. We are therefore of the opinion that the decree for divorce, being based upon constructive service by publication only, of which the defendant in that action had no actual notice and as the name of the defendant in the complaint, warning order, and decree is given as Minnie Grober—a name by which she was never known—is for that reason void and does not affect rights claimed in this action.” So, also, in *Jenne v. Jenne*, 7 Mass. 94, another divorce case, service upon the respondent, who was a nonresident, was sought by publishing an attested copy of the libel and order in a public newspaper. The published copy stated libellant’s maiden name to have been Saunders, whereas it had been Launderers. The court held the variance fatal, and in *Burge v. Burge*, 94 Mo. App. 20, 67 S. W. 703, the validity of a divorce from Emily Burge on constructive notice by a publication describing the defendant as Emma Burge, was questioned. The court held the names to be different and the publication insufficient to give jurisdiction. The court reviewed several cases of tax proceedings in which jurisdiction was sought by constructive notice, and held the same rules to apply to divorce proceedings, since proceedings for divorce where the defendant is a nonresident and is notified by publication are in rem or quasi in rem. In *Entrekin v. Chambers*, 11 Kan. 377, a default decree against Robert Brimford quieting title to a certain piece of land, upon service by publication only, was held not good as against the owner of the land whose name was Robert Binford, since the names not being idem sonans, the court never acquired jurisdiction of the suit.

The rule was also applied to a proceeding in escheat, in *Ellis v. State*, 3 Tex. Civ. 173, 21 S. W. 66, 24 S. W. 660, the court hold-

ing that no jurisdiction was obtained over the estate of Thomas Stephens by publication of citation to persons interested in the estate of Thomas Stephenson, deceased. A view contrary to that expressed in the cases cited above was set forth in *Hubner v. Reickhoff*, 103 Iowa, 368, 64 Am. St. Rep. 191, 72 N. W. 540, which was a collateral attack on a divorce decree obtained by publication, the question involved being whether the name Keesel in a summons served by publication was sufficient to authorize a decree upon default against Keisel, assuming the pronunciation of the names to be the same. The court set forth the reasons for its holding, in the following language: "It is conceded that the name Keisel is pronounced by giving to the diphthong the long sound of 'i.' If that pronunciation is to obtain for the purpose of this case the rule of *idem sonans* could not be made to apply, and so far as can be known it is a fact that it was so pronounced. But if the sound of long 'e' should be permitted, ought the rule to obtain in this case? The test suggests this inquiry: Where service is by publication, which is made conclusive because of a presumption that it comes to the notice of the person, can the court assume as a matter of law that the name Keesel would or should be understood as Keisel? Can it be said to be a rule of law that one of the latter name on seeing the former name in a notice must or should understand it to mean him? Let it be conceded that, if he were in court, the identity of the person as the one intended might be shown; but can it be assumed as a legal conclusion that 'Keesel' should be understood as 'Keisel'? It is hardly to be doubted that while 'Reed' could be held to apply to 'Read' or 'Reade' with the person in court and an issue of identity made, a court would not assume, in a publication service, that it meant, or should be understood to mean, either of the others. The danger of such a holding is apparent, because of the fact that all three words are names of persons pronounced alike but of different orthography. Under some conditions either name might be held to apply to either of the persons but not in a case where a name, not his own, is published in a notice, to which he has not responded, and the failure to respond is to be taken as confession of the truth of the charges, as the record recites in the divorce proceedings. The corrupt practices in divorce proceedings could hardly be aided by the courts better than to open the door for a variance between the actual name of the defendant in the record and that in the notice constituting the service and giving the court jurisdiction. It would seem as if the dissolution of the marriage relation should depend on greater accuracy of procedure than a variance involving such doubt and uncertainty. The divorce case, on the face of the record, is strange in the respect of the defendant's name, if not somewhat suspicious. The plaintiff was a person of the same name and of course knew it well. In the proceedings the name appears as Keisel and Kiesel, which is a mere reversal of the letters of the diphthong, but no-

where, except in the notice, does the name appear as Keesel, which is enough of a departure to indicate another name. As we understand the record, the published name is neither spelled nor pronounced like that of the defendant in the divorce proceeding. But if pronounced the same, and if under some circumstances as we have suggested, the variance in spelling might be held immaterial, we do not think the rule can be made to apply in this case, where the defendant was not in court, and there could have been no issue or facts from which he should be held to answer to a name not his own or be adjudged in default." See, also, *Fanning v. Krapf*, 61 Iowa, 419, 16 N. W. 293, 17 N. W. 727, to the same effect.

**c. To Tax Proceedings.**—As to whether the rule of *idem sonans* applies to sales of real property for taxes or city assessments there is a diversity of opinion. In *Emerie v. Alvarado*, 90 Cal. 465, 27 Pac. 356, the court refused to consider a tax deed in evidence on account of the invalidity of the assessment upon which it was based, because of the fact that the owner of the land involved was named Castro and the assessment was made to Castero. The court in discussing the question said: "It is contended by appellant that 'Castero' sounds like 'Castro,' and by respondent that in pronouncing the former name the accent should be on the second syllable—thus making the sound entirely different, but it is not a case to which the rule of *idem sonans* applies. Tax proceedings are in invitum, and, to be valid, must closely follow the statute; and *idem sonans* applies to cases of pleas of misnomer and issues of identity, where the question is whether the change of letters alters the sound—not to assessments and other cases of description, where the written name is material. 'Different letters will make different names though the sound be the same': *Commonwealth v. Gillespie*, 7 Serg. & R. 478, 10 Am. Dec. 475." In the *City of New Orleans v. Cordeviolle*, 10 La. Ann. 727, the city as plaintiff cited Etienne Cordeviolle, a defaulting taxpayer, according to the Louisiana statute providing for a public advertisement containing the names of all defaulting taxpayers. The advertisement stated his name as E. Cordoviatti. Notice of judgment was, however, served upon the defendant in his true name. The court held that the advertisement stood in the place of a citation and the names not being *idem sonans*, the court obtained no jurisdiction, since "a case of this kind differs somewhat from a suit commenced by citation where the personal service of the citation would demonstrate who was intended to be made defendant." In *Troyer v. Wood*, 96 Mo. 478, 9 Am. St. Rep. 367, 10 S. W. 42, under a Missouri statute providing that in relation to proceedings where publication of notice is authorized as to nonresidents or absent parties, the court or clerk "shall make an order directed to the nonresidents or absentees notifying them of the commencement of the suit," the court held that under this statute the name of the property owner

in a tax proceeding was as essential as the description of the property. In this case a sale of land of Daniel Troyer for taxes under a judgment in a tax suit in which notice of publication was directed against Daniel Tragar, was held a nullity notwithstanding Daniel Troyer's name was entered upon the record of his deed as Daniel Tragar: See *Chamberlain v. Blodgett*, 96 Mo. 482, 10 S. W. 44, to the same effect. But in *Felker v. New Whatcom*, 16 Wash. 178, 47 Pac. 505, it was held that the fact that a lot assessed for a street improvement was listed in the names of S. D. Henning instead of S. W. Herring would not defeat the title of the purchaser at the sale ordered for the collection of the assessment where the property assessed was properly described. It would seem to us that the statutes of the particular state would be a very important factor in determining whether the rule of *idem sonans* is to be applied to tax or city assessment proceedings.

**d. To Criminal Proceedings.**—As before stated, the rule of *idem sonans* applies to criminal proceedings as well as to civil proceedings. In regard to the application of the rule to indictments, the court in *State v. White*, 34 S. C. 59, 27 Am. St. Rep. 783, 12 S. E. 661, has stated the modern rule in the following language: "It seems to us, therefore, that without referring to the numerous cases in the books where slight variations in orthography have sometimes been held fatal and sometimes not, without reference to any definite rule, it would be better to follow the rule which may be deduced from the more modern decisions to this effect, that where the name as written in the indictment may be pronounced (although such may not be the strictly correct pronunciation) in the same way as the name given in the evidence, the variance will not be regarded as fatal, unless the variant orthography be such as would be likely to mislead the defendant in preparing his defense." So, also, in *Donnel v. United States*, 1 Morris (Iowa), 141, 39 Am. Dec. 457, the court in holding Donnel and Donald not *idem sonans* said: "Where the orthography of the indictment composes a name which by the ordinary rules of pronunciation, produces a different sound from the true one, the mistake will be fatal."

The court in *Walker v. State*, 13 Tex. App. 641, in applying the rule to a verdict in a criminal case finding "defendant guilty of mrder" said: "In the case before us the question of *idem sonans* does arise and directly affects the verdict. If the word 'mrder' used in the verdict is not *idem sonans* with the word 'murder' then, manifestly, the verdict is insufficient and must be set aside. But if the words are *idem sonans*, then the verdict must be sustained, notwithstanding the bad spelling of the word in the verdict, for it is well settled that incorrect orthography or ungrammatical language will not vitiate a verdict"; citing *Taylor v. State*, 5 Tex. App. 569; *Koontz v. State*, 41 Tex. 570; *McMillan v. State*, 7 Tex. App. 100; *Curry v. State*, 7 Tex. App. 91. After stating the rule that if the

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words may be sounded alike without doing violence to the power of the letters found in the variant orthography, the words are idem sonans and the variance immaterial, the court continued, saying: "Applying this rule to the word 'mrder' used in the verdict, we hold it to be idem sonans with the word 'murder,' as properly spelled, and that the variance in the orthography of the two is not a material one, but that their sound is so nearly the same when pronounced that there is scarcely, if in fact, any difference. They are not different words correctly spelled and not sounding alike as in the Wooldridge Case, 13 Tex. App. 456, 44 Am. Rep. 708, before referred to; but are, in fact, the same word differently spelled but sounding alike. We think, also, that the doctrine of idem sonans applies to, and governs, verdicts in the same manner and to the same extent that it does in other matters"; citing Haney v. State, 2 Tex. App. 504; Taylor v. State, 5 Tex. App. 569; Huffman v. Commonwealth, 6 Rand. (Va.) 685; Williams v. State, 5 Tex. App. 226; State v. Smith, 33 La. Ann. 1414. And, as further illustrating the rule, see Wilson v. State, 12 Tex. App. 487, where a verdict finding defendant "guilty" was held fatal; Wooldridge v. State, 13 Tex. App. 455, 44 Am. Rep. 708, where "first degree" and "fist degree" were held not idem sonans; Attaway v. State, 31 Tex. Cr. 475, 20 S. W. 925, where a verdict of "giltey" was held sufficient. In State v. Framness, 43 Minn. 491, 45 N. W. 1098, the jury, in returning their verdict finding defendant guilty, entitled it against Farmness instead of Framness, the defendant's name. The court, in holding the variance immaterial, said: "It was not necessary to entitle it." And in Williams v. State, 5 Tex. App. 229, the question of idem sonans arose over a verdict finding "John William guilty," under an indictment against "John Williams," the court, in sustaining the verdict, held that in cases where only one defendant was on trial it was not necessary to mention the name of defendant in the verdict. Hence, we see that the variance must be as to a matter which is material to the case.

**e. To Records and Indices Constituting Constructive Notice.**—The authorities to the point whether the rule of idem sonans should be applied to records and indices constituting constructive notice are not uniform, but it would seem that the rule is applicable to names commencing with the same capital letters, but not to such names as commence with variant capital letters. In Green v. Myers, 98 Mo. App. 438, 72 S. W. 128, one of the most recent cases on this subject, the court gave the following explanation of the rule; it said: "Some confusion has arisen in the authorities as to whether the rule as to idem sonans applies to records. It is said that the law of notice by record is addressed to the eye and not the ear, and that therefore the rule cannot apply to records. It is true that record notice is principally a matter of sight and not sound, yet it is above all a matter for the consideration of the mind, and



if the record of a name spelled in one way should directly suggest to the ordinary mind that it is also commonly spelled another way, the searcher should be charged with whatever the record showed in some other spelling under the same capital letter. It is not necessary to decide here whether this would be carried out to the extent of holding that the searcher for information in the record should look under some other capital for another mode of finding the same name—as, for instance, ‘Kane’ and ‘Cain,’ ‘Phelps’ and ‘Felps,’ etc. But that the rule of idem sonans has been applied to records has been too often accepted by the supreme court of this state for us to question it”; citing *Simonson v. Dolan*, 114 Mo. 179, 21 S. W. 510; *Whelan v. Weaver*, 93 Mo. 432, 6 S. W. 220; *Chamberlain v. Blodgett*, 96 Mo. 482, 10 S. W. 44; *Geer v. Lumber Co.*, 134 Mo. 93, 56 Am. St. Rep. 489, 34 S. W. 1099. And later on in the opinion, when making its holding that a judgment against Seibert is notice against property owned by the judgment debtor under the name Sibert, the court said: “The fact that the indices are kept in the vowel system, as in this case, and that names beginning with the letters ‘Si’ are found several pages further on than those beginning with ‘Se’ can make no difference, for, as before stated, one must be charged with notice that the name he seeks may be spelled either way.” In *Bergman’s Appeal*, 88 Pa. St. 120, a judgment against Heckman was allowed to participate in the proceeds of the real estate of one Hackman, the court saying: “Where, however, both names have the same initial a different rule prevails. The eye is naturally directed to names otherwise slightly different.” So, also, in *Myer v. Fegaly*, 39 Pa. St. 429, 80 Am. Dec. 534, a judgment against Bobb was allowed against Bubb. In *Aetna Life Ins. Co. v. Hesser*, 77 Iowa, 381, 14 Am. St. Rep. 297, 42 N. W. 325, the proceeding was to foreclose a mortgage executed by one Hesser. Prior to the execution of the mortgage a judgment had been obtained against Hesser in another county, and a transcript had been filed in the county where the mortgaged real estate was situate, but the clerk in indexing the name of the judgment debtor in the index of all liens (a statutory book) wrote it in such a manner that the name looked more like Hesse than Hesser. The mortgagee, prior to taking the mortgage, had examined the index to liens for liens against Hesser and had found none. The court held the names to be so dissimilar as not to charge the mortgagee with notice of the judgment. And in *Howe v. Thayer*, 49 Iowa, 154, it was held that a person who purchased premises from William H. Furman was not charged with notice of a mortgage upon the premises which was indexed and recorded as executed by William H. Freeman. But see *Heil and Lauer’s Appeal*, 40 Pa. St. 453, 80 Am. Dec. 590, where it was sought to satisfy a judgment against one Joest out of the real property of the identical party standing in the name of Yoest. The judgment was indexed under the letter “J” but not under the letter “Y.” The court, in refusing to al-

low the judgment to be thus satisfied, said: "We think the auditor and the court, below were right in refusing to permit the judgment of the appellants to participate in the distribution of the money in court. The fund was raised out of the sale of the real estate of George P. Yoest and the judgment of the appellants was entered against George P. Joest. It is true, that George P. Yoest and George P. Joest are the same person, and that in the German language the letters 'Y' and 'J' are pronounced alike. But in the distribution of the proceeds of a sheriff's sale besides the question of the identity of the debtor there is one of record notice. Upon this second question no light is thrown by the fact that the name of the debtor, though spelled with different capitals, is the same in sound. The act of assembly which requires that judgment dockets and indexes shall be kept, provides for notice to the eye, not to the ear. It contemplates that the dockets shall be kept in English, and it does not impose upon anyone who searches the duty of inquiring whether some other letters may not spell the name of the debtor in another language. It was the duty of appellants to see that their judgment was properly entered: *Wood v. Reynolds*, 7 Watts & S. 406; entered so as to furnish to the eye of purchasers and subsequent encumbrancers that record notice which the act of assembly contemplates. We do not think that the legislature intended that a purchaser or encumbrancer, in searching for a name, the initial letter of which is 'Y,' should be under obligations to examine the index through the letters 'Y' and 'J.' We must so hold, or the judgment dockets and indexes would be shorn of their value and the statutory purpose defeated. There are many sounds in our language which are indicated by different letters in other languages. This is true both of vowels and consonants. Thus in the Spanish language the initial 'J' has the sound of 'H.' Must a purchaser search under the letters 'J' and 'H'?" The above case was approved *arguendo* in *Crouse v. Murphy*, 140 Pa. St. 335, 23 Am. St. Rep. 232, 21 Atl. 358, wherein it was held necessary for a judgment to contain the debtor's middle initial in order to constitute notice against property held by a Christian name and middle initial: See, also, *Freeman on Judgments*, sec. 347. In *Anthony v. Taylor*, 68 Tex. 403, 4 S. W. 531, it was held that the statutory registration of the abstract of a judgment, recited to be a judgment in favor of Joan Burkhead and William Burkhead against W. T. & J. C. Roberts, fixed no lien for a judgment rendered in a suit in which Joan Bankhead and William Bankhead were plaintiffs and W. T. Roberts and J. C. Roberts were defendants.

#### IV. How the Question may be Raised.

Inasmuch as an attempt to apply the rule of *idem sonans* is an admission that a technical but not misleading variance exists, the

doctrine of *idem sonans* may be invoked whenever any variance exists whether as to the names of the parties to the suit or proceeding, the pleadings, or a variance between the allegations and the proof offered at the trial, but of course the variance must relate to a material issue and be a variance to such an extent that it would be fatal to either the recovery sought or the defense interposed: See *Bennett v. State*, 62 Ark. 534, 36 S. W. 947; *Stevens v. Stebbins*, 3 Scam. (4 Ill.), 25; *Lynch v. Wilson*, 4 Blackf. (Ind.) 288. As illustrating an instance where the rule was held not applicable on account of the question of *idem sonans* not affecting the right of recovery, see *Western Union Tel. Co. v. Bimetallic Bank*, 17 Colo. App. 229, 68 Pac. 115. That case was a suit against a bank for payment of a check to the wrong party. The court held that where a check was made payable to one Daily and the bank paid it simply upon the face of the indorsement, which was made by one Daley, the question of *idem sonans* could not arise, "because, if for no other reason, payment was made upon the written indorsement only. The name of the indorser being different from that of the payee, was amply sufficient to have placed the defendants upon its guard and caused it to have made some inquiry." When the variance relates to a misnomer as to any of the parties to the proceeding, the question may be specifically raised by a plea in abatement, but very often in such cases the parties rely upon the misnomer being so fatally variant as not to have given the court jurisdiction, and they afterward raise the question when an attempt is made to enforce the judgment or decree thus obtained. Otherwise the question generally arises at the trial upon a variance between the allegations and proof.

#### V. When Evidence of Pronunciation is Admissible.

When there is a generally received English pronunciation of the names as one and the same, and the difference in sound is so slight as to be scarcely perceptible, the doctrine of *idem sonans* may be applied without the aid of extrinsic evidence: *Sayres v. State*, 30 Ala. 17; *Munkers v. State*, 87 Ala. 96, 6 South. 357; *Boque v. Bigelow*, 29 Vt. 179. But where there is a doubt as to the similarity of the pronunciation of the names in controversy, the fact of whether they are *idem sonans* becomes a question of fact to be determined by evidence of the pronunciation: *Galliano v. Kilfoy*, 94 Cal. 88, 29 Pac. 416; *Donnel v. United States*, 1 Morris (Iowa), 141, 39 Am. Dec. 457; *Commonwealth v. Mehan*, 11 Gray (Mass.), 321; *Geer v. Missouri Lumber etc. Co.*, 134 Mo. 93, 56 Am. St. Rep. 489, 34 S. W. 1099; *Shields v. Hunt*, 45 Tex. 427. Thus, evidence is admissible to show whether certain letters of a name are pronounced with a hard or soft sound: *Commonwealth v. Jennings*, 121 Mass. 47, 23 Am. Rep. 249. The necessity for evidence as to the pronunciation often

arises in cases where the controversy arises as to the idem sonans of a name spelled according to a foreign language and a spelling in English based on its sound, or in cases where a name is spelled according to its local or vulgar pronunciation instead of the correct mode of spelling it. See *Gorman v. Dierkes*, 37 Mo. 576, where evidence was received as to the pronunciation of the German names, Doerges, Dierkes and Dierges; *Chiniquy v. Catholic Bishop*, 41 Ill. 148, where Michael Allain and Mitchell Allen were held idem sonans on a showing that the former, which was a French name, was pronounced "Meshole Allen"; *People v. Fick*, 89 Cal. 144, 26 Pac. 759, where it was said that the idem sonans of Chinese names would not be declared without evidence as to their identity of pronunciation; *Boyce v. Danz*, 29 Mich. 148, where the court refused to pass on the idem sonans of Boyce and Bice without evidence that they were commonly pronounced alike.

As to the character of evidence admissible to prove similar pronunciation, naturally the general rules of evidence are applicable. The evidence received without objection in most of the cases involving this question has been that of persons familiar with the pronunciation of the name in controversy: See *Commonwealth v. Donovan*, 13 Allen (Mass.), 571; *Tibbets v. Kiah*, 2 N. H. 558. Of course the weight to be given to the evidence offered to show the fact of a fatal variance or its nonexistence is a matter which may always be questioned. In *Bigelow v. Chatterton*, 51 Fed. 614, the court said: "The learned counsel for the appellant cited the St. Paul City Directory in support of the contention that 'Big-e-low' is the proper spelling and pronunciation of appellant's name and that it is a different name from 'Biglow.' On a question of spelling and pronunciation we think Professor Lowell and Webster's Dictionary are safer guides than the City Directory of St. Paul. Professor Lowell spells the name 'Biglow' (the Biglow Papers), and when it is spelled with an 'e' that letter is obscure or mute: Webster's Dictionary. It is the same name in law, whether spelled with or without the 'e,' and if the appellant did not know this when he read the published summons it was because he did not know his own name when he saw it."

## VI. Province of Court or Jury.

It is very difficult to lay down any general rule as to when the determination of a question of idem sonans is a matter for the court alone and when it becomes a matter for the jury. In most of the adjudicated cases, the courts have decided the question whether the variant name was idem sonans without referring the matter to the jury, and without making any comments as to what the rule is or ought to be. The question, however, has arisen in a number of cases, and the opinions of the court when thus expressed have not been uniform. In *Rooks v. State*, 83 Ala. 80, 3 South. 720, wherein



the question arose over having alleged defendant's name, which was Rux, as Rooks in the indictment, the court said: "In *Sayres v. State*, 30 Ala. 15, where the issue was one of *idem sonans*, it was observed by Stone, J., as follows: 'Generally, such issue is tried by the court without evidence and not by the jury. We will not say that there might not be cases in which it would be permissible to introduce evidence on the question. A foreign name might be in issue; and although the orthography of the supposed names might, according to the laws of our language, require us to affix to each a different sound, yet in fact the foreign orthography might be sounded precisely as the letters employed by the American pleader would be here pronounced. Whether in such a case the proper issue is *idem sonans*, or that the party is as well known by one name as the other, or, if the former, whether the issue thereby becomes one for the jury, we do not now determine': 1 Bishop's Criminal Procedure, 3d ed., sec. 792, note 3. Of course, as here intimated and often since decided, there may be cases where the issue is so involved in doubt as to be triable by the jury, and not by the court, under evidence introduced as to fact or usage: Wharton's Criminal Evidence, 8th ed., sec. 96; *Underwood v. State*, 72 Ala. 220." In *State v. Havely*, 21 Mo. 498, the defendant was indicted by the name of Owen D. Haverly for unlawfully selling liquor; he pleaded a misnomer in that he is named and called Owens D. Havely; the state demurred to this plea; the court overruled the demurrer and the state appealed. The appellate court said: "The question in this case involves the mode of answering the plea. Should the state have replied that the defendant was known as well by the one as the other? Or is the name in the indictment and the name in the plea the same in sound or in derivation so that the court can say so on demurrer? Must the state rely upon a fact, and therefore reply to the plea and leave the fact to be found by a jury; or is this a case where the matter involved is a question of law, which the court can determine? We consider this a case involving a question which the court can properly determine, and that the demurrer has raised that question. We are of the opinion that the circuit court erred in overruling the state's demurrer to the plea of misnomer; that the two names are of the same sound and should have been so held by the court." In *Commonwealth v. Warren*, 143 Mass. 569, 10 N. E. 178, it was said: "If two names spelled differently necessarily sound alike, the court may, as a matter of law, pronounce them to be *idem sonans*, but if they do not necessarily sound alike, the question whether they are *idem sonans* is a question of fact for the jury." See, also, *State v. Williams*, 68 Ark. 241, 82 Am. St. Rep. 288, 57 S. W. 792; *People v. Cooke*, 6 Park. C. Rep. 31; *Spoonmore v. State*, 25 Tex. App. 359, 8 S. W. 280, to the same effect. In *United States v. Hinman*, Baldw. (U. S.) 292, Fed. Cas. No. 15,370, it was said: "Where the variance is plain, the court will decide the



question by rejecting the evidence, where it is doubtful they will refer it to the jury, whose decision will be conclusive; as if an indictment lays a bank note to be signed 'J. Reed,' and the note produced is signed 'J. Read': *State v. Potts*, 4 Halst. 32, in which case the jury were instructed to find whether both names were the same." But in *Amann v. People*, 76 Ill. 188, it was held that where defendant, indicted by the name of John Ammon, filed a properly verified plea in abatement, setting forth that he was named and called John Amann, and had never been named and called "John Ammon," he was entitled to have the issue thus tendered tried by a jury or otherwise disposed of according to law. Some of the courts hold that the question whether the name of the injured person set out in the indictment is idem sonans with the name proved at the trial is a question for the jury: *People v. Fick*, 89 Cal. 144, 26 Pac. 759; *Siebert v. State*, 95 Ind. 476; *State v. Perkins* (N. H.), 47 Atl. 268; *Commonwealth v. Mehan*, 11 Gray (Mass.), 322; *Weitzel v. State*, 28 Tex. App. 523, 19 Am. St. Rep. 855, 13 S. W. 864; *Taylor v. Commonwealth*, 20 Gratt. (Va.) 829. Others state that where the question of idem sonans arises in evidence upon the general issue, the question is for the jury: *Commonwealth v. Donavan*, 13 Allen (Mass.), 571; *White v. Springfield Inst. for Sav.*, 134 Mass. 232. So, also, if by local usage, the names have the same pronunciation, the question of idem sonans becomes a question of fact for the jury: *Munkers v. State*, 87 Ala. 96, 6 South. 357. In *Commonwealth v. Gill*, 14 Gray (Mass.), 400, the defendant was prosecuted for selling liquor to one Klune, but the evidence showed the purchaser to have been one Cluin. The question of variance having been submitted to the trial court, the appellate court refused to review its ruling in the absence of the record showing how the two names were pronounced, or that any request had been made to submit the question to the jury.

#### VII. Alphabetical List of Names Held to be Idem Sonans.

A.—*Abbotsan* and *Abbatsan*, in *Cotton's Case*, Cro. Eliz. 258; *Adamson* and *Adanson*, in *James v. State*, 7 Blackf. (Ind.) 327; *Ad-derson's Island* and *Anderson's Island* were held immaterial variance in *Van Pelt v. Pugh*, 1 Dev. & B. L. (N. C.) 210; *Allen* and *Allaine*, in *Chiniquy v. Catholic Bishop*, 41 Ill. 148; *Allen* and *Allain*, in *Guertin v. Mombteau*, 144 Ill. 32, 33 N. E. 49; *Alwin* and *Alvin*, in *Jockisch v. Hardtke*, 50 Ill. App. 204; *Amel* and *Amiel*, in *People v. Goseh*, 82 Mich. 31, 46 N. W. 101; *Anna* and *Anne* were held immaterial variance where party appeared, in *Kerr v. Swallow*, 33 Ill. 380; *Anne* and *Anny*, in *State v. Upton*, 1 Dev. L. (12 N. C.) 513; *Anthron* and *Anthrum*, in *State v. Scurry*, 3 Rich. (S. C.) 68; *Antoine* and *Otaine*, in *Chiniquy v. Catholic Bishop*, 41 Ill. 148; *Arnall* and *Arnold*, in *Arnall v. Newcomb*, 29 Tex. Civ. 521, 69 S. W. 92; *Augustine* and *Augustina*, in *Commonwealth v. Desmarteau*, 16 Gray (Mass.), 15.

**B.**—Bagwell and Bagswell, in *Case v. Bartholow*, 21 Kan. 300; Barbara and Barbra, in *State v. Haist*, 52 Kan. 35, 34 Pac. 453; Barnstein and Burnstein, in *Springer v. Hutchinson*, 67 Ill. App. 80; Battles and Battels, in *Leath v. State*, 132 Ala. 26, 31 South. 108; Beckwith and Beckworth, in *Stewart v. State*, 4 Blackf. (Ind.) 171; Belton and Beton, in *Belton v. Fisher*, 44 Ill. 32; Benedetto and Beniditto, *Ahitbol v. Beniditto*, 2 Taunt. (Eng.) 401; Beneux and Bennaux, in *Beneux v. State*, 20 Ark. 97; Bernhart and Banhart, in *State v. Witt*, 34 Kan. 488, 8 Pac. 769; but there was evidence that the name was distinctly pronounced both ways: Berry and Barry, in *Ratteree v. State*, 53 Ga. 570; Bert Samrud and Bernt Sannerud, in *State v. Sannerud*, 38 Minn. 229, 36 N. W. 447; Bettie and Beattie, in *Gross v. Village of Grossdale*, 177 Ill. 248, 52 N. E. 372; Beulah and Berlah, in *Lane v. Innes*, 43 Minn. 143, 45 N. W. 4; Biglow v. Bigelow, in *Bigelow v. Chatterton*, 51 Fed. 614; Blackenship and Blankenship, in *State v. Blankenship*, 21 Mo. 504; Boge and Bogue, in *Bogue v. Bigelow*, 29 Vt. 179; Edmond Bolden and Ed. Bolen, in *Pitsnogle v. Commonwealth*, 91 Va. 808, 50 Am. St. Rep. 867, 22 S. E. 351; Booth and Boothe, in *Jackson v. State*, 74 Ala. 26; Boudet, Boredet, and Burdet, in *Aaron v. State*, 37 Ala. 106; Braddy and Brady, in *Dickerson v. Brady*, 23 Ga. 161; Brearly and Brailey, in *People v. Gosch*, 82 Mich. 22, 46 N. W. 101; Bubbs and Bobb, in *Myer v. Fegaly*, 39 Pa. St. (3 Wright) 429, 80 Am. Dec. 534; Busse and Bosse, *Ogden v. Bosse*, 86 Tex. 336, 24 S. W. 798.

**C.**—Joseph Calvert and F. Joseph Calvitt, in *Day Land etc. Co. v. New York etc. Co.* (Tex. Civ.), 25 S. W. 1089; Chambless and Chambles, in *Ward v. State*, 28 Ala. 53; Charleston and Charlestown, in *Alvord v. Moffat*, 10 Ind. 366; Che-gaw-go-quay and Che-gaw-ge-quay, in *Brown v. Quinland*, 75 Mich. 289, 42 N. W. 940; Chicopee v. Chickopee, in *Commonwealth v. Desmarteau*, 16 Gray (Mass.), 16; Coburn and Colburn, in *Colburn v. Baneroft*, 23 Pick. (Mass.) 57; Cocks and Cox, in *Waters v. State* (Tex. Cr.), 31 S. W. 642; Colin and Collin, in *Collin v. Farmers' Alliance etc.* (Colo. App.), 70 Pac. 698; Colster and Colsten, in *Luna v. State* (Tex. Cr.), 70 S. W. 89; Conaway and Conavay, in *Conaway v. Hays*, 7 Blackf. (Ind.) 159; Conkkan and Conklin, in *Cutting v. Conklin*, 28 Ill. 306; Conly and Conolly, in *Fletcher v. Conly*, 2 G. Greene (Iowa), 88; Corn and Conn, in *Moore v. Anderson*, 8 Ind. 18; Corrigan and Corgan, in *Prince v. McLean*, 17 U. C. Q. B. 463; Crusius and Crushes, in *People v. James*, 110 Cal. 155, 42 Pac. 479; Cuffy, Cuffee and Cuff, in *State v. Farr*, 12 Rich. (S. C.) 24.

**D.**—Dauden and Darden is an immaterial variance: *State v. Turner*, 25 La. Ann. 573; Danner and Dannaher, in *Gahan v. People*, 58 Ill. 160; Deadama and Diadema, in *State v. Patterson*, 2 Ired. (24 N. C.) 346, 38 Am. Dec. 699; De Hust and De Hurst, in *Cotton's Case*, 1 Cro. Eliz. (Eng.) 258; Dillahunt, Dillaunty and Dillahinty,

in *Dillahunt v. Davis*, 74 Tex. 344, 12 S. W. 55; *Dixon and Dickson*, in *Reading v. Waterman*, 46 Mich. 111, 8 N. W. 691; *Doerges*, *Dierges and Dierkes*, in *Gorman v. Dierkes*, 37 Mo. 576; *Domick and Domeck*, in *Olive v. Commonwealth*, 5 Bush (Ky.), 376; *Donly and Donnelly*, in *Donnelly v. State*, 78 Ala. 454; *Doorley and Dooley*, in *New York etc. Co. v. Dooley* (Tex. Civ.), 77 S. W. 1030; *Dugal McInnis and Dugald McGinnis*, in *Barnes v. People*, 8 Peck (18 Ill.), 52, 65 Am. Dec. 699; *Dowing and Downing* were said to be *idem sonans*, but the decision was based on the fact that it was not misleading in the case at bar: *O'Brien v. Krockinski*, 50 Ill. App. 456; *Droun and Drown*, in *Commonwealth v. Woods*, 10 Gray (Mass.), 482; *Dyre and Dyer*, in *Niblo v. Dyer* (Tex. Civ.), 56 S. W. 216.

**E.**—*Edmundson and Edmindson*, in *Edmundson v. State*, 17 Ala. 180, 52 Am. Dec. 169; *Edward and Edwin*, in *Mann v. Birchard*, 40 Vt. 326, 94 Am. Dec. 398; but not entirely on ground of *idem sonans*; *Elbertson and Elberson*, in *Elberson v. Richards*, 42 N. J. L. 70; *Ellett and Elliott*, in *Robertson v. Winchester*, 85 Tenn. 182, 1 S. W. 781; *Emerly and Emley*, in *Galveston etc. Ry. v. Daniels*, 1 Tex. Civ. 700, 20 S. W. 955; *Emonds*, *Emmens* and *Emmons* in *Lyon v. Kain*, 36 Ill. 368.

**F.**—*Fain and Fanes*, in *State v. Hare*, 95 N. C. 682; words “false” and “fauls” in *Gaines v. Gaines*, 109 Ill. App. 226; *Farely and Farley*, in *Leonard v. Wilson*, 2 Crompt. & M. (Eng.) 589; *Fauntleroy and Fontleroy*, in *Wilks v. State*, 27 Tex. App. 381, 11 S. W. 415; *Faust and Foust*, in *Faust v. United States*, 163 U. S. 452, 16 Sup. Ct. Rep. 112; *Fenn and Finn*, in *Alexander v. State* (Tex. Cr.), 25 S. W. 127; *Finnegan and Finegan*, in *People v. Mayworm*, 5 Mich. 148; *Flory and Florez*, used in a verdict, were said to be *idem sonans*, though their recital was held surplusage: *State v. Florez*, 5 La. Ann. 429; *Foley and Fooley*, in *Underwood v. State*, 72 Ala. 220; *Forest and Fourai*, in *State v. Timmins*, 4 Minn. 247; *Forris and Farris*, in *Lyne v. Sanford*, 82 Tex. 63, 27 Am. St. Rep. 852, 19 S. W. 847; *Foster and Faster*, in *Foster v. State*, 1 Tex. App. 532; *Foster and Forster*, in *Bedford v. Forster*, Cro. Jac. 77.

**G.**—*Gardiner and Gardner*, in *Rector v. Taylor*, 12 Ark. 128; *George and Georg*, in *Hall v. State*, 32 Tex. Cr. 594, 25 S. W. 292; *Geussler and Geissler*, in *Cleaveland v. State*, 20 Ind. 444; *Giboney and Gibney*, in *Fleming v. Giboney*, 81 Tex. 422, 17 S. W. 13; *Giddings and Gidings*, in *State v. Lincoln*, 17 Wis. 598; *Gigger, Jiger and Jigr*, in *Commonwealth v. Jennings*, 121 Mass. 47, 23 Am. Rep. 249; *Girous and Geroux*, in *Girous v. State*, 29 Ind. 94; *Gordon and Gorden*, in *White v. State*, 136 Ala. 58, 34 South. 177; *Gottlieb and Gottlieb*, in *Gottlieb v. Acton Grain Co.*, 87 App. Div. 382, 84 N. Y. Supp. 413; *Guadalupe County and Guadalupe County*, in *Reys v. State* (Tex. Civ.), 76 S. W. 457; “guilty” and “gilty,” in *Walker v. State*, 13 Tex. App. 641.

**H.**—Hanaford and Hanoford, in *Hanaford v. Morton*, 22 Tex. Civ. 588, 55 S. W. 987; Hanley and Hanly, in *Irwin v. Sebastian*, 6 Ark. 33; Harman and Herman, in *Kahn v. Herman*, 3 Ga. 266; Havelly and Haverly, in *State v. Havelly*, 21 Mo. 502; Hearn and Hearne, in *Coster v. Thomason*, 19 Ala. 719; Heckman and Hackman, in *Appeal of Bergman*, 88 Pa. 120; Henning and Herring, in *Felker v. New Whatcom*, 16 Wash. 178, 47 Pac. 505; Herriman and Harriman, in *State v. Bean*, 19 Vt. 530; Herring and Herron, in *Herron v. State*, 93 Ga. 554, 19 S. E. 243; Heptum and Hepburn, in *Hall v. Rice*, 64 Cal. 443, 1 Pac. 891; Hieronymus and Heronymus, in *Tevis v. Collier*, 84 Tex. 639, 19 S. W. 801; Hilmer, Hillmer and Helmer, in *Cline v. State*, 34 Tex. Cr. 415, 31 S. W. 175; Hinsdall and Hinsdale, in *Meredith v. Hinsdale*, 2 Caines (N. Y.), 362; Hix Nowels and Hicks Nowells, in *Spoonemore v. State*, 25 Tex. App. 359, 8 S. W. 280; Horick and Horrick, in *Evans v. State*, 150 Ind. 651, 50 N. E. 820; Hutcheson and Hutchinson, in *State v. Stedman*, 7 Port. (Ala.) 501; Hutson and Hudson, in *Chapman v. State*, 18 Ga. 736; Cato v. Hutson, 7 Mo. 147; *State v. Hutson*, 15 Mo. 512.

**I.**—Ichman and Eichman, in *Eichman v. State*, 22 Tex. App. 137, 2 S. W. 538; Irvin and Erwin, in *Williams v. Hitzie*, 83 Ind. 307; Isah and Isaiah, in *Ellis v. Merriman*, 5 B. Mon. (Ky.) 296; Isreal and Israel, in *Boren v. State*, 32 Tex. Cr. 643, 25 S. W. 775.

**J.**—Jacob and Jaacob, in *Jacob Aboab's Case*, 1 Mod. (Eng.) 107; January and Janury, in *Hutto v. State*, 7 Tex. App. 46; Japheth and Japhath, in *Morton v. McClure*, 22 Ill. 257; Jefferds and Jeffards, in *Commonwealth v. Brigham*, 147 Mass. 414, 18 N. E. 167; Jeffries and Jeffers, in *Jeffries v. Bartlett*, 75 Ga. 232; Jiger, Jigr and Gigger, in *Commonwealth v. Jennings*, 121 Mass. 42, 23 Am. Rep. 249; Johnson and Johnston, in *Miltonvale State Bank v. Kuhnle*, 50 Kan. 423, 34 Am. St. Rep. 129, 31 Pac. 1057; *State v. Jones*, 55 Minn. 329, 56 N. W. 1068; *Truslow v. State*, 95 Tenn. 196, 31 S. W. 987; Johnson and Johnsen, in *Paul v. Johnson*, 9 Phila. (Pa.) 32; Josiah and Josier, in *Schooler v. Asherst*, 1 Litt. (Ky.) 216; 13 Am. Dec. 232; Juli and Julee, in *Point v. State*, 37 Ala. 148; July and Julia, in *Dickson v. State*, 34 Tex. Cr. 1, 53 Am. St. Rep. 694, 28 S. W. 815, 30 S. W. 807.

**K.**—Kealiher, Keoliher, Kelliher, Kellier, Keolhier and Kelhier, in *Millett v. Blake*, 81 Me. 531, 10 Am. St. Rep. 275, 18 Atl. 293; Key and Kay, in *Dickinson v. Bowers*, 16 East (Eng.), 110; Keeland and Kneeland, in *Doe v. Roe*, Dudley (Ga.), 177; Keen and Keene, in *Commonwealth v. Riley*, Thach, C. C. (Mass.) 67; Kennedy McCutchen and Canada McCutchen, in *State v. White*, 34 S. C. 59, 27 Am. St. Rep. 783, 12 S. E. 661; Kenny and Kinney, in *Kinney v. Harrett*, 46 Mich. 90, 8 N. W. 708; Kiah and Currier, in *Tibbets v. Kiah*, 2 N. H. 557; Kimberling and Kamberling, in *Houston v. State*, 4 G. Greene (Iowa), 437; Kreitz, Krietz, Kritz and Critz, in *Kreitz v.*



Behrensmeyer, 125 Ill. 141, 8 Am. St. Rep. 349, 17 N. E. 232; Kuhns and Coons, in *Kuhn v. Kilmer*, 16 Neb. 703, 21 N. W. 443.

**L.**—Langford and Lankford, in *State v. Mahan*, 12 Tex. 283; Larson and Larsen, in *Gustavenson v. State*, 10 Wyo. 300, 68 Pac. 1006; Lawrence and Lawrance, in *Webb v. Lawrence*, 1 Crompt. & M. (Eng.) 806; Lebrun, Lebring and Lebering, in *Ketland v. Lebering*, 2 Wash. C. C. 201, Fed. Cas. No. 7744, upon a showing of identity; Leola and Leolar in *Miller v. State*, 110 Ala. 86, 20 South. 392; Lewis and Louis, in *Block v. State*, 66 Ala. 493; Marr v. Wetzel, 3 Colo. 5; Girous v. State, 29 Ind. 94; Lindsay, Lindsey and Lindsay, but neither are idem sonans with Lindly: *Roberts v. State*, 2 Tex. App. 6; Lincoln and Lington are so similar that when considered in connection with fact that Lincoln is only town with similar name in county, it will be admissible when used in a deed: *Armstrong v. Colby*, 47 Vt. 366; Littlemore and Lidmore, in *Parker v. People*, 97 Ill. 32; Little and Lytle, in *Lytle v. People*, 47 Ill. 424; Lossene and Lawson, in *State v. Pullens*, 81 Mo. 392.

**Mc.**—McDonald and McDonnell, in *McDonald v. People*, 47 Ill. 534; McGilligan and Megilligan, in *Pope v. Kirchner*, 77 Cal. 154, 19 Pac. 264; McGlofin and McLaughlin, in *McLaughlin v. State*, 52 Ind. 476; Dougal McInnis and Dugald McGinnis, in *Barnes v. People*, 18 Ill. 52, 65 Am. Dec. 699; McKay and Macke, in *International etc. Ry. v. Kindred*, 57 Tex. 500; M'Nicoll and M'Nicole, in *Regina v. Wilson*, 2 Car. & K. (Eng.) 527.

**M.**—Marres and Mars by the jury, in *Commonwealth v. Stone*, 103 Mass. 421; Mary Etta and Marietta, in *Goode v. State*, 2 Tex. App. 524; Meetz and Metz, in *Metz v. McAvoy Brew. Co.*, 98 Ill. App. 592; Meyer, Meyers and Mayer, in *Smurr v. State*, 88 Ind. 507; Michael and Michaels was held an immaterial variance in *State v. Houser*, Busb. (44 N. C.) 410, but in that case the issue as to whether the prosecuting witness was known as well by either name was submitted to the jury; Mikel and Mikil, in *Mikel v. State* (Tex. Cr.), 68 S. W. 512; Minner and Miner, in *Jackson v. Boneham*, 15 Johns. (N. Y.) 227; Ashahel Morse and Ashahel Moss, in *Litchfield v. Farmington*, 7 Conn. 108; Mozer, Mousner, Mosuser and Mouseur, in *Ruddell v. Mozer*, 1 Ark. 503.

**N.**—Newton, Nuton and Newten, in *Newton v. Newell*, 26 Minn. 541, 6 N. W. 346; Noland and Nolen, in *Burks v. State* (Tex. Cr.), 35 S. W. 175; Noberto and Norberto, in *Salinas v. State*, 39 Tex. Cr. 319, 45 S. W. 900; Nowels and Nowells, in *Spoonemore v. State*, 25 Tex. App. 358, 8 S. W. 280.

**O.**—O'Mara and O'Meara, in *O'Meara v. North American Min. Co.*, 2 Nev. 121; Ogilbee and Ogilsbee, in *Hamilton v. Langley*, 1 McMull. (S. C.) 498; Charles Oleson and Charley Olson held an immaterial variance in *Olson v. Peabody* (Wis.), 99 N. W. 458; Otaine and Antoine, in *Chiniquy v. Catholic Bishop*, 41 Ill. 148;



Owen D. Haverly and Owens D. Havely, in *State v. Havely*, 21 Mo. 502.

**P.**—Patterson and Petterson, in *Jackson v. Cody*, 9 Cow. (N. Y.) 147; Penryn and Pennyrine, in *Elliott v. Knott*, 14 Md. 135, 74 Am. Dec. 519; Peregrane and Peregrine, in *Dunn v. Clements*, 7 Jones (52 N. C.), 60; Petris and Petrie, in *Petrie v. Woodworth*, 3 Caines (N. Y.), 219; Pettes and Pettis, in *Hutto v. State*, 7 Tex. App. 46; Philip and Pilip, in *Taylor v. Rogers*, 1 Minor (Ala.), 197; Pillsby and Pillsbury, in *Pillsbury's Lessee v. Dugan*, 9 Ohio, 117, 34 Am. Dec. 427; Prior, Preyer and Pryor, in *Page v. State*, 61 Ala. 16.

**R.**—Ray and Wray, in *Sparks v. Sparks*, 51 Kan. 200, 32 Pac. 892; Robinson and Robison by the jury, in *People v. Cooke*, 6 Park. Cr. (N. Y.) 45; Rooks and Rux, in *Rooks v. State*, 83 Ala. 80, 3 South. 720; Rosa Kilfoy and Rose Kilfoy, in *Galliano v. Kilfoy*, 94 Cal. 86, 29 Pac. 416.

**S.**—Saffle and Saffell, in *Hoffman v. Bircher*, 22 W. Va. 541; Bert Samrud and Bernt Sannerud, in *State v. Sannerud*, 38 Minn. 229, 36 N. W. 447; Samul and Samuel, in *Fenn v. Alston*, 11 Mod. (Eng.) 284; Sarmine and Sarmin, in *Cull v. Sarmin*, 3 Lev. (Eng.) 66; Sawyer and Sawyers, in *Ex parte Sawyers* (Tex. Cr.), 48 S. W. 512; Schmitt & Brother Co. and Schmidt & Brother Co., in *Schmidt etc. Co. v. Mahoney*, 60 Neb. 22, 82 N. W. 99; Seaver and Seavers, in *Seaver v. Fitzgerald*, 23 Cal. 93; Seden and Soden, in *Wyatt v. Barwell*, 19 Ves. Jr. (Eng.) 435; Segrave and Seagrave, in *Williams v. Ogle*, 2 Strange (Eng.), 889; Selia and Celia, in *Galveston etc. Ry. v. Sanchez* (Tex. Civ.), 65 S. W. 893; Shacraft and Shacroft, in *Denner v. Shacroft*, 1 Cro. Eliz. (Eng.) 258; Sibert and Seibert, in *Green v. Meyers*, 98 Mo. App. 438, 72 S. W. 128; Shaffer and Shafer, in *Rowe v. Palmer*, 29 Kan. 339; Sinclair and St. Clair, in *Rivard v. Gardner*, 39 Ill. 126; Steinburg and Steenburg, in *Carrall v. State*, 53 Neb. 431, 73 N. W. 939; Steven and Stevens, in *Stevens v. Stebbins*, 3 Scam. (4 Ill.) 25; Stormer and Stermer, in *Sample v. Robb*, 16 Pa. St. 319; Stafford and Stratford, in *Wilson v. Stafford*, 18 Eng. C. L. (Eng.) 365; Stores and Storrs, in *People v. Sutherland*, 81 N. Y. 12; Robert Rodger Strang and Robert Roger Strong, in *In re Anne Smith*, 10 Com. B., N. S., 344 (100 Eng. C. L. 344); Susan and Susannah were said to be *idem sonans* in *State v. Johnson*, 67 N. C. 57, though the decision appears to have been based more on the theory that the party was known by both names; Symonds and Simons, in *Western Union Tel. Co. v. Drake*, 14 Tex. Civ. 602, 38 S. W. 633.

**T.**—Thonpson and Thompson, in *State v. Wheeler*, 35 Vt. 263; Thweatt and Threet, in *Gooden v. State*, 55 Ala. 178; Tinmarsh and Tidmarsh, in *Hornan v. Tidmarsh*, 11 Moody (Eng.), 231; Tougaw and Tugaw, in *Girous v. State*, 29 Ind. 94; Townsend and Tounsens,

in *Townsend v. Ratcliff*, 50 Tex. 152; *Trowbridge and Trobridge*, in *Buhl v. Trowbridge*, 42 Mich. 45, 3 N. W. 245.

**U.**—*Usrey and Usury*, in *Gresham v. Walker*, 10 Ala. 374.

**V.**—*Van Nortrick and Van Nortwick*, in *Mallory v. Reggs*, 76 Iowa, 749, 39 N. W. 886; *Vass and Vase*, in *State v. Collins*, 115 N. C. 719, 20 S. E. 452; *Veike and Vieke*, in *Selby v. State* (Ind.), 69 N. E. 463.

**W.**—*Wanser and Wanzer*, in *Wanzer v. Barker*, 4 How. (Miss.) 369; *Wash-pans and Was-pans*, in *Lynch v. Wilson*, 4 Blackf. (Ind.) 288; *Watford and Wadford*, in *Hayes v. State*, 58 Ga. 35; *Watkins and Wadkins*, in *Bennett v. State*, 62 Ark. 534, 36 S. W. 947; *Welch and Welsh*, in *Donohoe-Kelly Banking Co. v. Southern Pac. Co.*, 138 Cal. 183, 94 Am. St. Rep. 28, 71 Pac. 93; *Westley and Wesley*, in *Proudfoot v. Lount*, 9 Grant Ch. 70; *Weston and Wason*, in *Symmers v. Wason*, 1 B. & P. (Eng.) 105; *Whatson and Watson by the jury* in *Toole v. Peterson*, 9 Ired. (N. C.) 180; *Whiteman and Whitman*, in *Henry v. State*, 7 Tex. App. 392; *Wilkerson and Wilkinson*, in *Wilkerson v. State*, 13 Mo. 91, 53 Am. Dec. 137; *William and Williams*, in *Williams v. State*, 5 Tex. App. 231; *Winyard, Winnyard and Whyneard*, in *Rex v. Foster*, 1 Russ. & R. C. C. (Eng.) 412; *Witt and Wid*, in *Veal v. State*, 116 Ga. 589, 42 S. E. 705; *Woolley and Wolley*, in *Power v. Woolley*, 21 Ark. 462; *Wray and Ray*, in *Sparks v. Sparks*, 51 Kan. 200, 32 Pac. 892.

**Y.**—*Yarbery and Yarbrow*, in *Russell v. Oliver*, 78 Tex. 16, 14 S. W. 264.

**Z.**—*Zemeriah and Zimri*, in *Ames v. Snider*, 55 Ill. 498; *Zerelday, Seralda, and Serelda*, were held similar names in *Cartwright v. McGowan*, 121 Ill. 388, 2 Am. St. Rep. 105, 12 N. E. 737, but the evidence showed identity of person.

#### VIII. Alphabetical List of Names Held not to be Idem Sonans.

**A.**—*Aaron and Lamon*, in *Barnes v. Simms*, 5 Ired. Eq. (N. C.) 392, 49 Am. Dec. 435; *Abie and Avie*, in *Burgamy v. State*, 4 Tex. App. 572; *Able and Ebling*, in *Weber v. Ebling*, 2 Mo. App. 16; *Ammon and Amann*, in *Amann v. People*, 76 Ill. 188; *Asher B. and Ashley B.*, in *Bates v. State Bank*, 7 Ark. 394, 46 Am. Dec. 293.

**B.**—*Barent and Barnard*, in *Ducommun v. Hysinger*, 14 Ill. 249; *Barnep and Barnap*, in *Reg. v. Carter*, 6 Mod. (Eng.) 168; *Barnham and Barham*, in *Kirk v. Suttle*, 6 Ala. 681; *Boppes and Bappels*, in *Leath v. State*, 132 Ala. 26, 31 South. 108; *Behrensmeyer and Dehbsmeyer*, in *Kreitz v. Behrensmeyer*, 125 Ill. 141, 8 Am. St. Rep. 349, 17 N. E. 232; *Bernard and Berend*, in *Wilks v. Lorek*, 2 Taunt. (Eng.) 399; *Bill and Bull*, in *Bull v. Traynham*, 3 Rich. (S. C.) 433; *Colin Bland and Colin De Blond*, in *Leland v. Eckert*, 81 Tex. 229, 14 S. W. 897; *Bolling and Bowling*, in *Carr v. Kearns*, 1 Va. Cas. 109; *Brimford and Binford*, in *Eutrekin v. Chambers*, 11 Kan. 377; *Brison and Prison*, in *State v. Huffman*, Add. (Pa.) 141; *Bronson and Brunson*, in *Sioux Valley State Bank v. Drovers' Nat. Bank*, 58

Ill. App. 396; Brown and Brow, in Brown v. Marqueeze, 30 Tex. 77; Bryan and Bryant, in Weidemeyer v. Bryan, 21 Tex. Civ. 428, 53 S. W. 353; "burglary" and "burgerally," in Haney v. State, 2 Tex. App. 504; Burkhead and Bankhead, in Anthony v. Taylor, 68 Tex. 405, 4 S. W. 531; Burks and Banks, in Collins v. Ball, 82 Tex. 267, 27 Am. St. Rep. 877, 17 S. W. 614; Burrell and Burrill, in Commonwealth v. Gillespie, 7 Serg. & R. (Pa.) 469, 10 Am. Dec. 475.

**C.**—Carhart and Cawhart, in Carhart v. Britt, 3 Wils. Civ. Cas. (Tex.), sec. 373; Catherine and Ratherine, in Swails v. State, 7 Blackf. (Ind.) 324; Chas. Lundine and Claes. Lundine, in Bedwell v. Ashton, 87 Ill. App. 272; Clendinen and Clendenard, in Oates v. Clendenard, 87 Ala. 734, 6 South. 359; Cobb and Cobbs, in Jacobs v. State, 61 Ala. 448; Cocker and Cocken, in Finch v. Cocken, 2 Crompt. M. & R. (Eng.) 196; Comyns and Cummins, in Cruikshank v. Comyns, 24 Ill. 602; Conrad Furinash and Coonrod Fernash, in Shields v. Hunt, 45 Tex. 427; Cordeviolle and Cordoviatti, in New Orleans v. Cordeviolle, 10 La. Ann. 727; Couch and Crouch, in Whitwell v. Bennett, 3 B. & P. (Eng.) 559; Cunningham and Cunningham, in Ex parte Cheatham, 6 Ark. 531, 44 Am. Dec. 525.

**D.**—Dallam and Dillon, in Dallam v. Wilson, 4 T. B. Mon. (Ky.) 108; David and Davids, in Davids v. People, 192 Ill. 176, 61 N. E. 537; Davidson and Davison, in Mead v. State, 26 Ohio St. 505; Dellia and Della, in Vance v. State, 65 Ind. 460; Donald and Donnel, in Donnel v. United States, 1 Morris (Iowa), 141, 39 Am. Dec. 457; Dunlan and Dunbar, in Breyfogle v. Beckley, 16 Serg. & R. (Pa.) 264.

**E.**—Ebenezer and Edward, in Slasson v. Brown, 20 Pick. (Mass.) 436; Ebling and Able, in Weber v. Ebling, 2 Mo. App. 15; Edith and Edie, in Waters v. State (Tex. Cr.), 51 S. W. 642; Edward and Edmund, in Flood v. Randall, 72 Me. 439; Elirere Lowtrheiser and Ezra Loutzenheiser, in Abbott v. State, 59 Ind. 70; Elisha and Elijah, in Mead v. State, 26 Ohio St. 505; Craig v. Brown, Pet. (C. C.) 139, Fed. Cas. No. 3326; Emeline and Evelina, in Scott v. Ely, 4 Wend. (N. Y.) 557; Emma and Emily, in Burge v. Burge, 94 Mo. App. 15, 67 S. W. 703; Falleck and Falk, in Calkins v. Falk, 1 Alb. App. Dec. (N. Y.) 291; Farrow and Farrar, in Farrar v. Fairbanks, 53 Me. 143; Faver and Favers, in Faver v. Robinson, 46 Tex. 204; Fitz Patrick and Fitzpatrick, in Moynahan v. People, 3 Colo. 367; Frank and Franks, in Parchman v. State, 2 Tex. App. 241, 27 Am. St. Rep. 435; Freeman and Furman, in Howe v. Thayer, 49 Iowa, 154.

**G.**—Goodnight and Goodright, in Cherry v. Fergeson, 2 McMull. (S. C.) 15; Grautis and Gerardus, in Mann v. Carley, 4 Cow. 156; Griffin and Griffith, in Henderson v. Cargill, 31 Miss. 416; Griffie and Griffin, in State v. Griffie, 118 Mo. 198, 23 S. W. 878; Grimanda and Grimalda, in Hayney v. State, 5 Ark. 72, 39 Am. Dec. 363; Gratz and Groelts, in State v. Brown, 119 Mo. 537, 24 S. W. 1027, 25 S. W. 200.

**H.**—Hairholser and Hairholts, in *Mitchell v. State*, 63 Ind. 276, 574; Hall and Wall, in *Henderson v. State* (Tex. Cr.), 38 S. W. 618; Han and Hanly, in *Hanly v. Campbell*, 4 Ark. 562; Haynes and Haygens, in *Black v. State* (Tex. Cr.), 79 S. W. 308; Helen Desney and Ellen Desney, in *Thomas v. Desney*, 57 Iowa, 61, 10 N. W. 315; Henry and Harry, in *Garrison v. People*, 21 Ill. 538; Hesse and Hesser, in *Aetna Life Ins. Co. v. Hesser*, 77 Iowa, 381, 14 Am. St. Rep. 297, 42 N. W. 325; Hilburn, Holbein and Holburn, in *Simpson v. Johnson* (Tex. Civ.), 44 S. W. 1076; Hodnett and Hadnett, in *Nutt v. State*, 63 Ala. 184; Hollen, Hahn and Halin, in *Miller v. Frey*, 49 Neb. 472, 68 N. W. 630; Hudgins, Hudgsire and Hudgson, in *McClellan v. State*, 32 Ark. 611; Humphrey and Humphreys, in *Humphrey v. Whitten*, 17 Ala. 30; Hunting and Huntington, in *State v. Mims*, 39 S. C. 557, 17 S. E. 850; Hyde and Hite, in *State v. Williams*, 68 Ark. 241, 82 Am. St. Rep. 288, 57 S. W. 792.

**I.**—Israel and Isaac, in *Greenberg v. Angerman*, 84 N. Y. Supp. 244.

**J.**—Jeffery and Jeffries, in *Marshall v. Jeffries*, Hemp. (U. S.) 299, Fed. Cas. No. 9128a; Joest and Yoest, in *Heil and Lauer's Appeal*, 40 Pa. St. 453, 80 Am. Dec. 590; Jonathan McCarver and John McCravey, in *McCravey v. Cox*, 24 Ark. 574; Jonathan and John also in *Moore v. Graham*, 58 Mich. 25, 24 N. W. 670; Josias and Josiah, in *Johnson v. Cooper*, 5 Moody (Eng.), 472; Josua and Joshua, in *Boren v. State Bank*, 8 Ark. 500.

**K.**—Keisel and Keesel, in *Hubner v. Reickhoff*, 103 Iowa, 368, 64 Am. St. Rep. 191, 72 N. W. 540; Kritler and Kladder, in *Brotherline v. Hammond*, 69 Pa. St. 133; Krug and Kraig, in *McClaskey v. Barr*, 45 Fed. 151.

**L.**—La Barron and Labern, in *Lanesborough v. New Ashford*, 5 Pick. (Mass.) 190; Lamon and Aaron, in *Barnes v. Simms*, 5 Ired. Eq. (N. C.) 392, 49 Am. Dec. 435; Landers and Landis, in *Atwood v. Landis*, 22 Minn. 559; Leane and Lane, in the absence of evidence of similar pronunciation: *Geer v. Missouri Lumber etc. Co.*, 130 Mo. 85, 56 Am. St. Rep. 489, 34 S. W. 1099; Lemuel and Samuel, in *Jennings v. Wood*, 20 Ohio, 261; Lindsley and Lindsey, in *Selman v. Orr*, 75 Tex. 528, 12 S. W. 697; Lymour and Seymour, in *Porter v. State*, 15 Ind. 433; Lyons and Lynes, in *Lynes v. State*, 5 Port. (Ala.) 241, 30 Am. Dec. 557.

**Mc.**—McCann and McCarn, in *Rex v. Tannet*, R. & R. C. C. (Eng.) 351; McDevro and McDero, in *McDevro v. State*, 23 Tex. App. 429, 5 S. W. 133; Jonathan McCarver and John McCravey, in *McCravey v. Cox*, 24 Ark. 574; McCoskey, McKaskey, McKlaskey and McKloskey, in *Black v. State*, 57 Ind. 111; McKee and McRee, in *McRee v. Brown*, 45 Tex. 507; McGlenn and Glenn, in *Martin v. State*, 16 Tex. 240.

**M.**—Manter and Menter, as a matter of law, but held to be a question for the jury: *State v. Perkins*, 70 N. H. 330, 47 Atl. 268;



Mathews and Mather, in *Robson v. Thomas*, 55 Mo. 581; May and Mary, in *Kennedy v. Merriam*, 70 Ill. 230; Moys and Maze, in *State v. Sullivan*, 9 Mont. 496, 24 Pac. 25; Mena and Minnie, in *Grober v. Clements*, 71 Ark. 568, 76 S. W. 555; Metzzzer and Metzger, in *Mattfield v. Cotton*, 19 Tex. Civ. 595, 47 S. W. 549; Meyer and Meyers, in *Gonzalia v. Bartelsman*, 143 Ill. 640, 32 N. E. 532; Miller and Millen, in *Chamberlain v. Blodgett*, 96 Mo. 482, 10 S. W. 44; Mincher and Minshen, in *Adams v. State*, 67 Ala. 89; Mohr and Moores, in *State v. Mohr*, 55 Mo. App. 327; Mulette and Merlette, in *Merlette v. State*, 100 Ala. 42, 14 South. 562; Munkers and Moncus, in *Munkers v. State*, 87 Ala. 96, 6 South. 557.

**N.**—Nellie Raglin and Nelly Ragsley, in *Mindex v. State* (Tex. Civ.), 38 S. W. 995; Newton, New, Newt, Newto, Newn and Neto, in *Newton v. Newell*, 26 Minn. 541, 6 N. W. 346; Nuckols and Nichols, in *Dodge v. Phelan*, 2 Tex. Civ. 447, 21 S. W. 309; Noble and Nobles, in *Noble v. State* (Ala.), 36 South. 19.

**O.**—O'Shea and Shea, in *Clary v. O'Shea*, 72 Minn. 105, 71 Am. St. Rep. 465, 75 N. W. 115; Ovie, Abie and Avie, in *Burgamy v. State*, 4 Tex. App. 572.

**P.**—Pike and Pite, in *Barnes v. Simms*, 40 N. C. 392, 49 Am. Dec. 435.

**Q.**—Quartus and Gerardus, in *Mann v. Carley*, 4 Cow. (N. Y.) 156.

**R.**—Nellie Raglin and Nelly Ragsley, in *Mindex v. State* (Tex. Cr.), 38 S. W. 995; Ray and Roy, though variance held immaterial in case at bar on other grounds: *Buchanan v. Roy*, 2 Ohio St. 265; Redmond and Redman, in *Peckham v. Stewart*, 97 Cal. 153, 31 Pac. 928; Rodger and Rodgers, in *McDonald v. Rodger*, 9 Grant Ch. 75; Rufus and Russell, in *Pitts v. Brown*, 49 Vt. 86, 24 Am. Rep. 114.

**S.**—Samuel and Lemuel, in *Jennings v. Wood*, 20 Ohio, 261; Saunders and Launderers, in *Jenne v. Jenne*, 7 Mass. 94; Sayres, Saeyrs and Saeyvs, in *Sayres v. State*, 30 Ala. 19; Schoonhoven and Schoonover, in *Schoonhoven v. Gott*, 20 Ill. 46, 71 Am. Dec. 247; Sedbetter and Ledbetter, in *Zellers v. State*, 7 Ind. 659; Semon and Semons, in *Semon v. Hill*, 7 Ark. 73; Service and Servoss, in *Shinkell v. Letcher*, 40 Ill. 48; Ssenderfer and Ssenderf, in *Commonwealth v. Bowers*, 3 Brewst. (Pa.) 354; Seymour and Seigmund, in *Scholes v. Ackerland*, 13 Ill. 650; Shakepear and Shakespeare, in *Rex v. Shakespeare*, 10 East, 83; Shea and O'Shea, in *Clary v. O'Shea* (Minn.), 75 N. W. 115; Siemson and Simonson, in *Simonson v. Dolan*, 114 Mo. 179, 21 S. W. 510; Smith & Weston and Smith & Wesson, in *Morgan v. State*, 61 Ind. 448; Spintz and Sprinz, in *United States v. Spintz*, 18 Fed. 377; Stephens and Stephenson, in *Ellis v. State*, 3 Tex. Civ. 170, 21 S. W. 66, 24 S. W. 660; Sunderland and Sandland, in *Sandland v. Adams*, 2 How. Pr. 98.

**T.**—Tapley and Tarpley, in *Tarpley v. State*, 79 Ala. 274; Tarbart and Tabart, in *Bingham v. Dickie*, 5 Taunt. (Eng.) 814; Taussing, Livingston & Co. and Taussig, Livingston & Co., in *Taussig v. Glenn*, Am. St. Rep., Vol. 100—23



51 Fed. 413; Tragar and Troyer, in *Troyer v. Wood*, 96 Mo. 478, 9 Am. St. Rep. 367, 10 S. W. 42; Trius and Darius are not as matter of law, though they may be in the Dorset dialect: *Regina v. Davis*, 5 Cox C. C. (Eng.) 237.

**W.**—Waldimar and Walthmore, in *Moore v. Allen*, 26 Colo. 202, 77 Am. St. Rep. 255, 57 Pac. 698; Wall and Hall, in *Henderson v. State*, 37 Tex. Cr. 79, 38 S. W. 618; Wheler and Whelen, in *Whelen v. Weaver*, 93 Mo. 432, 6 S. W. 220; Wilhelmina and Minnie, in *Grober v. Clements*, 71 Ark. 568, 76 S. W. 555; Wilkin and Wilkins, in *Brown v. State*, 28 Tex. App. 70, 11 S. W. 1022; William and Wilhelm, in *Becker v. German Mut. etc. Co.*, 68 Ill. 412; Williston and Willison, in *Bull v. Franklin*, 2 Speers (S. C.), 46; Wood and Woods, in *Neiderluck v. State*, 21 Tex. App. 327, 17 S. W. 467; Wortman and Workman, in *Lafayette v. Wortman*, 107 Ind. 404, 8 N. E. 277.

**Y.**—Yoest and Joest, in *Heil & Lauer's Appeal*, 40 Pa. St. 453, 80 Am. Dec. 590.

**Z.**—Zachariah and Zachary, in *Lawrence v. State*, 59 Ala. 61.

## HYATT v. HAMILTON COUNTY.

[121 Iowa, 292, 96 N. W. 855.]

**ATTORNEYS**—Compensation for Prosecuting Disbarment Proceedings.—An attorney appointed by the court to act for the public in the prosecution of disbarment proceedings is entitled to reasonable compensation, to be paid by the county in which his services are performed. (p. 358.)

J. M. Blake, county attorney, and A. N. Boeye, for the appellant.

D. C. Chase, for the appellee.

**292** **McCLAIN, J.** The simple question involved in this appeal is whether the lower court erred in holding that, notwithstanding there is no statutory provision for compensation to an attorney appointed by the court to prosecute disbarment proceedings under the provisions of Code, section 325, such attorney is entitled to compensation. The theory of the appellant seems to be that the attorney thus appointed is an officer of the court, and, like **293** other public officers, is entitled only to such compensation as is provided for by statute, and that the county cannot be rendered liable for any expenses in conducting the cause, unless such liability is expressly declared by statute. But with these contentions we cannot agree. It is true that the attorney is in some sense an officer of the court.

But he is certainly not a public officer. As incident to the privilege of practicing in the courts, he may be required to discharge certain duties imposed upon him by statute. Thus he may be required to defend a criminal. But we know of no obligation imposed upon him by statute to give his services to the public without compensation. It was held by this court, before there was any statutory compensation to counsel appointed to defend one accused of crime who was without means to employ counsel, that, while the person appointed by the court for the purpose was under obligation to render his services, there was a corresponding obligation on the part of the county to pay him a reasonable compensation therefor: *Hall v. Washington County*, 2 G. Greene, 473. That case overruled *Whicher v. Cedar County*, 1 G. Greene, 217, in which the court had held that compensation was discretionary in such cases with the county. Likewise, in *Write v. Polk County*, 17 Iowa, 413, it was held by the two judges who favored affirmance that one appointed by the court to act as special prosecutor in criminal cases in the absence of the district attorney was entitled to reasonable compensation from the county for his services, although no compensation in such cases was provided for by law. The difference of opinion among the judges of the court in that case was not on the general proposition of implied liability, but on the question whether the prosecuting attorney was to be considered a state or a county officer, it being contended by the two judges who favored reversal that as the prosecuting attorney, under the law as it then existed, was not selected as a county officer, but <sup>294</sup> was elected for a district composed in most cases of several counties, and was paid out of the state treasury, like district judges, he could not be considered in any sense as the representative of the county. The right of an attorney who is required to perform a service for the public to have compensation therefor has been sustained in other states: See *Carpenter v. Dane County*, 9 Wis. 274; *Dane County v. Smith*, 13 Wis. 585, 80 Am. Dec. 754; *Webb v. Bird*, 6 Ind. 13. The contrary conclusion was reached in *Wayne County v. Waller*, 90 Pa. St. 99, 35 Am. Rep. 636; *Rowe v. Yuba County*, 17 Cal. 61; *Vise v. Hamilton County*, 19 Ill. 78. The cases of *Morton v. Watson*, 60 Neb. 672, 84 N. W. 91, and *In re Eaton*, 7 N. Dak. 269, 74 N. W. 870, relate to taxation of costs in disbarment proceedings, and, we think, have no direct bearing on the question now before us. The argument by analogy from cases in which this court has

held that an officer required by law to perform duties for which no special compensation is provided is not entitled to recover under an implied contract has, as it seems to us, no bearing whatever on the question. In *Foster v. Clinton County*, 51 Iowa, 541, 2 N. W. 207, it was held that an attorney appointed by a peace officer to prosecute an action for violation of the prohibitory liquor law was not entitled to recover compensation from the county for his services, for the reason that no authority for such appointment was found in the statute. In *Turner v. Woodbury County*, 57 Iowa, 441, 10 N. W. 827, it was held that township trustees, having authority to designate the place where an election should be held, could not render the county liable to make compensation to a private owner for the use of a place thus designated, the reason of the holding being that there was no duty on the part of the county to pay expenses for the purposes of an election otherwise than as provided by law. In *Howland v. Wright County*, 82 Iowa, 164, 47 N. W. 1086, it was held that the mayor of a town, rendering services as a magistrate, <sup>295</sup> was not, in the absence of any provision therefor, entitled to recover from the county for the value of his services, the reason given being that a public officer is entitled only to such compensation as the law provides; and the same reasoning was applied in *Guanella v. Pottawattamie County*, 84 Iowa, 36, 50 N. W. 217, to the claim of a city marshal against the county for fees in criminal cases. In *Mousseau v. Sioux City*, 113 Iowa, 246, 84 N. W. 1027, it was held that a special policeman, appointed to serve at a general election, could not recover for his services from the city or county in the absence of statutory provision therefor, the reason stated being that "no recovery for services rendered by public officers may be had unless compensation is directed by statute. . . . The state is not bound to provide for such payment, and he who takes employment under its agency accepts with the honors the burden also."

There are no decisions of this court subsequent to that announced in *Hall v. Washington County*, 2 G. Greene, 473, indicating dissatisfaction with the reason of that case, and we are satisfied to follow it. The analogy between that case and the one now before us is plain. In that case the duty imposed upon the attorney by appointment of the court, under authority of statute, was to defend a criminal. In this case the duty imposed upon the attorney by order of court, in pursuance of statutory authority, was to act in the prosecution

of a special proceeding, in the interest of the public, to disbar attorneys charged with misconduct. The disbarment of persons who have been admitted to the practice of law, but have by misconduct forfeited the right to pursue the profession, is as much a matter of public concern as the defense of those who are charged with crime. A disbarment proceeding is not primarily in the interest of members of the legal profession, but in the interest of those who, desiring to have the services of an attorney, may be misled to their injury, or defrauded, in employing a disqualified or dishonest attorney, by reason <sup>296</sup> of the action of the state in admitting him to practice and thereby impliedly indorsing him as one to whom legal business may properly be intrusted. When the state undertakes to regulate the admission of attorneys to practice in the courts, it thereby assumes a duty to see to it that unworthy and incompetent persons are not held out to the public by its indorsement as qualified to transact legal business. Other members of the profession, feeling a justifiable pride in the reputation and standing of the profession, may realize more acutely, perhaps, than do the members of the public in general, the danger to the public, and the disgrace to the other members of the profession, involved in allowing improper persons to hold themselves out as authorized by the state to practice. But the statutory provisions as to disbarment are not, apparently, provided for in any way as a protection to other lawyers; and we see no reason why an attorney, required by the court to discharge the duty of assisting in taking away from a brother attorney, who is unworthy of the trust reposed in him, the right to further recognition by public authority as an attorney, should render such services at his own expense.

One further suggestion, perhaps, may be made with reference to the liability of the county. It is true that disbarment proceedings are not instituted by the county, and are not directly in its interest as a quasi municipal corporation. But one of the duties imposed upon a county, as a branch of the government of the state, is to maintain and pay the expenses of a court for the administration of justice. Whatever expense is incident to the maintenance of such court is to be met by the county. The special provision of Code, section 226, that, "where terms are held in any city or town, not the county seat, such city or town shall provide and furnish the necessary rooms and places for such terms, free of charge to the county," implies the liability of the county for the expenses of the court



as <sup>297</sup> usually held at the county seat. There is no special provision for supplying the necessary furniture for the courtroom, and yet there is no reasonable doubt, we suppose, as to the authority of the court to require the county in some proper way to bear the expense of the reasonable accommodations to enable the court to transact its business. So it is the duty of the court, in the discharge of its judicial functions, to entertain proceedings for the disbarment of an attorney, and whatever necessary expense is involved in the prosecution of such a proceeding must inevitably fall upon the county. It appears to us that there can be no escape from the conclusion that the county may be liable by implication for some expenses not directly specified by statute.

Without further elaboration, we hold that a reasonable compensation of an attorney appointed by the court to act for the public in the prosecution of disbarment proceedings is a charge upon the county, and that the action of the lower court in overruling defendant's demurrer to the petition in the present case should be affirmed.

Weaver, J., taking no part.

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*An Attorney* assigned by the court to defend an indigent person charged with crime has, it has been held, no claim upon the public for fees or expenses: *Wayne County v. Waller*, 90 Pa. St. 99, 35 Am. Rep. 636; *Dismukes v. Board of Supervisors*, 58 Miss. 612, 38 Am. Rep. 339; *Case v. County Commissioners*, 4 Kan. 511, 96 Am. Dec. 190. A contrary view, however, is taken in *County of Dane v. Smith*, 13 Wis. 585, 80 Am. Dec. 754.

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## ANDERSON v. SCHURKE.

[121 Iowa, 340, 96 N. W. 862.]

**NEGLIGENCE—Proximate Cause.**—One who does a negligent act is liable for the consequences resulting therefrom, whether he has reason to anticipate them or not, if they are the natural result of his wrong, but if the result is purely accidental, and such wrong has no causal connection with the injury suffered, then no matter how great the wrong, the injury cannot be charged to him. (p. 361.)

**NEGLIGENCE—Proximate Cause.**—If a traveler on the traveled track in a highway is thrown by his horse into a wire fence wrongfully maintained by a land owner in the highway, but not in such way as to necessarily obstruct travel, the latter is not liable for the injury, as there is no causal connection between it and the land owner's wrong. (p. 361.)



Conner & Lally, for the appellant.

P. W. Harding for the appellee.

**340** McCLAIN, J. Plaintiff introduced evidence tending to show that the road along which plaintiff was riding was a legally established highway, and defendant in various ways interposed the objection that the evidence introduced, consisting of the records of the board of supervisors with reference to the establishment of this highway, was **341** not sufficient, on account of want of notice to the adjoining land owners. Plaintiff also relied upon a legalizing act, which counsel for defendant contended was unconstitutional, and the court, at the conclusion of plaintiff's case, on defendant's motion, struck from the record all the testimony with relation to the establishment of the alleged highway. Error is assigned as to this ruling, but, in the view which we take of the case, it is not necessary to discuss the correctness of the court's action, although considerable portions of the arguments of counsel on each side are devoted to this question.

The action of the court in directing a verdict for defendant was not based on any specific ground, but if the plaintiff, under the issues and the evidence, was, as matter of law, not entitled to recover, then the court committed no error, and the judgment should be affirmed. We direct our attention, therefore, to the ultimate issues presented to the court for determination, and find that the wrong complained of on the part of the defendant was maintaining his fence along and in the highway, eleven feet from the true boundary line between his premises and such highway; that the injury alleged to have been sustained by plaintiff was the result of this wrongful act of defendant; and that plaintiff was free from negligence. The evidence shows that the traveled track in the highway, if there were a highway, was about six feet from defendant's fence; that, as plaintiff rode his horse along this track after dark, the horse shied or stumbled toward the fence, which was of barbed wire, and forced plaintiff's leg against the fence, with the result that the leg was badly cut and injured. It occurs to us that the only question we need consider is whether, under the issues presented, this evidence tended to show plaintiff entitled to recover damages as against defendant.

It is very doubtful whether there is any competent evidence that defendant's fence was in the highway. No **342** question of that character seems ever to have been raised until after

the accident, when the county surveyor made a survey, and he testifies that he then found that the fence, at the place of the accident, was not on the line, but eleven feet from the line, in the highway. He announces this rather by way of conclusion than by stating any facts as to the measurements made. We do not find it necessary to discuss the competency of his testimony, which constitutes the sole evidence that there was any wrong done on the part of the defendant with reference to the maintenance of his fence.

The controlling question, as it seems to us, is whether there was any proximate connection between the alleged wrongful act of defendant in having his fence in the highway and the injury received by plaintiff. It appears from plaintiff's testimony that he was riding in the traveled track; that he could see the posts of the fence; that it was quite dark at the time; and that, without any volition on his part, his horse carried him out of the traveled track, and against the fence. It does not appear that plaintiff had any knowledge as to where the true line of the highway was, or that he was directing his course with reference to that line, independently of the fence which defendant had constructed, nor that the fence had been newly constructed, so as to encroach on the highway as previously used. Plaintiff knew where the traveled track was, and knew where the fence was, and was not misled nor surprised by reason of any act of the defendant with reference to the location and maintenance of the fence. To illustrate the view we take, we may suppose a case which, as we think, involves exactly the same legal proposition as the one before us. If the traveled track had been near the other side of the highway, which, as legally established, must have been sixty-six feet wide (and all the evidence before us on the subject is to the effect that it was of this width), and a person traveling along such <sup>343</sup> track had been violently thrown from his carriage the width of the highway, and had fallen against defendant's fence, and received injuries involving permanent disability and constant pain and suffering, such as would justify a verdict for very large damages, and it could be shown that if the defendant's fence had been on the exact line, instead of a few feet therefrom, the injured person would not have struck such fence, and would not therefore have suffered damages, would the defendant be liable for the consequent injury? Would there be any proximate connection between maintaining the fence not on the true boundary line and the injury suffered

in such case? Conceding that defendant was in the wrong in having his fence set over for some distance in the highway, but not in such way as to obstruct the travel, or render the highway too narrow for safe use, would his wrong be the proximate cause of such injury? No doubt defendant could be indicted for the obstruction of the highway, but would there be any proximate connection between the wrong which he commits and the injury suffered? The answer is self-evident. One who does a negligent or wrongful act is responsible for the consequences resulting from such act, whether he has reason to anticipate them or not, if they are the natural result of his wrong; but if the result is purely accidental, and the defendant's wrong has no causal connection with the injury suffered, then, no matter how great the wrong may be, the injury cannot be charged to him. The occasion of plaintiff's injury in this case was the accident of his horse carrying him against the fence. There is no reason to suppose that the traveled track would not have been within six feet of the fence, even if the fence had been constructed on the true line, and the chance of injury to plaintiff from such an act would have been exactly the same as it actually was in this case. With all the ingenuity we can exercise in marshaling the facts before us, we are unable to imagine any <sup>344</sup> connection whatever between the accident to plaintiff and the wrong of defendant in having his fence in the highway. The court was, therefore, justified in directing a verdict for defendant, and the judgment is affirmed.

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*The Doctrine of Proximate Cause* is the subject of a monographic note to *Gilson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 807-861.

*The Liability for Dangerous Fences* is considered in *Ray v. Stuckey*, 113 Wis. 77, 90 Am. St. Rep. 844, 88 N. W. 900; *Kuhnert v. Angell*, 10 N. Dak. 59, 88 Am. St. Rep. 675, 84 N. W. 579; *Siglin v. Coos Bay Co.*, 35 Or. 79, 76 Am. St. Rep. 463, 56 Pac. 1011; *Lowe v. Guard*, 11 Ind. App. 472, 54 Am. St. Rep. 511, 39 N. E. 428.

## LANE v. WRIGHT.

[121 Iowa, 376, 96 N. W. 902.]

**LIENS—Rights of Coholders—Holder of Tax Title.**—If several persons hold claims which are liens upon the same land, equity will not permit one of the lienholders to absorb the common fund by purchasing the land at tax sale. He must be treated as a redemptioner with a preferred claim to the amount paid to redeem. (p. 363.)

J. Newburn and C. C. Cole, for the appellant.

Carr, Hewitt, Parker & Wright, for the appellees.

**376** WEAVER, J. The record is somewhat confused as to the manner in which this case was disposed of by the trial court. The petition was amended several times, and was demurred to in its amended as well as original form, and the abstract states that the demurrer was sustained. But it is also averred that there was a trial to the court, testimony introduced, and, after both parties had rested, a decree was entered which recites a hearing and trial upon evidence, and adjudges plaintiff not entitled to the relief demanded. It is, perhaps, not very material whether we treat the final judgment as entered upon the trial of an issue of fact or upon the demurrer, but we are disposed to regard the recitals of the decree as conclusive, and treat **377** the case as having been tried and decided upon its merits. The following statement of facts will make plain the nature of the dispute presented by the appeal: The plaintiff, Lane, and the appellee, Wright, were severally the holders of judgment liens upon the land in controversy, the former being senior in point of time. Under an execution entered upon the junior judgment the land was sold to Wright June 20, 1896. In the following year, under execution entered upon the senior judgment, the same land was sold to Lane, who took a sheriff's deed therefor January 26, 1899. At the date of the sheriff's sale to Wright there was an outstanding and unredeemed sale of said land for delinquent taxes, the certificate of which was held by one Tris. Wright did not take a sheriff's deed under his execution sale, although no redemption therefrom was ever made, but obtained an assignment of the certificate of tax sale, upon which the county treasurer issued a tax deed January 3, 1898. Thereafter, and before this suit was commenced, Wright conveyed the land by quitclaim deed to the defendant Richart. There is question



made of the sufficiency of the description by which the land was taxed, and by which it was sold at tax sale; but for the purposes of this branch of the case we assume the description to be correct. The point made, and one which we think decisive of this appeal, is that Wright, as the holder of a lien upon the land, and of a sheriff's certificate of a sale thereof, cannot be allowed to defeat the senior lien by obtaining a tax deed, and that in equity his purchase of the certificate of tax sale must be considered and treated as a redemption.

We regard it as a well-settled proposition under the decisions of this court that, where several persons hold claims which are liens upon the same land, equity will not permit one of the lienholders to absorb the common fund by purchasing the land at tax sale. In *Fair v. Brown*, 40 Iowa, 209, the plaintiff was the holder of a <sup>378</sup> mortgage lien upon certain land. The defendant Weiser was the holder of a senior judgment lien and of a junior mortgage upon the same premises, and sought, as did the appellee Wright in this case, to defeat plaintiff's lien by the purchase of outstanding certificates of tax sale and obtaining deed thereon. As is now done by the appellee, Weiser sought to escape the point made against the tax deed by urging that he was under no legal obligation to pay the tax, and therefore could rightfully make the purchase and acquire an indefeasible title. To this contention we said that, notwithstanding he was bound neither by law nor contract to pay the delinquent tax, yet "the land is a common fund for the payment of plaintiff's mortgage and defendant's liens. Defendant was authorized to redeem from the tax sale: *Rice v. Nelson*, 27 Iowa, 148. Equity will not permit him to acquire the title for an inconsiderable sum, when he was authorized to remove the trifling encumbrance by redemption. Though not bound to pay the tax, yet it was his right to do so to protect his own liens. He cannot obtain that protection by pursuing a course that will deprive the mortgagee of his security, and leave the mortgagor to sustain the weight of liens which are personal judgments, after being deprived of his property by tax title. Equity will relieve against such oppression, and teach the grasping creditor moderation in his demands, and that he cannot destroy others to build up his own fortunes." In *Garrettson v. Scofield*, 44 Iowa, 37, we cited and approved this principle, saying: "The defendant Scofield and the plaintiff were both mortgagees, and both claiming interest in the land to the extent of their respective mortgages; and while it is true there was no absolute duty resting upon either to pay the taxes,



yet they had such an interest in the land as to make it necessary to do so in order to properly protect the title. Under these circumstances we do not believe that the payment of taxes by either at the tax sale should entitle him to the <sup>379</sup> statute penalties." The same doctrine was reiterated in *Eck v. Swennumson*, 73 Iowa, 423, 5 Am. St. Rep. 690, 35 N. W. 503. See, also, *Manning v. Bonard*, 87 Iowa, 648, 54 N. W. 549, and *Cowdry v. Cuthbert*, 71 Iowa, 733, 29 N. W. 798. In each one of the cited cases there was no legal obligation to pay the taxes resting upon the party asserting the tax title, but in each it was held that a person having the right to redeem from tax sale cannot, by refusing or neglecting to exercise that right and becoming a purchaser at the sale, extinguish the liens held by others upon the property so obtained. As is illustrated by these precedents, it is not required that a party shall be vested with ownership of the property in the sense of holding title to it in order to come within the influence of this rule. The term "owner," as used in determining who may redeem from tax sale, has been construed to include mortgagees, judgment creditors and holders of contingent interests in the land affected by the sale: *Adams v. Beale*, 19 Iowa, 61; *Swan v. Harvey*, 117 Iowa, 58, 90 N. W. 489. The principle which involves the rule denying the right of one lienholder to obtain a tax title to the disadvantage of others in similar relation to the common security seems to be that, as the law gives each of them the right to protect the security by making a redemption, and gives the redemptioner a preferred lien to the extent of his disbursement for that purpose, it would be inequitable to permit him to waive such right and become a purchaser at the sale, and thus, by an expenditure not greater than would have been required to pay the tax, exclude his fellow-lienholders from all participation in the common fund. The proposition seems to be entirely just, while the opposite rule would often bring about manifestly inequitable results. We conclude, therefore, that the purchase of the certificate of tax sale by the appellee Wright must be treated as a redemption, and the tax deed issued to him on such sale be declared void. The appellee Richart holds under a quitclaim deed from his codefendant Wright, and occupies <sup>380</sup> no stronger position in this controversy than his grantor. Our views upon this branch of the case render it unnecessary to consider the question raised concerning the description of the land as advertised and sold by the treasurer.

The judgment below is reversed, and cause remanded for further proceedings in harmony with this opinion.

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*Who may Purchase and Enforce a Tax Title* is considered in *McFarlane v. Grober*, 70 Ark. 371, 91 Am. St. Rep. 84, 69 S. W. 56, and the monographic notes to *Blake v. Howe*, 15 Am. Dec. 684-690; *Cone v. Wood*, 75 Am. St. Rep. 229-253. At page 244 of this last note it is said that one who holds a mortgage on property cannot ordinarily defeat a prior mortgage by acquiring a tax title thereto.

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### BARCLAY v. ABRAHAM.

[121 Iowa, 619, 96 N. W. 1080.]

**WATERS—Subterranean.**—The waters of a well-defined subterranean stream cannot be diverted to the injury of an adjoining land owner. (p. 366.)

**WATERS—Subterranean—Known Channel—Burden of Proof.** Subterranean waters are presumed to be percolating unless the supply is shown to be from a known and defined stream or channel, and the burden of proving the existence of such channel is on the one asserting its existence. (p. 366.)

**WATERS—Subterranean—Right to Use.**—One under whose land there is subterranean percolating water may make such beneficial use thereof as he may choose, but he has no right to draw from such reservoir within the earth merely to waste the water or carry out a design to injure those having equal access to the same supply. (p. 368.)

**WATERS—Subterranean.—A Land Owner has no Right to Collect, Drain, or Divert** waters percolating through the earth, merely to carry them from his own land for no useful purpose, when such action on his part will have the effect of materially injuring or destroying the well or spring of another, the waters of which are devoted to some beneficial use connected with the land where found. (p. 373.)

W. W. Goodykoontz and Crooks & Snell, for the appellant.

C. Whitaker, for the appellee.

<sup>621</sup> LADD, J. The particular district within which flowing wells may be obtained at a depth varying from one hundred to two hundred feet is three or four miles in length by about one-half mile in width, following the direction of the creek. Within this area there are at least eleven wells which are now or have been flowing above the earth's surface. That of plaintiff, near his barn, is one hundred and fifty-two feet deep. The well sunk by defendant is only one hundred and seven feet deep, but on ground about as much lower as the difference. Its casings are

three inches in diameter, and the flow, when uninterrupted, has the effect of stopping plaintiff's well and of several others. It is located near the south line of defendant's land, from which the water runs in the creek, and, save that necessary for about thirty head of cattle, is without benefit to him or anyone else. The water in excess of a stream one-fourth inch in diameter, to which extent the district court directed him to restrain the flow, is absolutely wasted, and so done without excuse. True, he pretended that the entire flow was essential to prevent clogging with sand or gravel, but the evidence shows conclusively that this was less likely with the smallest available exit. Again, he pretended to have in contemplation the elevation to his tenant's house, across the eighty acres, up some forty feet, of water for domestic use by the operation of a hydraulic ram. But the extent of his preparation therefor was the reading of a circular from some manufacturing company. There was no proper showing that the flow permitted would be inadequate for this purpose, and it conclusively appears that it had nothing to do with his insistency upon utterly wasting the water his neighbors so much needed. <sup>622</sup> Indeed, the record indicates strongly his object was to maliciously cut off the water supply of a well owner other than plaintiff. In the light of these facts, it is not very important that we determine whether the water was supplied by percolation through the soil or a well-defined subterranean stream. If the latter, of course the water might not thus be diverted: *Hougan v. Milwaukee etc. R. R. Co.*, 35 Iowa, 558, 14 Am. Rep. 502; *Burroughs v. Saterlee*, 67 Iowa, 396, 56 Am. Rep. 350, 25 N. W. 808; *Willis v. Perry*, 92 Iowa, 297, 60 N. W. 727.

But the presumption obtains that such waters are percolating waters, unless shown to be supplied by a stream of known and defined channel: *Gould on Waters*, secs. 280, 281; *Hanson v. McCue*, 42 Cal. 303, 10 Am. Rep. 299; *Tampa Waterworks Co. v. Cline*, 37 Fla. 586, 53 Am. St. Rep. 262, 20 South. 780; *Metcalf v. Nelson*, 8 S. Dak. 87, 59 Am. St. Rep. 746, 65 N. W. 911; *Wheatley v. Baugh*, 25 Pa. St. 528, 64 Am. Dec. 721; *Huber v. Merkel*, 117 Wis. 355, 98 Am. St. Rep. 933, 94 N. W. 354. And it follows that the burden of proof is upon those asserting right to waters below the surface, on the ground that they flow in a defined and known channel, to establish the existence of such channel: *Black v. Ballymena Commrs.*, 17 L. R. Ir. 459; *Huber v. Merkel*, 117 Wis. 355, 98 Am. St. Rep. 933, 94 N. W. 354. It is to be observed that the mere existence of the channel

is not enough; its location must be known or reasonably ascertainable: *Lybe's Appeal*, 106 Pa. St. 626, 51 Am. Rep. 542; *Collins v. Chartiers Valley Gas Co.*, 131 Pa. St. 143, 17 Am. St. Rep. 791, 18 Atl. 1012, where the court concludes that it is clear, "from the principles and the reasoning of all the cases, that the distinction between rights in surface and in subterranean waters is not founded on the fact of their location above or below the ground, but on the fact of knowledge, actual or reasonably acquirable, of their existence, location, and course. And in *Black v. Ballymena Commrs.*, 17 L. R. Ir. 459: "So far the law on the subject is clear; <sup>623</sup> but a difficulty appears still to exist as to the application of this rule by reason of the use of the word 'known' in connection with the word 'defined,' and it does not seem to have been laid down as yet what the nature or extent of the knowledge is which must be proved to exist in order to constitute the riparian relation. It cannot mean that a channel should be visible throughout its course, which would be an impossibility, from the very fact of its being subterranean. In considering the question, the knowledge required cannot be reasonably held to be that derived from a discovery in part by excavation exposing the channel, but must be knowledge by reasonable inference from existing and observed facts in the natural, or, rather, the pre-existing, condition of the surface of the ground. The onus of proof, of course, lies on the plaintiff claiming the right, and it lies upon him to show that without opening the ground by excavation, or having recourse to abstruse speculations of scientific persons, men of ordinary powers and attainments would know, or could with reasonable diligence ascertain, that the stream when it emerges into light comes from and has flowed through a defined subterranean channel." Surface indications of a stream are discussed in *Tampa Waterworks Co. v. Cline*, 37 Fla. 586, 53 Am. St. Rep. 262, 20 South. 780, where surface depressions extended on either side of a spring; in *Hale v. McLea*, 53 Cal. 578, where a line of bushes usually found nowhere except over watercourses extended from a spring on adjoining land: See, also, *Saddler v. Lee*, 66 Ga. 45, 42 Am. Rep. 62; *Wheatley v. Baugh*, 25 Pa. St. 528, 64 Am. Dec. 721; valuable note to *Wheelock v. Jacobs*, 67 Am. St. Rep. 665. In the instant case surface indications do not aid in locating a stream below. The mere fact that the excessive flow from one well interrupted that of several others did not tend to point out the location, course, or even existence of a subterranean river or smaller watercourse: *Taylor v. Welch*, 6



Or. 199. A similar result would be as likely to occur when the supply is derived from water filtrating <sup>624</sup> through the soil until caught in a stratum of sand and gravel lying between impervious layers of other material: See *Huber v. Merkel*, 117 Wis. 355, 98 Am. St. Rep. 933, 94 N. W. 354. Indeed, the fact that large quantities of sand and gravel are drawn up when the level at which water is reached strongly sustains the latter view. But we need go no further than to say there is nothing in the record to overcome the presumption that the supply of the entire district is percolating water. If a stream one-half mile wide, it could scarcely be affected by the small outlets afforded by these wells. If a number of narrower streams flow beneath the surface, the location of none has been pointed out nor appears to be ascertainable: *Chase v. Silverstone*, 62 Me. 175, 16 Am. Rep. 419; *Taylor v. Welch*, 6 Or. 199; *Greencastle v. Hazelett*, 23 Ind. 189; *Haldeman v. Bruckhart*, 45 Pa. St. 514, 84 Am. Dec. 511; *Gould v. Eaton*, 111 Cal. 639, 2 Am. St. Rep. 201, 44 Pac. 319.

This being true, there is no doubt but defendant had the right to make such beneficial use of the water in the improvement of his land as he might choose. But it does not follow that he had the right to draw from this reservoir within the earth wherein nature had stored water in large quantities for beneficial purposes merely to waste or carry out a design to injure those having equal access to the same supply. Decisions to the effect that percolating waters are to be treated the same in law as the land in which found, and may be diverted, consumed, or cut off with impunity, without liability for interfering or destroying the supply, are numerous in this country and England—too numerous for citation; but see *Wheatley v. Baugh*, 25 Pa. St. 528, 64 Am. Dec. 721, *Mayer & Aldeman etc. v. Pickles*, [1895] App. Cas. 587, and *Frazier v. Brown*, 12 Ohio St. 294. In the last of these cases the principle underlying the right to such waters, and the reasons upon which it rests, were thus stated: "In the absence of express contract and of positive authorized legislation, <sup>625</sup> as between proprietors of adjoining lands, the law recognizes no correlative rights in respect to underground waters percolating, oozing, or filtrating through the earth; and this mainly from considerations of public policy: 1. Because the existence, origin, movement, and course of such waters, and the causes which govern and direct their movements, are so secret, occult, and concealed that an attempt to administer any set of legal rules in respect to them would be involved in hopeless uncertainty, and would be, therefore, practically impossible; 2.



Because any such recognition of correlative rights would interfere, to the material detriment of the commonwealth, with drainage, and agriculture, mining, the construction of highways and railroads, with sanitary regulations, building, and the general progress of improvement in works of embellishment and utility." An examination of the authorities, however, indicates that they proceed upon the theory that the right thereto relates to the beneficial use of the land, and is connected with its enjoyment for the purposes of agriculture, mining, trade, improvement and the like. This thought is emphasized by the dicta in many decisions to the effect that percolating waters may not be extracted from the earth to the injury of others merely to gratify malice. Thus, in the leading case of *Wheatley v. Baugh*, 25 Pa. St. 528, 64 Am. Dec. 721, the court declared that "neither the civil law nor the common law permits a man to be deprived of a well or spring or stream of water for the mere gratification of malice. The reason is that water, like air, is of such a nature that no one can have an exclusive right in it. In the process of evaporation and condensation it is sent in refreshing showers all over the earth. In its descent into the ocean it necessarily passes from one to the other, and is intended for the benefit of all. The right of each is more or less dependent upon that of his neighbor": See, also, *Greenleaf v. 626 Francis*, 18 Pick. 119, where it was held that an owner may dig a well in any part of his land, even though the water in his neighbor's well be diminished, but with this limitation, that in doing so he is not actuated by a malicious intent to deprive his neighbor of water without benefit to himself. The right being conceded, possibly the intent with which exercised would be immaterial. On this point the authorities are in conflict: See *Chesley v. King*, 74 Me. 164, 43 Am. Rep. 569; *Huber v. Merkel*, 117 Wis. 355, 98 Am. St. Rep. 933, 94 N. W. 354.

The important intimation to which we wish to direct attention is that with respect to the beneficial use. A decided tendency to depart from the strict rules of the common law with respect to percolating waters in the adjustment of modern conditions is manifest in recent decisions. In the well-considered case of *Stillwater Water Co. v. Farmer*, 89 Minn. 58, 99 Am. St. Rep. 541, 93 N. W. 907, the supreme court of Minnesota held that subsurface water might not be drained from his land by an owner merely to pour it into a sewer, when this resulted in depriving a company of the supply from which it furnished the people of a city. There the plaintiff supplied water for domes-

tic purposes to the people of the city of Stillwater from a spring about which it had constructed a wall some six feet in diameter. This was within a few feet from the boundary line between the company's and Farmer's land. Near this line, and not more than ten feet from the center of the spring, Farmer excavated a trench, and placed in it a ten-inch tile drain connected with the city sewer. As a result percolating waters were drawn away from the spring, where they would naturally have gone, materially affecting the supply of water in the spring. Thereupon the company made a change in the outlet and in the mains to guard against such loss; whereupon Farmer began to lay his tile at a lower level, commencing at the sewer. A temporary injunction was <sup>627</sup> granted, and in a well-considered opinion the court held that defendant might not even collect percolating waters merely to squander them to the detriment of his neighbor. The theory of the decision is that, while ownership of the soil extends to the center of the earth, it is somewhat restrained by the maxim, "*Sic utere tuo ut alienum non laedas.*" The court directs attention to the fact that in nearly every case where the right to collect or divert percolating waters has been upheld this has been for some beneficial purpose, and pertinently suggests that there is no good reason for not applying the doctrine of correlative rights in such a case, and that such application will not interfere with proper improvement of land, but tend to promote the general welfare of all citizens alike. The rule approved is thus stated: "Except for the benefit and improvement of his own property or for his own beneficial use, the owner of land has no right to drain, collect, or divert percolating waters thereon, when such acts will destroy or materially injure the spring of another person, the waters of which spring are used by the general public for domestic purposes. He must not drain, collect, or divert such waters for the sole purpose of wasting them. Briefly stated, a land owner must not collect and wantonly waste percolating waters, which would otherwise be or have theretofore been appropriated by his neighbor for the general welfare of the people."

The doctrine of correlative rights between land owners respecting the appropriation and use of percolating waters has been broadly applied in New Hampshire (*Bassett v. Salisbury Mfg. Co.*, 43 N. H. 569, 82 Am. Dec. 179; *Swett v. Cutts*, 50 N. H. 439, 9 Am. Rep. 276), where the court declared that no good reason could be given why it should not be applicable in all cases where the rights of owners of adjoining lands to collect

and use percolating waters are in apparent, though not real, hostility. The courts of New York seem to have held that the owner of land may <sup>628</sup> not sink wells on his own land from which, by the use of pumps of potential force and reach, he may drain the percolating waters from the premises of his neighbors to their injury, merely for the purpose of merchandising the water to consumers distant from the land: *Forbell v. City of New York*, 164 N. Y. 522, 79 Am. St. Rep. 666, 58 N. E. 644. In that case it was said: "In the absence of contract or enactment, whatever it is reasonable for the owner to do with his subsurface water, regard being had to the definite rights of others, he may do. He may make the most of it that he reasonably can. It is not unreasonable, so far as it is now apparent to us, that he should dig wells, and take therefrom all the water that he needs, in order to the fullest enjoyment and usefulness of his land as land, either for purposes of pleasure, abode, productiveness of soil, trade, manufacture, or for whatever else the land as land may serve. He may consume it, but must not discharge it to the injury of others. But to fit it up with wells and pumps of such pervasive and potential reach that from their base the defendant can tap the water stored in the plaintiff's land, and in all the region thereabout, and lead it to his own land, and by merchandising it prevent its return, is, however reasonable it may appear to the defendant and its customers, unreasonable as to the plaintiff and the others whose lands are thus clandestinely sapped, and their value impaired." The opinion seems to be grounded upon the notion that extracting the water by force constituted a trespass, and the court, apparently in recognizing a departure from previous decisions, added: "We more readily conclude to affirm because the immunity from liability which defendant claims violates our sense of justice. It seems to pervert just rules to unjust purposes. It does wrong under the letter of the law, in defiance of its spirit." *Smith v. City of Brooklyn*, 18 App. Div. 340, 46 N. Y. Supp. 141, is referred to approvingly. In that case, upon full consideration, the <sup>629</sup> court declared that, while waters might be extracted from the depths for the reasonable use or improvement of the land, the law will not allow this to be done for some purpose unconnected with the use, improvement, or enjoyment of the land itself to the detriment of adjoining owners: See same case on appeal, *Smith v. City of Brooklyn*, 160 N. Y. 357, 54 N. E. 787.

It is not necessary to go to this extent in order to sustain the decree in this case. The water from defendant's well, in excess of that allowed him by the court, fell to the earth, and immediately flowed from his land on that of a neighbor below.

He proposed to draw the percolating waters, not to supply the people of a great city, but to waste without advantage to anyone. In principle the case is like that of *Stillwater Water Co. v. Farmer*, 89 Minn. 58, 99 Am. St. Rep. 541, 93 N. W. 907, and we are inclined to approve the doctrine therein announced. A contrary conclusion would permit defendant by allowing his well to flow at full capacity, not only to stop plaintiff's well, but every other well in the neighborhood, and this without the slightest benefit to himself. Indeed, this is precisely what he has threatened if interfered with. May one man thus waste the waters stored by nature for the community and wantonly deprive it of their use? Are the courts powerless to remedy such a wrong? The supreme court of Wisconsin seems to have so held: *Huber v. Merkel*, 117 Wis. 355, 98 Am. St. Rep. 933, 94 N. W. 354. A distinction between an injury to the quality of the neighbor's land, as in *Forbell v. City of New York*, and to the enjoyment of its use, is suggested, but this is not substantial: See, also, *Hague v. Wheeler*, 157 Pa. St. 324, 37 Am. St. Rep. 736, 27 Atl. 714. Certainly no good reason can be found for allowing the owner of land to draw subsurface water therefrom merely to waste, when this results in draining like water from his neighbor's land, to his detriment in its use and enjoyment. Water moves so readily from one place to <sup>630</sup> another that any definite portion of it cannot be said to be the property of the owner of the soil until in some way reduced to control. The water flowing in defendant's well may have been from plaintiff's land or that of some other well owner, a moment previous. In this respect it differs from minerals beneath the surface, and is more like natural gas, which may not be allowed to escape by a land owner, when not made use of, to the detriment of his neighbors: *Ohio Oil Co. v. State*, 150 Ind. 698, 50 N. E. 1124; *Ohio Oil Co. v. Indiana*, 177 U. S. 190, 20 Sup. Ct. Rep. 576.

Possibly he may waste that on his own land, if he can do so without draining water from his neighbor's. But the source of the supply of percolating waters can seldom be determined, and this is one of the main reasons for permitting its free appropriation by the owner of the soil. A different rule would undoubtedly restrict the use and improvement of land. But the



prevention of carrying the water from the land of the owner for the purposes of commerce or waste cannot retard the improvement of the land itself, and there is no just ground for tolerating such diversion when the direct result is to deprive the adjoining land owners by the incidental drainage of their land of a supply of water from the same natural reservoir. This would be extracting the subterranean water from the adjoining land to its injury, without any counter benefit to the land through which taken. This is a stronger case for the interference of a court of equity than *Forbell v. City of New York*, 164 N. Y. 522, 79 Am. St. Rep. 666, 58 N. E. 644. There the drainage rendered the adjoining land unfit for the growth of watercresses, which had formerly been raised upon it; here it destroyed the water supply essential for its customary use and enjoyment. There the drainage was to secure water to distribute to the inhabitants of a great city for profit; here the object was to turn it into a creek to flow unused in any way down to another's land below. The soundness of <sup>631</sup> some of the reasoning of the *Forbell* case may well be doubted. The exertion of the force there was in the removal of the subterranean waters in the city's land, and the only suction occasioned was by emptying a cavity into which the water naturally drained from the surrounding country. It is at least exceedingly doubtful whether this constituted trespass. In a lesser degree this happens whenever the sinking of one well has the effect of drying up another. The doctrine of *Smith v. City of Brooklyn*, 160 N. Y. 357, 54 N. E. 787, that the free use of such waters is limited to the improvement, use, and enjoyment of the land from which taken, and cannot be carried away for the purposes of commerce, to the injury of the premises of an adjoining owner, has the better reason for its support. But we need not go this far, even to sustain the decree of the district court, as in the case at bar the owner derived no benefit from the sale or use of the water. As said, the case is in principle like *Stillwater Water Co. v. Farmer*, 89 Minn. 58, 99 Am. St. Rep. 541, 93 N. E. 907. The doctrine there announced is in harmony with good morals. It interferes with no valuable right of the defendants. It shields from destruction property rights of great value belonging to the plaintiff and others. It goes no further than to say that a land owner may not collect, drain, or divert waters percolating through the earth merely to carry from his own land for no useful purpose, when such action on his part will have the effect of materially



injuring or destroying the well or spring of another, the waters of which are devoted to some beneficial use connected with the land where found. It applies in principle the doctrine of correlative rights to the control of subsurface waters whenever the appropriation proposed is unconnected with the use, enjoyment, or improvement of the land from which taken.

Affirmed.

Deemer, J., concurs in result.

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*The Questions Involved in the Principal Case* will be found discussed in the recent note to *Katz v. Walkinshaw*, 99 Am. St. Rep. 66-75.

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## SWIGERT & HOWARD v. TILDEN.

[121 Iowa, 650, 97 N. W. 82.]

**RESTRAINT OF TRADE.**—Contracts in Themselves Reasonable and based upon good consideration, will be enforced according to the rights of the respective parties thereto, although it may appear that in some respects, or in a limited way, the enforcement of such contracts has, for a result, the partial restraint of trade. (p. 378.)

**RESTRAINT OF TRADE**—Test of Validity of Contract.—Contracts in restraint of trade are valid if the restraint is such only as affords a fair protection to the interests of the person in whose favor they are given, and not so large as to interfere with the interests of the public. The restriction as to time and place must be reasonable, not oppressive, or out of proportion to the benefits which the vendee may, in reason, expect to flow from the restrictive measures of the contract. (p. 379.)

**RESTRAINT OF TRADE**—Sale of Business and Goodwill—Public Policy.—A contract, based on a good consideration, for the sale of the goodwill of a mail order shirt business, with an agreement, without limitation of time, to abstain from engaging in the shirt business within a radius of one hundred miles of a specified city, and not to engage in the shirt business or in selling shirts in two states named for a period of ten years, is not opposed to public policy as being in general restraint of trade. (pp. 380, 381.)

Carr & Parker and Dunshee & Dorn, for the appellants.

Clark & Clark, for the appellee.

654 BISHOP, C. J. It will be observed that, by the contract in question, defendant agreed, without limitation of time, to abstain from engaging in the shirt business within a radius of one hundred miles of Des Moines; that, as related to the states of Iowa and Nebraska generally, the agreement provides for a time limit of ten years. Taking the facts as stated in the

petition to be true—and, as far as well pleaded, the demurrer admits the truth thereof—it is manifest that the alleged conduct on the part of defendant does now, and, unless he be restrained therefrom, will continue to, interfere with, and work injury and damage to the property rights and business interests of plaintiffs. It is certain that the defendant possessed valuable rights, and without dispute these were in the nature and character of property rights. It was in consideration of a transfer of such to plaintiffs that they entered into the contract of purchase, and paid the consideration price. It would seem that common fairness requires that plaintiffs should be protected in the rights thus acquired by them, unless, forsooth, some consideration of general public policy dictates that their complaint should go unheard. That the attempted restriction is <sup>655</sup> against public policy, and therefore void, is the sole contention on behalf of appellee. It is said that the contract, having application to the entire states of Iowa and Nebraska, is one in general restraint of trade; that the one hundred mile restriction is a limitation in pretense only, while covering practically the entire state; and that the same cannot be upheld, because the contract being indivisible, if one part is void all parts are void.

The doctrine that contracts in general restraint of trade are to be held void as against public policy found root early in the development of our system of law, and recognition of such doctrine has continued down to the present time, but with more or less of modification as different courts have been called upon to make practical application thereof. Formerly, in the enforcement of this doctrine the rights of the immediate parties to a contract, as between themselves, were put entirely out of view until it had been determined that the contract was not one the enforcement of which would operate as an encroachment upon the interests of the general public. The reason of the rule is said to be twofold—that such restraints work injury to the public by depriving it of the industry of the restricted party in the vocation for which he is best adapted, as well as by the tendency thereof to throw the person so restrained upon the public for support, or compel him to expatriate himself and transfer his residence and allegiance to some other state or country in order to pursue his occupation; also that the tendency of such restraint is to foster monopolies, prevent competition, enhance prices, and might ultimately enable organized capital to silence all competition, become the sole producer, and

place the public at its mercy. The following cases will serve to illustrate: *Alger v. Thatcher*, 19 Pick. 51, 31 Am. Dec. 119; *Wright v. Ryder*, 36 Cal. 342, 95 Am. Dec. 186; *Western W. Assn. v. Starkey*, 84 Mich. 76, 22 Am. St. Rep. 686, 47 N. W. 604; <sup>656</sup> 1 *Smith's Leading Cases*, 9th ed., 694. In view, however, of the ever-changing conditions of trade, commerce, the mechanic arts, etc., and the diversity of interests which obtain in the various states and countries it must be manifest that there can be no single standard respecting public policy. This is true to the extent that it frequently happens that in certain respects the policy of one state is found to be the exact opposite of that maintained by another; and, even where there is no essential difference in the matter of abstract definition, it may be certain that self-interest viewed from the standpoint of locality more or less immediate, will enter into and dominate the side of practical application. Now, in this country we have no such conditions as existed when the doctrine was first promulgated. In a recent case it has been well said: "Public policy is a variable test. In the days of the early English cases, one who could not work at his trade could hardly work at all. The avenues to occupation were not as open nor as numerous as now, and one rarely got out of the path he started in. Contracting not to follow one's trade was about the same as contracting to be idle, or to go abroad for employment. But this is not so now. It is an every-day occurrence to see men busy and prosperous in other pursuits than those to which they were trained in youth, as well as to see them change places and occupations without depriving themselves of the means of livelihood, or the state of the benefit of their industry. It would therefore be absurd, in the light of this common experience, now to say that a man shuts himself up to idleness or to expatriation, and thus injures the public, when he agrees, for a sufficient consideration, not to follow some one calling within the limits of some particular state. There is no expatriation in moving from one state to another, and from such removals a state would be likely to gain as much as it would lose": *Herreshoff v. Boutineau*, 17 R. I. 3, <sup>657</sup> 33 Am. St. Rep. 850, 19 Atl. 712. Again, in *Wood v. Whitehead*, 165 N. Y. 545, 59 N. E. 357, it is said: "The doctrine which avoids a contract for being one in restraint of trade is founded upon a public policy. It has its origin at a time when the field of human enterprise was limited, and when each man's industrial activity was more or less necessary to the material well-being and welfare of his community

and of the state. The conditions which made so rigid a doctrine reasonable no longer exist. In the present practically unlimited field of human enterprise there is no good reason for restricting the freedom to contract, or for fearing injury to the public from contracts which prevent a person from carrying on a particular business. Interference would only be justifiable when it was demonstrable that in some way the public interests were endangered"; See, also, *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 60 Am. Rep. 464, 13 N. E. 419; *Leslie v. Lorrillard*, 110 N. Y. 519, 18 N. E. 363. To anyone at all familiar with present day conditions, it requires no argument to demonstrate that public policy requires that in trade matters there shall be no restraints imposed, save in those instances where it is clearly made to appear that the public welfare would be otherwise seriously endangered. And an all-important factor in business life is the right of individual contract—the right to buy and sell, to bargain and convey at will. The demand for recognition of this, coming up from the world of business, has been heard and countenance given thereto, by legislatures and courts everywhere. So, too, note has been taken of the baneful results which follow, seemingly with inevitable certainty, from giving sanction even negatively to acts or conduct involving fraud or dominated by bad faith. Certainly it is not going too far to say that there can be no sound public policy which operates to give countenance to the open disregard and <sup>658</sup> violation of personal contracts entered into in good faith and upon good consideration. A recent expression of the English court of appeals on the subject rings true. In *Underwood v. Barber*, 68 L. J. Ch. Div. 201, it is said: "If there is one thing more than another which is essential to the trade and commerce of this country, it is the inviolability of contracts deliberately entered into; and to allow a person of mature age, and not imposed upon, to enter into a contract to obtain the benefit of it, and then to repudiate it and the obligations which he has undertaken, is *prima facie*, at all events, contrary to the interests of any and every country."

It has thus come to be the rule of the cases in most jurisdictions that a contract in itself reasonable and based upon good consideration will be enforced according to the rights of the respective parties thereto, and this notwithstanding it may appear that in some respects or in a limited way the enforcement of such contract has for a result a partial restraint of trade. Several of our own cases make it certain that such is the rule in



this state: *Heichew v. Hamilton*, 3 G. Greene, 596; *Hedge v. Lowe*, 47 Iowa, 137; *Smalley v. Greene*, 52 Iowa, 241, 35 Am. Rep. 267, 3 N. W. 78; *Chapin v. Brown*, 83 Iowa, 160, 32 Am. St. Rep. 297, 48 N. W. 1074. See, also, the following recent cases from other jurisdictions in which the doctrine has found application: *Diamond Match Co. v. Rueber*, 106 N. Y. 473, 60 Am. St. Rep. 464, 13 N. E. 419; *Herreshoff v. Boutineau*, 17 R. I. 3, 33 Am. St. Rep. 850, 19 Atl. 712; *Cowan v. Fairbrother*, 118 N. C. 406, 54 Am. St. Rep. 733, 24 S. E. 212; *Wood v. Whitehead Bros. Co.*, 165 N. Y. 545, 59 N. E. 357; *Anchor Electric Co. v. Hawkes*, 171 Mass. 101, 68 Am. St. Rep. 403, 50 N. E. 509; *Trenton Potteries Co. v. Olyphant*, 58 N. J. Eq. 507, 78 Am. St. Rep. 612, 43 Atl. 723. It is to be noted, however, that a distinction is generally drawn and with much force, between those trades or avocations, on the one hand, in which the general public, as such, has some special interest, as for instance, 659 common carriers, water and light companies, and others of a quasi public character, and those trades and avocations, on the other hand, in which the interest does not arise out of a common necessity, or is not otherwise a matter of common concern to the general public, but which serve rather to minister to the convenience or gratify the desires, tastes, etc., of such individual members of the community as care to extend their patronage. The reason for this is apparent. Take the case of a city in which water is supplied to the inhabitants from two or more general sources, each under the control of a separate private ownership. Now, a contract between such owners, whatever the consideration as between themselves, providing for the shutting off of all such sources of supply but one, would serve to create a monopoly, and would certainly be so far repugnant to the general public interest that the courts would refuse to enforce the same. The case of *Chapin v. Brown*, 83 Iowa, 160, 32 Am. St. Rep. 297, 48 N. W. 1074, furnishes a further illustration. It there appeared that all dealers doing business in Storm Lake who had theretofore engaged in the purchase of butter from the farmers of the surrounding country entered into a contract with plaintiff to the effect that they would discontinue such business, and give plaintiff sole and exclusive control thereof. Here was an interest common to all the farmers residing within the trade circle of Storm Lake, and the court held that the contract was void as against public policy, for the reason that the direct tendency and effect thereof was to create



a monopoly. But to our minds the reasoning which proves satisfactory in such cases loses quite all its force when applied to a case where, as for illustration, two out of one hundred or one thousand shirt dealers agree between themselves, upon a sufficient consideration, and without any purpose to control the trade generally, that the one will not engage in business in competition with the other. And this more especially where one sells out his business, including the goodwill <sup>660</sup> thereof, to the other. In such cases the interest of the general public, from a trade standpoint, is infinitesimal. We have simply the substitution of one tradesman for another.

In giving application to the present day doctrine, it has been said that the true test is whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. And the restriction must be reasonable, not oppressive, or out of proportion to the benefits which the vendee may, in reason, expect to flow from the restrictive features of the contract. In *Hubbard v. Miller*, 27 Mich. 15, 15 Am. Rep. 153, it is said: "If, considered with reference to the situation, business and objects of the parties, and in the light of all the surrounding circumstances with reference to which the contract was made, the restraint contracted for appears to have been for a just and honest purpose, for the protection of the legitimate interests of the party in whose favor it is imposed, reasonable as between them and not specially injurious to the public, the restraint will be held valid." And this language is quoted approvingly in *Hedge v. Lowe*, 47 Iowa, 137. Now, whether a contract is reasonable in respect of the length of time during which the restriction is to run, and in respect of the scope of territory which is to be covered thereby, as applied to a case like the one before us, it would seem that the fair and full protection of the business and goodwill which the vendee has purchased and paid for may well be accepted as the test. Certainly, the restriction ought not to be wider in the scope of its operation, and there can be no good reason for confining it to any narrower limits. It follows naturally that each case must be governed in the main by its own facts. Take, for instance, the case of *Hedge v. Lowe*, 47 Iowa, 137. There it appeared that Lowe had sold his stock of goods at Winterset to Hedge, and, in connection <sup>661</sup> therewith, had agreed that he would not engage in the same business at Winterset or vicinity for a period of five years. There was no suggestion

that the restriction as to time or territory was unreasonable, and such could not have been well urged, in view of the fact that the business was carried on at retail, and, of necessity, confined to the town where located and its vicinity; and five years was not thought an unreasonable time in which to enable the purchaser to convert the goodwill of the vendor into a goodwill personal to himself. But manifestly there are trades and employments which, from their nature, cannot be and are not confined to local limits. The business of a wholesale merchant in the city of Des Moines will serve to illustrate. His trade extends over the state as a whole, and mayhap into adjoining states. It certainly cannot be said that the goodwill of his business is limited to the city of Des Moines. On the contrary, it must be apparent that it extends as far as his trade extends. Now, there is no basis upon which to draw a distinction between the enforcement of the property right in the goodwill of a retail business at Winterset and the enforcement of the property right in the goodwill of a wholesale business at Des Moines, as the same actually exists. Nor are we persuaded that the welfare of the state is jeopardized in the one case more than in the other. The expatriation of the one is no different in character from that of the other, and the one is no more likely to become an idler or pauper than the other. Indeed, as we read the cases, the courts no longer attempt to fix geographical limits within which only contracts of the character in question can be enforced. And if such they ever had, the terms "general restraint of trade" and "partial restraint of trade" have no longer a territorial meaning. We think the subject may be disposed of by saying that in respect of time and territory, and in the absence of any affirmative showing that the public welfare is put in jeopardy, as that a monopoly <sup>662</sup> is created, or the like, the validity of all such contracts must be made to depend upon the question, as presented by each case, whether the restraint goes so far only as to reasonably insure to the purchaser the full enjoyment of the right purchased by him in good faith and for a good and valuable consideration. This view finds support in many of the reported cases. Among others, the following may be referred to: *Cowan v. Fairbrother*, 118 N. C. 406, 54 Am. St. Rep. 733, 24 S. E. 212; *Oregon Navigation Co. v. Winsor*, 20 Wall. 64; *Nordenfeldt v. Maxim*, 63 L. J. Ch. Div. 908; *Smalley v. Greene*, 52 Iowa, 241, 35 Am. Rep. 267, 3 N. W. 78; *Troendle v. Bender* (Iowa), 79 N. W. 1123. We are aware that there are cases in which a contrary doctrine is announced. We have

examined all those cited by counsel for appellee, and others as well, and we find nothing to disturb the conclusion as above expressed.

It follows from what we have said that, as matter of law, at least, the contract involved in this action cannot be held to be void as in general restraint of trade. The goodwill sold extended over the territory covered by the contract, and, in the absence of any showing, the time limit, as applied to the states of Iowa and Nebraska, cannot be said to be unreasonable. Even though the time limit as applied to the city of Des Moines and vicinity, may be said to be unreasonable, we cannot agree that this avoids the contract in its entirety; and, as the petition states a cause of action, the demurrer should have been overruled.

Reversed.

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*Contracts in Partial Restraint of Trade* are valid if founded upon a good consideration, and if they afford only reasonable protection to the interests of the parties in whose favor the restraint is imposed: Union Strawboard Co. v. Bonfield, 193 Ill. 420, 86 Am. St. Rep. 346, 61 N. E. 1038; Tuscaloosa Ice Mfg. Co. v. Williams, 127 Ala. 110, 85 Am. St. Rep. 125, 28 South. 669; Pohlman v. Dawson, 63 Kan. 471, 88 Am. St. Rep. 249, 65 Pac. 689; Lanzit v. Sefton Mfg. Co., 184 Ill. 326, 75 Am. St. Rep. 171, 56 N. E. 393; Harding v. American Glucose Co., 182 Ill. 551, 55 N. E. 577, 74 Am. St. Rep. 189, and note. Contracts in restraint of trade are not necessarily void by reason of universality of time or space. Their validity depends upon the reasonableness of the restrictions under the conditions of each case, and the test of reasonableness is the test of validity: Oakdale Mfg. Co. v. Garsh, 18 R. I. 484, 49 Am. St. Rep. 784, 28 Atl. 973; Cowan v. Fairbrother, 118 N. C. 406, 54 Am. St. Rep. 733, 24 S. E. 212; Trenton Potteries Co. v. Oliphant, 58 N. J. Eq. 507, 78 Am. St. Rep. 612, 43 Atl. 723.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**KANSAS**

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SWEDISH AMERICAN INSURANCE COMPANY v.  
KNUTSON.

[67 Kan. 71, 72 Pac. 526.]

**INSURANCE—Additional Waiver.**—A provision in an insurance policy and in the by-laws of the insurer, that procuring additional insurance on the insured property shall avoid the policy unless the written consent of the insurer shall be indorsed thereon, is waived by the failure of the insurer to cancel the policy or indorse its consent thereon within a reasonable time after notice to it of the additional insurance before the loss. (p. 384.)

**INSURANCE—Waiver of Conditions by Agents.**—There is no difference between mutual and stock insurance companies in respect to the power of officers or agents to waive provisions in their policies or by-laws. (p. 384.)

**INSURANCE—Instructions.**—Failure of the court to instruct the jury with reference to a certain provision in an insurance policy is not error when the record fails to show affirmatively that such provision was brought to the attention of the court before the submission of the case. (p. 385.)

Grattan & Grattan, for the plaintiff in error.

Z. C. Millikin, for the defendant in error.

**72 BURCH, J.** A plaintiff brought suit on an insurance policy containing a provision that if the assured should have at the date of the policy, or should thereafter obtain, any other policy or agreement for insurance, whether valid or not, on the property covered, or any part thereof, the policy should become void, unless consent to such additional insurance should be indorsed in writing by the company on the policy. It was issued by a mutual company, organized under the laws of this state,

and the by-laws thereof attached to the policy contained the following provision: "Property insured in this company shall not be insured in any other fire insurance company without the permission of the board of directors and it be so noted in the policy. Any violation of this rule shall render the policy null and void."

The company answered that these provisions of the policy and by-laws had been violated. The plaintiff replied, admitting the additional insurance, and alleging as a waiver that due notice thereof had been given to the company, but that no objection to such additional insurance had been made, and no steps taken to cancel or terminate the policy by the company. On the trial the plaintiff produced the testimony <sup>73</sup> of two witnesses to the effect that notice of the additional insurance had been given by a postal card, duly stamped, mailed, and directed to the defendant's secretary at his official postoffice address. The secretary denied the receipt of this card. The court instructed the jury that if it should find from the evidence that after the additional insurance was obtained the plaintiff wrote and mailed the card, as claimed, then, in the absence of evidence to the contrary it should be presumed the card was received by the defendant at its place of business. At the request of the defendant special questions were asked, and answers returned as follows: "Did the plaintiff before the fire notify the defendant that he had taken out other insurance on the wheat? A. Yes. If you answer question 1 that plaintiff notified the defendant, what did the plaintiff do to notify the defendant? A. Sent postal card. Did the defendant ever receive the notice before the fire? A. Yes. If you answer that the defendant received the notice prior to the fire, state the name of the person who received it, and where it was received. A. Goodholm, secretary Swedish American Insurance Company, at Lindsborg, Kansas."

The company claims that since the officer in charge of the company's business at Lindsborg, the place to which the card was addressed, testified that he did not receive it, there was evidence contradicting the receipt of the card, and the jury were not authorized to find that the card had reached its destination from presumption alone. However this may be, the jury were not left to rely on presumption. The secretary himself testified that he did have information that the additional insurance had been taken out. He gave <sup>74</sup> as the source of such information a certain letter which he produced, but the letter contained



no reference to the matter of additional insurance, and nothing whatever from which any information relating thereto could, by any possibility, be derived. Therefore, the jury were authorized to find that the secretary had been notified in the manner claimed by the plaintiff from the testimony of these two men, without the aid of the presumption.

The company claims that, even though it received proper notice of the additional insurance, it did not indorse its consent thereto upon the policy, and hence that the policy was void. Some two months elapsed from the giving of the notice until the loss occurred. Upon receiving the notice the company had a right to take advantage of the provisions of its policy and by-laws. The provisions quoted therefrom were inserted for its sole benefit. When it assumed to remain passive the assured was deprived of any opportunity to protect himself if the policy were to be forfeited. The term "void," as used in the contract, is to be regarded as meaning that the insurer had, at its exclusive option, the right to treat the policy as a nullity. It was put to its election whether or not it would do so upon receipt of the notice, and having failed to act within a reasonable time, it is estopped to claim a forfeiture when it became to its advantage to do so, after loss had occurred: *Home Ins. Co. of New York v. Marple*, 1 Ind. App. 411, 27 N. E. 633; *Phoenix Ins. Co. v. Holcombe*, 57 Neb. 622, 73 Am. St. Rep. 532, 78 N. W. 300; *Phoenix Ins. Co. v. Spiers & Thomas*, 87 Ky. 285, 8 S. W. 453; *Planters' Mut. Ins. Co. v. Lyons*, 38 Tex. 253; *Grubbs v. North Carolina Home Ins. Co.*, 108 N. C. 472, 23 Am. St. Rep. 62, 13 S. E. 236; *Pelkington v. National Ins. Co.*, 55 Mo. 172; *Wilson* <sup>75</sup> *v. Mutual Fire Ins. Co.*, 174 Pa. St. 554, 34 Atl. 122; *Phoenix Ins. Co. v. Johnston*, 143 Ill. 106, 32 N. E. 429; *Orient Ins. Co. v. McKnight*, 197 Ill. 190, 64 N. E. 339; *Wakefield v. Orient Ins. Co.*, 50 Wis. 532, 7 N. W. 647.

It is claimed, however, that because the company is organized on the mutual plan it is not estopped by the conduct of its officers. The better rule is that there is no distinction between mutual and stock companies in respect to the power of officers and agents to waive the provisions of their policies and by-laws: *Pratt v. Dwelling-house etc. Ins. Co.*, 130 N. Y. 206, 29 N. E. 117; *Conductors' Benefit Assn. v. Tucker*, 157 Ill. 194, 42 N. E. 398, 44 N. E. 286; *Wilson v. Mutual Fire Ins. Co.*, 174 Pa. St. 554, 34 Atl. 122; *Susquehanna etc. Ins. Co. v. Elkins*, 124 Pa. St. 484, 10 Am. St. Rep. 608, 17 Atl. 24; *Redstrake v.*

Cumberland Ins. Co., 44 N. J. L. 294; Towle v. Ionia etc. Ins. Co., 91 Mich. 219, 51 N. W. 987.

The proof was ample that under the peculiar organization of the defendant company the secretary to whom the notice of additional insurance was mailed was so far intrusted with the management of its business that his conduct was binding upon it. The question of his authority was submitted to the jury, under a proper instruction, and a verdict thereon is conclusive.

The court instructed the jury that, should they find for the plaintiff, he was entitled to recover the full amount of the insurance on the property covered by the policy. The policy contained a provision that it should prorate with other insurance, and hence it is claimed the instruction given is erroneous. The answer was framed on the theory that the policy was utterly void, and neither disclosed the amount of the subsequent insurance nor asked that the policy in <sup>76</sup> suit prorate with it. The reply admitting the subsequent insurance did not disclose the amount of it. It is true that on the trial the amount of the subsequent insurance was incidentally shown to be one thousand dollars, but to the end of the trial the theory of the defense, so far as the record discloses, was that there could be no recovery whatever. The instructions asked by the defendant, and the special questions which it propounded to the jury, were framed on that theory. No instruction or finding whatever was asked relating to the prorating of the two policies. Hence the record utterly fails to show that the question now raised was brought to the attention of the court at any time during the progress of the trial. The court was not bound to search some thirty-five provisions of the policy and by-laws printed in small type to find a provision beneficial to the defendant which was not referred to in the pleadings, and to which attention was not directed by a proper request for an instruction. Failure to do so was not error. And even though the matter may have been presented upon the motion for a new trial, that motion related merely to errors occurring at the trial, and hence the question was raised too late.

It is very earnestly contended that the court erred in submitting other questions of waiver to the jury and in its instructions relating to them. Even if this be true, the judgment cannot be reversed on that account, since by the special findings of the jury one substantial ground of waiver was properly established, and that is sufficient to uphold the action of the trial court.

Other assignments of error are unsubstantial, and the judgment is affirmed.

All the justices concurring.

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*If an Insurance Policy* provides that the taking of additional insurance without the written consent of the company shall render the policy void, but the company has notice that this condition has been violated, it is estopped, by thereafter collecting further premiums, from treating the policy as void: *Lutz v. Anchor Fire Ins. Co.*, 120 Iowa, 136, 98 Am. St. Rep. 349, 94 N. W. 274. See, too, *Phenix Ins. Co. v. Holcombe*, 57 Neb. 622, 73 Am. St. Rep. 532, 78 N. W. 300; *Grubbs v. North Carolina Home Ins. Co.*, 108 N. C. 472, 23 Am. St. Rep. 62, 13 S. E. 236; *Kahn v. Traders' Ins. Co.*, 4 Wyo. 419, 62 Am. St. Rep. 47, 34 Pac. 1059.

*That the Officers of Mutual Insurance Companies* may waive conditions in contracts of insurance see *McBryde v. South Carolina Mut. Ins. Co.*, 55 S. C. 589, 74 Am. St. Rep. 769, 33 S. E. 729; *McQuillan v. Mutual Reserve etc. Assn.*, 112 Wis. 665, 88 Am. St. Rep. 986, 87 N. W. 1069, 88 N. W. 925; *Susquehanna Mut. Fire Ins. Co. v. Elkins*, 124 Pac. 484, 10 Am. St. Rep. 608, 17 Atl. 24. But see *Kocher v. Supreme Council etc.*, 65 N. J. L. 649, 86 Am. St. Rep. 687, 48 Atl. 544, 52 L. R. A. 861.

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## HARRISON v. HENDERSON.

[67 Kan. 194, 72 Pac. 875.]

**ACCORD AND SATISFACTION** is the settlement of a disagreement as to what is due from one person to another and the payment of the amount agreed upon. (p. 387.)

**ACCORD AND SATISFACTION.**—To **Constitute** an accord and satisfaction, dependent upon the offer of the payment of money, it is necessary that the money be offered in full satisfaction of the demand of the creditor, and be accompanied by such acts or declarations as amount to a condition that if the money is accepted it is to be in full satisfaction, and be of such character that the creditor is bound so to understand the offer. (p. 388.)

**ACCORD AND SATISFACTION**—"Balance."—Payment by a debtor of a "balance" upon an account rendered and its retention by the creditor, do not constitute an accord and satisfaction. (p. 389.)

**ACCORD AND SATISFACTION.**—Simple Tender of a "Balance" as shown by an account rendered to the debtor, does not carry with it an implication or conclusion that by such tender the debtor paid, or that the creditor agreed to receive, that amount in full of the amount due, when there has been no prior disagreement or discussion as to what was actually due. Hence, such tender does not constitute an accord and satisfaction. (p. 389.)

T. W. Harrison, Welch & Welch, and D. T. Gregg, for the plaintiff in error.

A. F. Williams and E. Hagan, for the defendant in error.

**197** CUNNINGHAM, J. There are two questions raised by the plaintiff in error. The first is on the facts, it being claimed that the report of the referee and judgment of the district court are not binding upon this court; that, as all of the evidence introduced before the referee is in the record here, we may look into it as though we were trying the case *de novo*, and that upon doing so we will come to a conclusion different from that of the referee and trial court. Granting that the findings of the referee and their approval by the district court are not binding here, we have looked into the evidence enough to enable us to conclude that the findings are fully warranted thereby and are such as meet with our approval.

The main contention in the case is that there was an accord upon, and a satisfaction of, the demands arising between the parties in this case; that inasmuch as the account submitted on the tenth day of March, 1898, struck what was denominated therein as a "balance," and as the indorsement upon the draft indicated that it was for such "balance," and as the letter accompanying the same contained the suggestion that a "balance" was therein remitted, as a matter of law Henderson could not accept such draft under these circumstances and afterward claim a further payment. An accord is an agreement, an adjustment a settlement of former difficulties, and presupposes a difference, a disagreement, as to what is right. A satisfaction, in its legal significance in this connection, is a performance of the terms of the accord; if such terms require a payment of a sum of money, then that such payment has been made.

In this case there is no evidence of any disagreement **198** between the parties prior to the sending of the account and remittance accompanying it. Plaintiff in error contends, however, that because such remittance was denominated a "balance" its acceptance constituted an accord and satisfaction, and cites a number of authorities where courts have held that a remittance made as a "balance" and the acceptance of the same amounted to an accord and satisfaction. These cases have all been carefully examined and in every one there appears to have been a prior disagreement, a contention as to what amount was due, so that a remittance, being denominated a "balance," carried with it to the creditor, as a fair conclusion that it was intended by the debtor to be in full of all demands. Without the requirement being made by the debtor that if the creditor accepts and retains the proffered amount he must do so in full satisfaction of his demand, or without accompanying and sur-



rounding circumstances fairly indicating that such was the purpose and object of the debtor in making the remittance, a creditor cannot be said so to have accepted a payment. To constitute an accord and satisfaction in law, dependent upon the offer of the payment of money, it is necessary that the money be offered in full satisfaction of the demand or claim of the creditor, and be accompanied by such acts or declarations as amount to a condition that if the money be accepted it is to be in full satisfaction, and to be of such character that the creditor is bound so to understand such offer. In *Kingsville Preserving Co. v. Frank*, 87 Ill. App. 586, it was held: "To constitute an accord and satisfaction of a claim unliquidated and in dispute, it is necessary that the money should be offered in satisfaction of the claim, and the offer accompanied with such acts and declarations as amount to a condition that if the money is accepted it is to be in satisfaction, and such that the <sup>199</sup> party to whom it is offered is bound to understand therefrom that if he takes it he takes it subject to such condition."

In *Pottlitzer v. Wesson*, 8 Ind. App. 472, 35 N. E. 1030, a debtor sent his check in payment of an account. It was held that this did not necessarily imply that if the creditor accepted the check he must have understood that his accepting it was in full of his claim; hence there was no accord and satisfaction thereby shown. In *Perkins v. Headley*, 49 Mo. App. 556, it was held: "Where a controversy as to the amount of the indebtedness exists between a creditor and his debtor, and the debtor tenders to the creditor the amount which he claims is due on condition that the acceptance of it should discharge the entire demand, the acceptance will constitute an accord and satisfaction as a matter of law, since one who accepts a conditional tender assents to the condition."

But it was held in this case: "The mere fact that the plaintiff received from defendants less than the amount of his claim in silence, and with knowledge that defendants claimed to be indebted to him only to the extent of the payment made, did not conclusively and as matter of law establish an accord and satisfaction."

In *Beckman v. Birchard*, 48 Neb. 805, 67 N. W. 784, where a payment of money was made as a balance due and the claim made that this was an accord and satisfaction, it was held: "A creditor who accepts money tendered by the debtor unconditionally does not by that act estop himself from maintaining an action to recover any further sum that may be due." In *Kruger*

v. Greer, 26 Misc. Rep. 772, 56 N. Y. Supp. 1015, an attorney wrote to his client: "Inclosed you will find a statement of account, my receipted bill for professional <sup>200</sup> services since our last settlement, and a check for one hundred and sixty-six dollars and eighty-six cents, being the balance due you." No other indication being found that this was intended as full settlement, the court held: "The fact that plaintiff retained the check and the receipted statement, where the check contained no condition that it should be received in full payment, is insufficient to show an accord and satisfaction." It was ruled in *Brigham v. Dana*, 29 Vt. 1: "A sum of money paid and received will not operate as a full settlement although the payer so intended it, and would not have paid it if he had not understood that such would be its effect, but in reference to which he made no such express condition, if the payee did not so understand it, and would not have received it upon such an understanding": See, also, 1 Cyc. 332.

An accord and satisfaction is the result of an agreement between the parties, and, like all other agreements, must be consummated by a meeting of the minds of the parties, accompanied by a sufficient consideration. If the creditor is to be held to abate his claim against the debtor, it must be shown that he understood that he was doing so when he received the claimed consideration therefor. A simple tender of a "balance" as shown by an account tendered by the debtor does not carry with it an implication or conclusion that by such tender the debtor paid, or that the creditor agreed to receive the same in full of the amount due, where there has been no prior disagreement or discussion as to what was actually due. Surely it cannot be claimed that such was the condition in the case at bar. It was shown in the evidence that the administrator had no knowledge of fees properly chargeable by attorneys in this state for services rendered, or that he even knew of the character <sup>201</sup> and extent of the services which had been rendered. The sender of the check did not require its acceptance in full of all demands upon him as a condition precedent to its acceptance. The circumstances better warrant the conclusion that the sender was saying: "In my judgment these fees charged are correct, and a proper remuneration for the services which I have rendered, and, in accordance with this view, the amount sent you is the balance that is due. If, however, after you have investigated you do not so conclude, we will hereafter have an adjustment of any difference that may then arise"; rather than: "I will

give you no opportunity whatever to inquire as to the correctness of the charges I have made, and if you accept the draft it must foreclose all question." The former view is most just to the plaintiff in error, and it is the position that an honorable and fair-minded attorney would take. Under our statute he at best was only entitled to a lien upon the moneys which had come into his hands by virtue of his employment, to secure his properly charged fees. It was his duty to remit at once all such moneys less only such properly charged fees, if indeed, we may make this concession. He could not be permitted to charge extortionate fees, remit the "balance" as per his conclusion, and estop his client thereby.

We are fully persuaded that in this case there was no accord and satisfaction, and that the defendant in error is entitled to recover the amount found due by the referee. The judgment of the district court will be affirmed.

All the justices concurring.

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### ACCORD AND SATISFACTION.

#### Scope of Note.

- I. General Nature of an Accord and Satisfaction.
  - a. Definition.
  - b. As Distinguished from Novation.
  - c. As Distinguished from Payment or Performance.
  - d. As Distinguished from Compromise.
  - e. As Distinguished from Composition.
  - f. As Distinguished from Release.
- II. Persons Between Whom Allowable.
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  - b. One of Several Joint Debtors, Creditors or Wrongdoers.
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    2. Joint Tort-feasors.
    3. Joint Creditors.
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    3. Husband as Representing Wife.
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- III. Matters or Claims Subject to an Accord and Satisfaction.
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- A. In General.
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- D. Acceptance of Money or Check "in Full" as Accord.
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    - J. Waiver of Rights by Either Debtor or Creditor.
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- e. Necessity for Both Accord and Satisfaction.
  - 1. Necessity for Satisfaction.
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  - 3. Time for Making Satisfaction.
  - 4. What Constitutes Satisfaction.
  - 5. Effect of Tendering Satisfaction.

#### Scope of Note.

This note will treat only of the substantive features of the law of accord and satisfaction, and will not attempt to go into the subject in so far as it relates to the construction of specific agreements for an accord and satisfaction or as to specific acts which are evidence thereof or as to the manner of pleading or proving an accord and satisfaction.



### I. General Nature of an Accord and Satisfaction.

a. **Definition.**—As a general rule the courts in giving definitions of any particular phase of the law do so with a view to the particular case at bar, and hence many of the definitions of an accord and satisfaction set forth in the decisions have not been comprehensive enough to include all the conditions under which an accord and satisfaction may exist. The statement by Blackstone (3 Blackstone's Commentaries, 15) that an "accord is a satisfaction agreed upon between the party injuring and the party injured which when performed is a bar to all actions upon this account" has been frequently approved by the courts as a satisfactory definition: *Mitchell v. Hawley*, 4 Denio, 418, 47 Am. Dec. 260; *Rorer Iron Co. v. Trout*, 83 Va. 397, 5 Am. St. Rep. 285, 2 S. E. 713; *Sieber v. Amunson*, 78 Wis. 682, 47 N. W. 1126. In the recent case of *Perin v. Catheart*, 115 Iowa, 557, 89 N. W. 12, the court said: "An accord and satisfaction is an executed agreement whereby one of the parties undertakes to give, and the other to accept, in satisfaction of a claim arising either from contract or tort, something other or different from what he is, or considers himself entitled to." In *Pulliam v. Taylor*, 50 Miss. 257, the court said: "Accord and satisfaction is the substitution of another agreement between the parties in satisfaction of the former one, and an execution of the latter agreement. Such is the definition of this sort of defense, usually given. But a broader application of the doctrine has been made in later times, where one promise or agreement is set up in satisfaction of another. The rule is, that an agreement or promise of the same grade will not be held to be in satisfaction of a prior one, unless it has been expressly accepted as such. As where a new promissory note has been given in lieu of a former one, to have the effect of a satisfaction of the former, it must have been accepted on an express agreement to that effect." And in *Bull v. Bull*, 43 Conn. 462, the court said: "An accord and satisfaction may be briefly defined as 'the settlement of a dispute or the satisfaction of a claim, by an executed agreement between the party injuring and the party injured,' or, to give a definition indicating more definitely its peculiar nature, it is 'something of legal value to which the creditor before had no right, received in full satisfaction of the debt, without regard to the magnitude of the satisfaction': 1 Smith's Leading Cases, 10th Am. ed., p. 558." Thus, it will be seen that some of the definitions are based on the theory that an accord and satisfaction is only applicable where a contract exists and eliminate its application to the settlement of a debt before it has become due, or the settlement of the damages arising from a tort. But it seems to us from the cases just cited, and from the various applications of the defense of accord and satisfaction, which will be adverted to later on in this note, that it might be said, that an accord and satisfaction is a method of discharging a contract or settling a cause of action, arising either from a contract or a tort by substituting for

such contract or cause of action an agreement for the satisfaction thereof, and an execution of such substituted agreement.

**b. As Distinguished from Novation.**—In *McDonnell v. Alabama Gold Life Ins. Co.*, 85 Ala. 414, 5 South. 120, it was said that: “A novation, under the rules of the civil law, whence the term has been introduced into the modern nomenclature of our common-law jurisprudence, was a mode of extinguishing one obligation by another—the substitution, not of a new paper or note, but of a new obligation, in lieu of an old one; the effect of which was to pay or dissolve, or otherwise discharge it”; also citing *Parsons on Contracts*, 217; *Butterfield v. Hartshorn*, 26 Am. Dec. 714; *Bonnemer v. Negrete*, 35 Am. Dec. 217. See, also, *Hobson v. Davidson’s Syndic*, 8 Mart. (La.) 422, 13 Am. Dec. 294, where the principle of the civil law was applied to renewal notes taken by an agent. So also, in the recent case of *Netterstrom v. Gallistrel*, 110 Ill. App. 352, it was held that a novation is the extinguishment of one obligation and the creating of another. Thus, it will be seen that an accord and satisfaction when it consists in the substitution of a new contract for the old one and the substituted contract is accepted, without performance as a satisfaction of the old contract, is a novation: *Allison v. Abendroth*, 108 N. Y. 472, 15 N. E. 606. Some of the courts treat such novations as an accord and satisfaction, while others draw a distinction by holding that an execution of the terms of the accord is necessary in order to constitute the transaction an accord and satisfaction. The subject will be dwelt upon further in a subsequent part of this note.

**c. As Distinguished from Payment or Performance.**—In its most restricted sense, a payment is the discharge in money of a sum due, but in the most general acceptance of the term, it is the fulfillment of a promise, the performance of an agreement, or the accomplishment of every obligation, whether it consists in giving or in doing. The word is not a technical term, it having been imported into law proceedings from the exchange and not from the law treatises: *Bouvier’s Law Dictionary*, 311. In *Manice v. Hudson River R. Co.*, 3 Duer, 441, it was said: “The term ‘payment’ in its legal import means the full satisfaction of a debt by money, not by an exchange or compromise, or an accord and satisfaction, and it is only where the words used in connection with it plainly manifest a different intention that the legal import of the term can be rejected.”

The main distinction would seem to consist in this, that by payment is generally understood a discharge by a compliance with the terms of the obligation, or its equivalent, while in an accord and satisfaction the discharge is effected by the performance of terms other than originally agreed upon. Thus, it was held in *Franklin Fire Ins. Co. v. Hamill*, 5 Md. 170, that an accord and satisfaction is something other than a strict performance or payment; that it was the doing by the covenantor of that which the covenantee accepts in lieu of a performance of the terms of the covenant.

**d. As Distinguished from Compromise.**—A compromise is the yielding of something by each of two parties and can exist only when something is yielded by each party to it: *Bellows v. Sowles*, 55 Vt. 399, 45 Am. Rep. 291; and of course, the prevention of litigation is a sufficient consideration for a compromise: *Treitschke v. Western Grain Co.*, 10 Neb. 360, 6 N. W. 427. A compromise is based upon a disputed claim, while an accord and satisfaction may be had as to a claim which is not disputed, as we shall see by a reference to the subject in subsequent sections.

**e. As Distinguished from Composition.**—A composition is defined as an agreement between an insolvent or embarrassed debtor and his creditors, whereby the creditors in consideration of an immediate payment agree to accept a dividend less than the whole amount of their claims, to be distributed pro rata, in discharge and satisfaction of the whole debt: *Continental Nat. Bank v. McGeoch*, 92 Wis. 310, 66 N. W. 606; whereas an accord and satisfaction is an agreement between the debtor and a single creditor, requiring an extraneous consideration, and which when applied to a liquidated debt will not operate as a discharge of it by a mere partial payment: See *Wilson v. Samuels*, 100 Cal. 514, 35 Pac. 148; *Bailey v. Boyd*, 75 Md. 125; *Newell v. Higgins*, 55 Minn. 82, 56 N. W. 577; *White v. Kuntz*, 107 N. Y. 518, 1 Am. St. Rep. 886, 13 N. E. 423; *Crawford v. Krueger*, 201 Pa. St. 348, 50 Atl. 931.

**f. As Distinguished from Release.**—A release is said to be a discharge of a debt by act of the party: *Baker v. Baker*, 28 N. J. L. 20, 75 Am. Dec. 243. One of the requisites seems to be that it shall be under seal: *Kirchner v. New Home Sewing Machine Co.*, 135 N. Y. 188, 31 N. E. 1104; *Buck v. Kittle's Estate*, 49 Vt. 291; whereas, as we have seen, an accord and satisfaction need not be evidenced by any formal instruments.

## II. Persons Between Whom Allowable.

**a. Strangers to the Transaction.**—The decisions as to whether an accord and satisfaction can be made with one who is a stranger to the transaction to which it relates are not harmonious, one line of decisions holding that such an accord and satisfaction is good, while another holding it not to be, and still another holding that it will be good if authorized or ratified. The subject of accord and satisfaction being in many of its aspects quite technical and founded more upon authority than upon logical reasoning, the courts have justified their various holdings by the citation of the English authorities and some of the earlier American decisions. In the very recent case of *Jackson v. Pennsylvania R. R. Co.*, 66 N. J. L. 323, 49 Atl. 730, 55 L. R. A. 87, the English authorities and also the leading American decisions on the subject were reviewed in the following language: "It remains to consider the real question in controversy which is to the effect of an accord and satisfaction entered into, not with the person

against whom a claim is asserted, but with a third person. In this case the third person is a corporation, which, between itself and the person against whom the claim is asserted, has made itself primarily liable by an agreement undisclosed to the claimant. An early authority as to accord and satisfaction with a third person is *Grymes v. Blofield*, Cro. Eliz. 541, which reads as follows: 'Debt upon an Obligation of 20 pounds. The Defendant pleads. That J. S. surrendered a Copy-hold Tenement to the use of the plaintiff in satisfaction of that 20 pounds, which the Plaintiff accepted, etc. And it was thereupon demurred. Popham and Gawdy held it to be no plea; for J. S. is a meer stranger, and in [no] sort privy to the Conditions of the Obligation; and therefore, satisfaction given by him is not good: Vide, 36 H. 6; Barr. 166; 7 H. 4, pl. 31. Afterward, Pasch. 31 Eliz. by Popham, and Clench, *Caeteris justiciariis absentibus*, it was adjudged for the plaintiff.' In *Edgecombe v. Rodd*, 1 Smith, 515, reported also in 5 East, 294, the case of *Grymes v. Blofield* was discussed, Mr. Justice Lawrence remarking that it was quite unreasonable to doubt the authority of that case. In *Jones v. Broadhurst*, 9 Com. B. 193, Mr. Justice Creswell commented upon *Grymes v. Blofield*, and pointed out its inconsistency with an earlier case which is thus stated in Fitz. Abr., tit. 'Barre,' pl. 166 (Hilary, 36 H. of L. 6): 'If a stranger doth trespass to me and one of his relations, or any other gives anything to me for the same trespass, to which I agree, the stranger shall have an advantage of that to bar me; for, if I be satisfied, it is not reason that I be again satisfied. Quod tota curia concessit.' A course of decisions ensued, which Baron Parke summed up in *Simpson v. Eggington*, 10 Ex. 844, in the following words: 'The general rule as to payment or satisfaction by a third person, not himself liable as a cocontractor or otherwise has been fully considered in the cases of *Jones v. Broadhurst*, 9 Com. B. 193, *Belshaw v. Bush*, 11 Com. B. 191, and *James v. Isaacs*, 22 L. J. C. P. 73; and the result appears to be that it is not sufficient to discharge a debtor unless it is made by a third person, as agent for and on account of the debtor, and with his prior authority or subsequent ratification. In the first of these cases, in an elaborate judgment delivered by Mr. Justice Creswell, the old authorities are cited, and the question whether an unauthorized payment by and acceptance in satisfaction from a stranger is a good plea in bar is left undecided. It was not necessary for the decision of that case. In *Belshaw v. Bush*, it was decided that a payment by a stranger considered to be for the defendant and on his account, and consequently ratified by him, is a good payment; and in the last case of *James v. Isaacs*, a satisfaction from a stranger, without the authority, prior or subsequent, of the defendant was held to be bad. We consider, therefore, the law as fully settled by these cases.'

"The English cases justify the observation of Mr. Justice Wales, in *Snyder v. Pharo*, 25 Fed. 398 (at p. 401), that none of the later decisions adhere with any strictness to the rule laid down in *Grymes*



v. Blofield, and that it is evident from an examination of them that a plea of satisfaction by a stranger, when properly averred, would be held good.

“In the United States the case of *Grymes v. Blofield* has been, to some extent, followed, notably in the state of New York. The earliest case is *Clow v. Borst*, 6 Johns. 37, which, like *Grymes v. Blofield* arose upon a point of pleading. It was there held, on demurrer, in an action of covenant that a plea of the acceptance of a satisfaction by the plaintiff from a third person or stranger is not good. This case was followed in *Daniels v. Hallenbeck*, 19 Wend. 408, *Bleakley v. White*, 4 Paige, 654, *Atlantic Dock Co. v. New York*, 53 N. Y. 64, and *Muller v. Eno*, 14 N. Y. 597, 605. To the same effect is *Armstrong v. School District*, 28 Mo. App. 169. These cases are not, on the whole, inconsistent with the idea that this defense may be made if it be properly pleaded. The tendency of the American decisions is strongly in favor of supporting a satisfaction moving from a third person when such person either had authority to make it or the act was followed by ratification and the article in satisfaction was retained. In *Leavitt v. Morrow*, 6 Ohio St. 71, 67 Am. Dec. 334, the supreme court of Ohio (Chief Justice Bartley reading the opinion), held, after a vigorous discussion of the doctrine, that an accord with, and satisfaction coming from, a stranger having no pecuniary interest in the subject matter are, if accepted in discharge of the debt, a perfect defense to a subsequent action against the debtor. Another valuable case is *Snyder v. Pharo*, 25 Fed. 398, 401, where, in an opinion written by Mr. Justice Wales, all the leading cases are cited. The head-note reads as follows: ‘Satisfaction of a debt by the hands of a stranger is good when made by the authority of, or subsequently ratified by, the defendant. The fact of pleading, it will be sufficient evidence of ratification.’ In the note to *Cumber v. Wane*, 1 Smith’s Lead. Cas., 9th ed., 624, the same conclusion is reached. The reason of the rule is simple. On the one hand, no party can be deprived of a right by mere payment by a volunteer. On the other hand, since a party is entitled to only one satisfaction, his acknowledgment that he has received it, and his retention of it, operate to extinguish his right. As was said in *Henshaw v. Rawlings*, 1 Strange, 23: ‘Although payment by a stranger be not a legal discharge, yet acceptance in satisfaction is.’ In 2 *Parsons on Contracts*, eighth edition, 688, the same rule is stated, with the remark that the defense is clearly available when the debtor and the stranger are principal and agent. In 2 *Chitty on Contracts*, eleventh edition, 1133, this is said to be the correct doctrine. This is true, because the nature of the relation of principal and agent is such that proof of its existence necessarily shows that the person against whom the claim is asserted has made the accord and satisfaction his own.” Hence we see that the rule laid down by the case just quoted from is that an accord and satisfaction made by a third person to the subject matter is available in bar of an action on the

subject matter if the defendant had either authorized or ratified the settlement.

In *Crumlish v. Central Imp. Co.*, 38 W. Va. 396, 45 Am. St. Rep. 872, 18 S. E. 456, 23 L. R. A. 120, the court also reviewed the English authorities and the early New York cases. In reviewing the later American cases, the court said: "It was held in *Harrison v. Hicks*, 1 Port. (Ala.) 423, 27 Am. Dec. 638, 'that payment of a debt, though made by one not a party to the contract, and though the assent of the debtor to the payment does not appear, is still the extinguishment of the demand.' The opinion says that, as between the person paying and him for whose benefit it was paid, a question might arise whether it was voluntary, which would depend on circumstances of previous request or subsequent, express or implied. This doctrine is sustained by *Martin v. Quinn*, 37 Cal. 55; *Gray v. Herman*, 75 Wis. 453, 44 N. W. 248, 6 L. R. A. 691; *Cain v. Bryant*, 12 Heisk. 45; *Leavitt v. Morrow*, 6 Ohio St. 71, 67 Am. Dec. 334; *Webster v. Wyser*, 1 Stew. (Ala.) 184; *Harvey v. Tama Co.*, 53 Iowa, 228, 5 N. W. 130. Bishop on Contracts, section 211, holds that if payment 'be accepted by a creditor in discharge of debt, it has that effect': See 2 Wharton on Contracts, sec. 1008.

"It seems utterly unjust and repugnant to reason that a creditor accepting payment from a stranger of the third person's debt should be allowed to maintain an action against the debtor pleading and thereby ratifying such payment, on the technical theory that he is a stranger to the contract. The creditor has himself for this purpose allowed him to make himself a quasi party, and consents to treat him so, so far as payment is concerned. To regard the debt paid, so far as he is concerned, is but to hold him to the result of his own act. Shall he collect the debt again? In that case can the stranger recover back? What matters it to the creditor who pays? As the supreme courts of Wisconsin and Ohio in cases above cited said, this doctrine is against common sense and justice. It does not at all infringe the rule that one cannot, at law, make another his debtor without request to allow such payment to satisfy the debt as to the creditor; and this court, while recognizing the rule that one cannot officiously pay the debt of another and sue him at law, unless he has ratified it, by allowing the stranger to go into equity and get repayment, makes the payment in the eyes of a court of equity operate to satisfy the creditor, and render the stranger a creditor of the debtor: *Neeley v. Jones*, 16 W. Va. 625, 37 Am. Rep. 794. I know that in that case it is held that, if a payment by a stranger is neither ratified or authorized by the debtor, it will not be held to be a discharge of the debt; but, though this point is general, that was a case of the stranger seeking to make the debtor repay, and the case and opinion intended to lay down the rule at law only as between the stranger paying and the debtor, not as between the creditor and debtor, so I hold that, when Jamison & Co. received the money for this judgment, it operated as a discharge as to them."

So, also, in *Bennett v. Hill*, 14 R. I. 323, the court, after reviewing the early English and New York authorities, said: "But the better doctrine is that satisfaction by a stranger, made for or on account of the debtor and adopted by the debtor, is good"; citing among other cases, *Webster v. Wyser*, 1 Stew. 184; *Harrison v. Hicks*, 1 Port. 423, 27 Am. Dec. 638; *Leavitt v. Morrow*, 6 Ohio St. 71, 67 Am. Dec. 334; *Schmidt v. Ludwig*, 26 Minn. 85, 1 N. W. 803; and then continuing the court said: "It is not necessary that the debtor should have formally adopted the satisfaction before pleading it; the plea itself is an adoption: *Belshaw v. Bush*, 11 Com. B. 190, 207; *Walter v. James*, L. R. 6 Ex. 124, 127. We do not think that any request from the plaintiff to Burrough need be alleged. It is enough that the plaintiff accepts the satisfaction as shown by his replication."

In *Clark v. Abbott*, 53 Minn. 90, 39 Am. St. Rep. 577, 55 N. W. 542, the court said: "When one, not the debtor nor under any legal or moral obligation to pay a debt, agrees to pay, and does pay, a sum less than the whole debt, in consideration of an agreement on the part of the creditor to satisfy and discharge the whole, no action will lie against the debtor to recover the balance of his indebtedness: See *Sonnenberg v. Riedel*, 16 Minn. 83; *Mason v. Campbell*, 27 Minn. 54, 6 N. W. 405; *Schmidt v. Ludwig*, 26 Minn. 87, 1 N. W. 803; *Laboyteaux v. Swigart*, 103 Ind. 596, 3 N. E. 373; *Varney v. Conery*, 77 Me. 527, 1 Atl. 683; *New York State Bank v. Fletcher*, 5 Wend. 85; *Brooks v. White*, 2 Met. 283, 37 Am. Dec. 95; *Welby v. Drake*, 1 Car. & P. 557; *Henderson v. Stobart*, 5 Ex. 99."

In *Hathaway v. Orient Ins. Co.*, 134 N. Y. 409, 32 N. E. 40, 17 L. R. A. 514, the plaintiff held a mortgage upon certain real estate, which contained a covenant on the part of the mortgagor to keep the buildings insured for the benefit of the mortgagee. Pursuant to this covenant the owner of the fee procured from the defendant a policy of insurance on the buildings, by the terms of which any loss was made payable to plaintiff "as his mortgage interest may appear." A loss having occurred, a settlement was effected between the owner of the fee and the insurer without the knowledge or consent of the plaintiff. In an action by the assignee of the mortgagee the court held that this settlement was no bar to a recovery by the plaintiff. In making its holding the court said: "It is a general rule that where a demand is owned by several by such a unity of interest that all must be joined as parties in a strictly personal action for its recovery, that a release of the claim by one of the owners is as effectual as the release of all: *Austin v. Hall*, 13 Johns. 286, 7 Am. Dec. 376; *Decker v. Livingston*, 15 Johns. 479; *Osborn v. Martha's Vineyard etc.*, 140 Mass. 549, 55 N. E. 486. But this rule has its exceptions: *Gock v. Keneda*, 29 Barb. 120; *Upjohn v. Ewing*, 2 Ohio St. 13; 1 Am. & Eng. Ency. of Law, 106. Beckon, the owner, was not a necessary party plaintiff to an action for the recovery of the amount due from the defendant, for the whole amount was recoverable by an action brought

by the mortgagee individually: *Dakin v. Liverpool, London & Globe Ins. Co.*, 77 N. Y. 600; though a joint action by the owner and the mortgagee could have been maintained: *Winne v. Niagara Fire Ins. Co.*, 91 N. Y. 185.

"In case a claim arises in favor of A and B against C out of a contract entered into by the three, to which claim by the contract A has the prior and B the subsequent right, C and B cannot without the consent of A effect an accord and satisfaction which will cut off the right of A: *Ennis v. Harmony Fire Ins. Co.*, 3 Bosw. 516; *Cromwell v. Brooklyn Fire Ins. Co.*, 44 N. Y. 42, 4 Am. Rep. 641; *Reid v. McCrum*, 91 N. Y. 412; *Baltis v. Dobin*, 67 Barb. 507."

So, also, in *Sieber v. Amunson*, 78 Wis. 681, 47 N. W. 1126, it was held in an action for a tort, that a settlement by one not connected with the commission of the tort would not operate as an accord and satisfaction, but the court also intimated in that case that the purported accord and satisfaction was merely a payment more in the nature of a gratuity than an accord. And in *Gordon v. Moore*, 44 Ark. 349, 51 Am. Rep. 606, it was held that an agreement to accept from a third person, on behalf of the debtor, money or a security for a smaller sum in satisfaction of the whole is valid and binding and will discharge the debt. In connection with this general subject see, also, *Ritenour v. Mathews*, 42 Ind. 7, *Stark v. Thompson*, 3 T. B. Mon. (Ky.) 296, and *Brown v. Chesterville*, 63 Me. 241.

From a reading of the authorities commented upon, it seems to us that much of the elaborate discussion of the subject indulged in by the courts could be obviated by holding that the acceptance by the creditor of an accord and satisfaction by a stranger was such an act as would estop the creditor from disavowing an accord and satisfaction and that the mere pleading of an accord and satisfaction performed by a stranger would be such a ratification of the act of the stranger as would thereafter estop the pleader from asserting that it was a voluntary payment in any action by the stranger for the funds advanced to the creditor in effecting the accord and satisfaction.

#### **b. One of several Joint Debtors, Creditors or Wrongdoers.**

1. **Joint Debtors in General.**—The court in *Allison v. Abendroth*, 108 N. Y. 472, 15 N. E. 606, in laying down the general rules in regard to the effect of an accord and satisfaction by one joint debtor on the other joint debtors, reviewed the earlier cases relating to the payment of a lesser sum by the debtor in satisfaction of the debt, and then said: "Following the same principle it is held, that when the debtor enters into a new contract with the creditor to do something which he was not bound to do by the original contract, the new contract is a good accord and satisfaction if so agreed. The case of accepting the sole liability of one of two joint debtors or copartners in satisfaction of the joint or copartnership debt is an illustra-



tion. This is held to be a good satisfaction, because the sole liability of one of two debtors 'may be more beneficial than the joint liability of both, either in respect of the solvency, of the parties or the convenience of the remedy': *Thompson v. Percival*, 5 Barn. & Adol. 925. In perfect accord with this principle is the recent case in this court of *Ludington v. Bell*, 77 N. Y. 138, 33 Am. Rep. 601, in which it was held that the acceptance by a creditor of the individual note of one of the members of a copartnership after dissolution, for a portion of the copartnership debt, was a good consideration for the creditor's agreement to discharge the maker from further liability. There can be no doubt, therefore, that if the firm of Allison & Sons, knowing at the time that the defendant Abendroth was a general partner in the firm of Griffith & Wundram had received his individual note for twenty-five per cent of their debt against the firm in full satisfaction, or in full satisfaction when paid, the agreement would have been supported by a good consideration, and the payment of the notes would have been a satisfaction of the entire debt." It was also held in *Mason v. Wickersham*, 4 Watts & S. (Pa.) 100, that a note given by one partner, after dissolution, for a debt of the firm would extinguish the original debt so as to discharge the copartner, if such was the agreement when the note was given. The same principles have been applied to such accord and satisfaction as is evidenced by a release under seal, and technically termed a release: See *Elliott v. Holbrook*, 33 Ala. 659; *Walker v. McCulloch*, 4 Me. 421; *Hale v. Spaulding*, 145 Mass. 482, 1 Am. St. Rep. 475, 14 N. E. 534.

In *Maslin v. Hiatt*, 37 W. Va. 15, 16 S. E. 437, it was held that payment by a third person on behalf of a joint maker of a note in order to release such joint maker from the whole of the note would operate as a discharge of the note. The agreement in that case was indorsed on the back of the note. The court stated that the well-known principle that the release of one joint promisor was a release of all applied to such a transaction.

There are some cases which apparently hold that a part payment by one joint maker of a note would not operate as a discharge of the note, even though so agreed by the parties, but those cases were decided on the ground that there was not a sufficient consideration for the extinguishment of the balance due, and do not make any holding as to what the effect would be if there had been a sufficient consideration. The cases of *Cavaness v. Ross*, 33 Ark. 572, and *Smith v. Bartholomew*, 1 Met. (Mass.), 276, 35 Am. Dec. 365, are illustrations of such holdings. Other cases proceed upon the theory that the transaction is a technical release. For instance, in *Heckman v. Manning*, 4 Colo. 544, one of the defenses was that in a former suit upon the note and in which all the makers were parties, the owner of the note had settled with one of the joint makers and released them all from all liability thereon. The court said: "The finding of the court below upon this point was that the release of Harris from the note was not a technical release, and that 'a release to be

effectual must be under seal.' This is certainly not the law. A release, equally with an obligation, must rest upon a consideration. A seal imports the consideration, and hence it need not be otherwise shown. But where the consideration is shown by the instrument itself, there is then no reason for requiring a seal, and the instrument is as valid without it. Where the consideration is neither expressed or implied, it must be proved, and may be proved by parol evidence'' (citing various authorities); and then the court stated the well-settled doctrine, before adverted to, that the release of one of two or more joint, or joint and several, obligors or promisors, operates as a release of all.

As to the effect of a payment by one joint judgment debtor, the court in *Williams v. Riehl*, 127 Cal. 370, 78 Am. St. Rep. 60, 59 Pac. 762, which was a judgment against the sureties on a guardian's bond, said: "The payment of the judgment by respondents to plaintiff did not amount to a satisfaction of the same as against their cosureties or the principal. The rule is, that the mere payment of a judgment by one joint debtor does not operate as an accord and satisfaction of the judgment as to the joint judgment debtors, unless it plainly appears that the payment was intended to have such effect." And the court cited *Brandt on Suretyship and Guaranty*, sec. 275; *Brown v. White*, 29 N. J. L. 514, 80 Am. Dec. 226; *Coffee v. Tevis*, 17 Cal. 259; *Freeman on Executions*, sec. 444.

**2. Joint Tort-feasors.**—The rule as to a settlement with one joint tort-feasor and the reasons for the rule were well stated in *Donaldson v. Carmichael*, 102 Ga. 42, 29 S. E. 135, which was a suit against two persons as joint wrongdoers for the recovery of damages for personal injuries resulting from a fall into a cellar which one of the defendants had caused the other to excavate on his lot. The court said: "Damages are given as compensation for the injury done: Civ. Code, sec. 3905. The universal and cardinal principle is, that the person injured shall receive a compensation commensurate with his loss or injury, and no more: 1 *Sutherland on Damages*, 27. This rule, of course, will be understood as not intended to embrace cases in which punitive or vindictive damages may be awarded, but as stating primarily the main object for which damages are awarded. The cause of action is the damage occasioned by the wrongful or negligent act of the defendant; if the act be done without damage, there is no injury to compensate; hence, there can be no recovery. If there was damage by such act and the amount of such damage has been agreed on and paid, then it has been compensated. Although one may be damaged by the joint act of two persons, there is but one injury; and if that is satisfied, the party injured is placed in as near his normal condition as the law can place him. There can be no double recovery of the amount of damage which one has sustained. It would be as reasonable to ask to recover from one defendant twice the amount sustained, as

it is to ask from each of two defendants payment of the full amount of such damage, even when the cause of action is against both. The plaintiff is entitled to only one satisfaction; and if the manner of releasing one involves satisfaction in whole or in part of the claim, it will inure to the discharge, pro tanto, of all who are liable: *Lord v. Tiffany*, 98 N. Y. 412, 50 Am. Rep. 689; *Kasson v. People*, 44 Barb. (N. Y.) 347; *Ellis v. Esson*, 50 Wis. 138, 36 Am. Rep. 830, 6 N. W. 518; and if a party injured accept satisfaction from one of several joint tort-feasors, that is a bar to all: *Cooley on Torts*, 2d ed., p. 161. In a case where the plaintiff in an action against several tort-feasors executed to one of them a release under seal, acknowledging full satisfaction for the tort, but reserving his claim against the others, it was held that the release inured to the benefit of all the defendants, and that the reservation was inoperative. All the cases, both English and American, maintain the doctrine that satisfaction from one joint tort-feasor, whether received before or after recovery, extinguishes the right as against the others. The plaintiff is not entitled to receive more than one satisfaction for and in respect of the same injury. As was said by the court in *Lovejoy v. Murray*, 3 Wall. 1, when the plaintiff has accepted satisfaction in full for the injury done him, from whatever source it may come, he is so far affected in equity and good conscience that the law will not permit him to recover again for the same damage: See, also, *Baker v. Frick*, 45 Md. 337, 24 Am. Rep. 506, citing numerous authorities. Even if separate suits are brought against several who are guilty of a joint trespass, while each is liable for what he has done and may be separately pursued to final judgment, the plaintiff may elect which of the separate judgments he will enforce, but having received his damage recovered against any one and his costs against all, he must be content with that; otherwise, he must receive more than one satisfaction for his injury: *Ayer v. Ashmead*, 31 Conn. 453, 83 Am. Dec. 154; *Livingston v. Bishop*, 1 Johns. 290, 3 Am. Dec. 330; *Knickerbocker v. Colver*, 8 Cow. 111; *Sheldon v. Kibbe*, 3 Conn. 214, 8 Am. Dec. 176. See, also, to same effect, *Mitchell v. Allen*, 25 Hun (N. Y.), 543; *Urton v. Price*, 57 Cal. 270; *McGehee v. Shafer*, 15 Tex. 198; *Brown v. Cambridge*, 3 Allen, 474. It is useless, however, to multiply authorities on these questions about which there has been little or no conflict."

The rule above stated is sustained by the following cases: *Urton v. Price*, 57 Cal. 270; *Ayer v. Ashmead*, 31 Conn. 447, 83 Am. Dec. 154; *Reese v. Hood*, 99 Ga. 132, 24 S. E. 843; *Gilpatrick v. Hunter*, 24 Me. 18, 41 Am. Dec. 370; *Goss v. Ellison*, 136 Mass. 503; *Ellis v. Bitzer*, 2 Ohio, 89, 15 Am. Dec. 534; *Brown v. Kencheloe*, 43 Tenn. (3 Cold.) 192.

**3. Joint Creditors.**—The rule as to the right of one joint creditor to effect an accord and satisfaction was expressed in the very recent case of *Ely v. Ely* (N. J. L.), 56 Atl. 246, in the following language: "The legal right of one joint creditor to enter into and consummate

an accord and satisfaction with the debtor, and thus discharge the debt, was adjudged in *Wallace v. Kensall*, 7 Mees. & W. 264, and *Rawstorne v. Gandell*, 15 Mees. & W. 304. That right was upheld in *Craig v. Hulsehizer*, 34 N. J. L. 363. No doubt an attempt to exercise the power fraudulently may be defeated, as in case where the acting party is a creditor in name only, and the debtor knows he has no substantial interest in the debt; or where the creditor, being himself irresponsible, seeks in collusion with the debtor to discharge the debt without payment. But no such conditions appear in the present case. All that can be said against the strict impartiality of the transaction is that the father was willing to favor his son by accepting property instead of cash, bearing the loss, if any, himself, but fully indemnifying his associate creditor. In that there was no sign of a lack of good faith. There was the mere exercise of a legal right. As Baron Alderson said in *Phillips v. Claggett*, 11 Mees. & W. 84: 'Where the party is an interested party, and where, by the law, all persons having a joint interest have a right to release and dispose of the debt, how is his acting on that right which the law gives him as arising out of his interest a fraud?' We think there was no evidence on which the question submitted could be lawfully decided against the defendant."

The *Ely v. Ely* case was a suit by tenants in common for the rent of a farm demised to defendant. The accord and satisfaction was had with one of the tenants in common. The accord and satisfaction had in the case of *Craig v. Hulsehizer*, 34 N. J. L. 363, referred to in the *Ely v. Ely* case, arose over the settlement by one of the partners of a promissory note payable to the firm.

It seems to us that an accord and satisfaction by one member of a partnership would be operative as to his copartners, since the payment to one partner of a debt owing to the firm is held to be payment to the firm: See *Gregg v. James*, 1 Ill. (Breese) 143, 12 Am. Dec. 151; *Yandes v. Lefavour*, 2 Blackf. (Ind.) 371; *Vanderburgh v. Bassett*, 4 Minn. 242 (Gil. 171); *Shepard v. Ward*, 8 Wend. (N. Y.) 542; *Scott v. Trent*, 1 Wash. (Va.) \*77.

### c. Persons Acting in a Representative Capacity.

1. **Attorneys and Agents.**—The general principles of the law of agency undoubtedly apply to agreements for accord and satisfaction made by agents on behalf of their principals. In *Saunders v. Whitcomb*, 177 Mass. 462, 59 N. E. 192, it was held that a Massachusetts bank which was acting as a mere collecting agent could not settle a dishonored bill of exchange payable in London in pounds sterling, for less than its face, in the absence of express authority or a subsequent ratification.

In *Fosha v. Prosser* (Wis.), 97 N. W. 924, it was held that an attorney has no authority under his retainer to bind his client in an attempted accord and satisfaction, and that he can exercise such a power only upon an express authority.



This rule is supported by the weight of authority: See monographic note to *Clark v. Randall*, 76 Am. Dec. 256, on the powers of attorneys at law where the authorities sustaining the rule are collected: See, also, *Miller v. Edmonston*, 8 Blackf. (Ind.) 290; *Rohr v. Anderson*, 51 Md. 205; *Lewis v. Gamage*, 18 Mass. (1 Pick.) 346; *Cram v. Sickel*, 51 Neb. 828, 66 Am. St. Rep. 478, 71 N. W. 724; *De Mets v. Dagron*, 53 N. Y. 635.

Inasmuch as an attorney or agent could undoubtedly be expressly or impliedly authorized to effect an accord and satisfaction, it often becomes a question whether the acts of the client or principal are such as to constitute a satisfaction of the attempted accord and satisfaction. The very recent case of *Fosha v. Prosser* (Wis.), 97 N. W. 924, will serve to illustrate the rule in such cases, especially where the accord and satisfaction was attempted during the pendency of litigation concerning the subject matter. The original case was an action on one of a series of notes given on a purchase of land. A stipulation was made between the attorneys that in consideration of the payment of a certain sum by one of the defendants that the case would be dismissed as to him and all claims arising under the transaction would be waived as against him, but that the case would be continued as against the other defendant. Thereafter the plaintiff sued the defendant who had been dismissed for the balance of the notes. It was contended that the plaintiff had ratified the settlement made by her attorney on account of having retained the amount paid under the stipulation, but it appears that the plaintiff had not previously authorized the settlement and that she did not know of it when she received the money paid by virtue of it. The court said: "It is contended that this constitutes an affirmance of her attorney's acts and thereby ratifies the settlement as an accord and satisfaction of the notes in question. We cannot assent to this claim in view of the situation of the parties under the facts and circumstances of the case. That respondent stood in the attitude of repudiating the settlement is manifested by her course in commencing this action on the notes and by offering to litigate the questions upon the trial. She had a right to a trial of the issue in this case, whether the alleged settlement included these notes. Her position in the action was positive notice to appellant that she controverted his defense of an accord and satisfaction. The stipulation was not so plain and clear on its face as to preclude all inquiry into the situation of the parties and the circumstances under which it was made for the purpose of aiding the court to determine, in the light thereof, whether the parties making it intended it should be deemed an accord and satisfaction of the notes sued upon. This cast the burden on appellant of establishing the fact that she ratified the acts of her attorney, and thus was bound by the stipulation.

"Considering the evidence aside from her failure to tender back the seventy-five dollars, it appears that she promptly and actively

declared her nonassent and condemnation of the unauthorized acts of her attorney. Appellant's affirmance of the settlement in this action precluded him from voluntarily taking back the money, and compelled him to refuse it if tendered. Respondent's claim that the stipulation and payment under it was a settlement only of the note sued on in that action entitled her to hold the money until that question was determined upon the trial of this case, and she was not, therefore, called upon to restore the amount so paid her until the court found and determined she had, in fact, not ratified the accord and satisfaction. We are led to the conclusion that respondent's conduct and acts from the time she was notified of appellant's claim as to the settlement do not constitute a ratification of the unauthorized accord and satisfaction which her attorney attempted to make for her." The court then cited in support of the foregoing: *Mechem on Agency*, sec. 153; *Mobile etc. Ry. Co. v. Jay*, 65 Ala. 113; *Aetna Ins. Co. v. U. W. Iron Co.*, 21 Wis. 458; *Wheeler v. N. W. Sleigh Co. (C. C.)*, 39 Fed. 347; *Waite v. Vose*, 62 Me. 188; *Owings v. Hull*, 9 Pet. 607, 9 L. ed. 246; *Thacher v. Pray*, 113 Mass. 291, 18 Am. Rep. 480; *Lester v. Kinne*, 57 Conn. 9.

**2. Administrators and Executors or Persons Acting as Such.—**

The question may sometimes arise as to whether a person, who in bringing an action must do so as a legal representative of others, can later on, when he has obtained the proper appointment, be estopped by acts on his part in the nature of an accord and satisfaction prior to his appointment. Such a question arose in *Stuber v. McEntee*, 142 N. Y. 200, 36 N. E. 878. That was a statutory action by the administrator for the death of plaintiff's intestate. The administrator, who was the brother in law, prior to his appointment as such administrator, made a settlement with the defendant on behalf of the family and gave the defendant a receipt, stating that the payment was for all expenses caused by the untimely death of the young man, and "further, that I shall have no further claim whatsoever against Mr. McEntee," the defendant. The court in stating the rule in such cases said: "Actions for damages by reason of injuries resulting in death were unknown to the common law and are founded wholly upon the statute. The cause of action is no part of the assets of the estate of the deceased. The statutory liability has no existence in his lifetime and accrues only by reason of his death. It is not subject to the payment of the debts of the deceased nor to the ordinary rules applicable to the settlement and administration of the estates of deceased persons: Code, secs. 1902-1905. The damages are not general assets of an estate of a deceased person in the hands of the executor or administrator and subject to their control, but are exclusively for the benefit of the decedent's husband or wife or next of kin. The claim before suit cannot be barred or released except by some person who has authority to bring the action at the time and who in a legal sense represents the right of action. When the plaintiff Krause gave the receipt and received the money, he

was in no such position and had no authority to bind the next of kin of the deceased by a settlement or release. The cases cited by the learned trial judge in support of his view do not, we think, control the question. It is only necessary to refer to the two leading cases in this state—*Rattoon v. Overacker*, 8 Johns. 126; *Priest v. Watkins*, 2 Hill, 225, 38 Am. Dec. 584. These cases hold that when a person assumes to collect the assets or credits belonging to the estate of a deceased person, and who subsequently is appointed administrator of the estate, and in that capacity brings an action upon the claim so collected, the prior payment made to him before his appointment is a defense to the party against whom the claim existed and who made the payment. For the purpose of protecting parties making payment in good faith to the widow or other person without authority to collect the assets at the time, the letters, where subsequently issued to them, are deemed to relate back so as to legalize such payments. But these cases do not hold that a stranger may compromise a claim due to an estate on receiving a part only of what is due and thereby estop himself in a subsequent suit, in a representative capacity, from collecting the residue. If there is any such rule of law in the administration of the estates of deceased persons it has no application in an action like this for the recovery of unliquidated damages under a special statute by the next of kin resulting from a negligent or wrongful act, causing the death of their intestate. We have no doubt that the defendant was entitled to prove the fact of payment and its application to the expenses of the funeral and burial of the deceased, and to be credited with the same by the jury in making its estimate of the damages which the plaintiff should recover, if any. In this way the principle decided in the cases above referred to is given full effect, but to hold that the receipt operated as an accord and satisfaction would be extending its operations in a manner to accomplish results that cannot be sustained by reason or authority.”

The same question as to the right of an administrator to make before his appointment an accord and satisfaction of a debt owing the estate arose in *Vroom v. Van Horne*, 10 Paige (N. Y.), 549, 42 Am. Dec. 94, and the court held that in New York the grant of administration would relate back to the time of the death of the intestate. The court in making its decision, however, said: “By the laws of some states and countries, where the decedent has made a will, and has named an executor to administer his estate, such executor becomes entitled to the possession of the whole of the personal estate of the testator immediately upon his death; and actual probate of the will is only necessary to enable the executor to recover the property by suit. Such was the English common law and the law of this state previous to the Revised Statutes. Where such a law exists, the probate and granting of letters testamentary is a mere legal form, as such an executor does not derive his title from the letters testamentary, but under the will. He may, therefore, take

possession of the property, receive payment of debts, and may release a right of action, before such letters are granted." Hence we see that these questions are largely dependent upon the conditions of the statutory provisions in the various states.

In *Beck v. Snyder*, 167 Pa. St. 234, 31 Atl. 555, an accord and satisfaction of a balance on a promissory note by an administratrix before her appointment was also sustained.

3. **Husband as Representing Wife.**—The question whether it was necessary for a husband to join in an accord and satisfaction made by his wife for personal injuries was raised in *Brundige v. Nashville etc. R. Co.* (Tenn.), 79 S. W. 1027. It was contended that it was necessary for him to join on account of the marital relation. The court said: "The first question presented is whether the contract of accord and satisfaction made by Mrs. Brundige was void because of her coverture. The suit was brought in the name of the wife and for damages caused to her; the husband was joined merely for conformity, and claimed no right in the recovery, and the suit was not for damages caused to him for the loss of his wife's services; the recovery, if any had been made, would have been in the name, and for the use of, Mrs. Brundige, and would have been in her separate estate, and would not have been subject to the control and marital rights of the husband. As before stated, the suit was hers, and the husband was merely joined for conformity. He had, however, signed the contract of accord and satisfaction, and had indorsed his approval upon it. We are of the opinion, therefore, that Mrs. Brundige, with the assent of her husband, had a right to enter into this contract of accord and satisfaction as far as her coverture was concerned."

4. **Receivers.**—In the case of *Goodrich v. Sanderson*, 35 App. Div. 516, the question whether an ancillary receiver of a foreign corporation appointed under an order investing him "with the usual powers and duties of receivers according to the laws of this state and the practice of this court," including the right to continue the business of the corporation until the further order of the court, had the right to make an accord and satisfaction of a claim owing to the corporation was raised. The court, after reviewing the various New York statutory provisions relative to the powers and duties of such receivers, said: "There is also, I think, evidence in the language of the order that the court intended to confer upon the receiver all the powers defined in any statute of this state generally applicable to receivers of corporations. I think that if it had been intended to limit his powers to those of a temporary receiver under section 1788 (of the Code), there would have been some appropriate reference to that section.

"My general conclusion on the topic of the extent of the receiver's power is, therefore, that except so far as they were limited by the very fact that his appointment was ancillary, the order con-



ferred upon him the powers of trustees of insolvents as defined in 2 Revised Statutes, 41, sec. 7; 3 Birdeye's 21st ed., p. 3190, sec. 77. By the eighth subdivision of this section power and authority are conferred upon the trustees 'to settle all matters and accounts between such debtor and his debtors or creditors.' The ninth subdivision is in the following words: 'Under the order of the officer appointing them, to compound with any person indebted to such debtor and thereupon to discharge all demands against such person.'

"I am satisfied that what was done amounted to a settlement rather than a composition, and that it was not necessary to its validity that it should receive the express sanction of the court. It seems to me that the act distinguishes between a settlement of accounts or other matters needing adjustment, and a composition—i. e., the acceptance of less than an amount known to be due: *Haskins v. Newcomb*, 2 Johns. 405.

"The plaintiff cites cases in which the courts have held it proper to grant special power to receivers to compromise. It is perhaps implied in some of them that a receiver ought not to compromise without submitting the matter to the court, but I find no expression that a receiver is without power to compromise disputed matters if he will take the responsibility of doing so. I do not suppose that Mr. Justice Gaynor, in saying that 'the receiver could not allow a deduction,' intended to be understood as passing upon the powers of the receiver as distinguished from his legal rights. The question before him for decision was not strictly whether the receiver might properly make a deduction in favor of the Sandersons under the terms of their lease, but whether he could do so on any ground as would give him a claim against the superior landlords.

"In *Matter of Empire City Bank (United States Trust Co. v. United States Fire Ins. Co.)*, 18 N. Y. 199 (at p. 213), Judge Denio, citing the provisions of the Revised Statutes above referred to, says: 'The receiver is authorized to adjust and settle the claims of creditors by mutual agreement.' It seems to me that the sanction for this statement must be found in the eighth subdivision above quoted, and, therefore, that he has the same power to settle by agreement with debtors to the corporation. The remark which follows, that 'he has no judicial authority,' does not, I think, imply that he cannot close with a debtor to the estate so as to complete the settlement. He must do so in order to get in the assets. He cannot pay a creditor until authorized to make dividends, but it is his duty, after an account with a debtor, to collect the balance due.

"A number of cases have been cited from which the plaintiff reasons by analogy that the action of the receiver was ultra vires. Such cases are: *Wisconsin Central R. R. v. United States*, 164 U. S. 190, 17 Sup. Ct. Rep. 45; *Logan County v. United States*, 169 U. S. 255, 18 Sup. Ct. Rep. 361; *Village of Ft. Edward v. Fish*, 156 N. Y. 363, 50 N. E. 973. The rule laid down by these cases is that a public officer cannot exceed the powers conferred upon him by statute.

What I hold in this case is that the receiver acted within the authority conferred upon him by the order of appointment.

"I think, therefore, that the accord and satisfaction should be sustained as a settlement of an 'account or other matter' between the Union Warehouse Company and its debtors. Although the rent accrued after the appointment of the receiver, I suppose that, from a strictly technical point of view, the tenant's indebtedness was to the company, although the receiver might sue for it.

"Section 67 of the act (2 Rev. Stats. 469), vesting in a receiver the title to property, applies only to domestic corporations, and there is no reference to its provisions in the order of appointment. But in any case, the receiver was, I think, under the power conferred upon him to carry on the business of the company, authorized to make such a settlement as he deemed proper of the matters in suit. The principal lease covered certain warehouses, in addition to the piers sublet to the Sandersons. The exercise of the authority to continue the business of storing goods obviously required that the receiver retain the warehouses. To keep possession, he must pay the superior landlords their rent in full, and I think that, by the necessity of the situation, the business which he was to carry on included any necessary dealings with the subtenants. He could, of course, have applied to the court for instructions, but I think he had the power to settle with them without such an application, if he chose to take the responsibility of doing so. His authority to transact business included, by necessary implication, power to make bargains in the course of business in like manner as the company might, had he not been appointed."

Thus, we see, in the above case the right of the receiver to effect the accord and satisfaction, referred to therein, was not only sustained on the theory that it was authorized by the statute law of the state of New York, which is most likely the same in most of the states, but the court also held that it was, independent of the statute, authorized by implication from his authority to continue the business: See, also, as bearing on the subject: *Morrison v. Lincoln Savings etc. Co.*, 1 Neb. (Unofficial) 449, 89 N. W. 996; *In re Croton Ins. Co.*, 3 Barb. (N. Y.) 642; *United States v. Late Corporation of Latter Day Saints*, 6 Utah, 9, 21 Pac. 506.

5. **Next Friend of Infant.**—In *Burt v. McBain*, 29 Mich. 260, it was held that an infant is not bound by an accord and satisfaction of his claim, which was accepted by his next friend. See, also, monographic note to *Fletcher v. Parker*, 97 Am. St. Rep. 995.

### III. Matters or Claims Subject to an Accord and Satisfaction.

#### a. General Requisites of Debt or Claim.

1. **Necessity for Dispute.**—The principal case (*Harrison v. Henderson*) is based on the theory that to constitute the acceptance of a check, tendered as the balance of an account, an accord and satis-

faction there must have been a previous disagreement or discussion as to what was actually due. There seems to be an idea amongst the profession that a disagreement or controversy in regard to the subject matter of the accord is a necessary requirement in order that it may be the subject of an accord and satisfaction, but the authorities show that an accord and satisfaction may take place even where the claim is not disputed or controverted. The cases illustrating an accord and satisfaction of liquidated claims will be treated later on when considering the sufficiency of the consideration forming the basis of the accord, and also in the discussion of when part payment of a claim will be held to constitute an accord and satisfaction. It will, for the present, suffice to say that a consideration is a necessary element of an accord and satisfaction and that the courts hold, in a general way, that there is no consideration for the part payment of an undisputed claim, and hence that such an agreement is nudum pactum, but that where there is anything which can serve as the basis for a consideration, such as payment before the time when due, or at a different place than called for in the contract, or where the payment is made in property of an unascertained value instead of in money, it is not a necessary prerequisite for an accord and satisfaction that the amount due should be disputed or controverted. When considered in this light the principal case does not state any rule in regard to the subject of accord and satisfaction which is at a variance with the rule laid down by the weight of the authorities.

The case of *McKay v. Myers*, 168 Mass. 312, 47 N. E. 98, arose under a state of facts somewhat similar to the principal case. In that case the court also held that the acceptance of a check inclosed in a letter, referring to the amount as the balance due on the account between the parties, was not a bar to an action upon the account if the plaintiff ascertained from a subsequent statement sent to him at his request that the defendant had credited himself in the account, for which the check purported to be the balance, with items which could not be allowed to diminish the amount due the plaintiff, and the court also held that a silence of eighteen months after receiving the account would not preclude the plaintiff from recovering the balance really due. The court said: "There was no accord and satisfaction. There was no controversy between the parties when the check was accepted by the plaintiff, and no compromise or knowledge on the part of the plaintiff that there was anything to be compromised. If the check had been accepted as a settlement and compromise of a matter in dispute, the settlement would have been binding as an accord and satisfaction." So, also, in *Beardsley v. Davis*, 52 Barb. 159, the court held a settlement between a firm of factors and their consignee for insurance on goods lost by fire while in the hands of the factors, to be no accord and satisfaction on account of there being no dispute at the time of the settlement. And in the recent case of *Bloomington Min. Co. v. Brooklyn*

Hygienic Ice Co., 58 App. Div. 71, 68 N. Y. Supp. 699, which was affirmed by the court of appeals in 171 N. Y. 673, 64 N. E. 1118, the court said: "As to the defense of accord and satisfaction, there is no merit in it. Both parties at the time of the settlements in September, 1895, and in March, 1896, were ignorant of the fact that the boat-load of coal in question had, in fact, been delivered to the defendant. Under such circumstances, the rule of accord and satisfaction does not apply. That rule only applies where a demand is unliquidated and one party claims more than the other concedes to be due, and, as an adjustment and settlement of the dispute between them an arbitrary amount is fixed upon and paid: *Nassoioy v. Tomlinson*, 148 N. Y. 329, 51 Am. St. Rep. 695, 42 N. E. 715; *Fuller v. Kemp*, 138 N. Y. 231, 33 N. E. 1034, 20 L. R. A. 785. Here the liability of the defendant to pay the coal in question, if it were delivered, is not disputed, and where a liability to pay a certain amount is not disputed, the acceptance of a less amount than is due will not discharge the debt, when the acceptance of such sum arises from a mutual mistake; and this is so, even if a receipt in full be given. The element of a consideration is lacking and the obligation of the debtor to pay the entire debt is not satisfied: *Fuller v. Kemp*, 138 N. Y. 231, 33 N. E. 1034, 20 L. R. A. 785. 'To constitute an accord and satisfaction,' says the court of appeals in *Fuller v. Kemp*, quoting from *Preston v. Grant*, 34 Vt. 201, 'it is necessary that the money should be offered in satisfaction of the claim and the offer accompanied with such acts and declarations as amount to a condition that if the money is accepted, it is accepted in satisfaction, and such that the party to whom it is offered is bound to understand therefrom that if he takes it he takes it subject to such condition. When a tender or offer is thus made the party to whom it is made has no alternative but to refuse it or accept it upon such conditions.' Applying this rule, it at once becomes apparent that, notwithstanding the settlement in September, and the settlement in March, and the receipt then given, the defendant was not discharged from its obligation to pay for the coal in question."

In the case of *Walston v. Calkins*, 119 Iowa, 150, 93 N. W. 49, another very recent case, the plaintiff alleged a contract of employment for a term of six months and a wrongful discharge at the end of three months. There was no dispute as to the balance due plaintiff under the contract of employment, but the defendant claimed an accord and satisfaction because of having paid the plaintiff the balance due him for the three months of work performed before the discharge. The court in holding the payment not to have been an accord and satisfaction said: "It does not operate as a bar to matters not contemplated by the parties in their agreement, nor is it valid and binding if wholly without consideration. The acceptance of the agreed balance due for work already performed, for which the plaintiff [defendant] was admittedly liable, can, under no theory of accord and satisfaction to which our attention has been called, bar the plaintiff's claim. Furthermore, under the facts here, even if it



had been expressly agreed that the amount so paid would be accepted in full satisfaction of the damages, it would have rested on no sufficient consideration, and could not have been a bar to this action."

**2. What Constitutes a Disputed or Liquidated Claim.**—The question often arises as to what state of facts constitute a claim a disputed one so as to make it the proper subject of accord and satisfaction by a part payment.

The supreme court of Minnesota, in *Ness v. Minnesota etc. Co.*, 87 Minn. 413, 92 N. W. 333, indorsed the rule laid down in *Demars v. Musser-Sauntry etc. Co.*, 37 Minn. 418, 35 N. W. 1, wherein the court said: "A person cannot create a dispute sufficient as a consideration for a compromise by a mere refusal to pay an undisputed claim. That would be extortion, and not compromise. There must, in fact, be a dispute or doubt as to the rights of the parties honestly entertained." The court applied this rule in a case where the defense of accord and satisfaction was set up in an action for breach of a contract of employment, the defendant having paid the plaintiff for the work which he had performed prior to defendant's breach of the contract, there being, however, no dispute as to those items. See, also, *Johnson v. Simmons*, 76 Minn. 34, 78 N. W. 863, which involved a somewhat similar controversy regarding the amount due for labor and which the court held to be no bona fide dispute as to the real amount due.

In the case of *Gray v. United States Savings etc. Co. (Ky.)*, 77 S. W. 200, the court approved the rule laid down in *Creutz v. Heil*, 89 Ky. 429, 12 S. W. 926, concerning the requirement necessary to make the recovery in court of a claim sufficiently doubtful to be compromised, wherein the court used the following language: "It seems that the inquiry is whether the party relying on the agreement had reasonable and proper cause for believing that the question was doubtful and that the right might ultimately prove to be with him. In other words, it is sufficient that there was an honest claim on his part, asserted without fraud, and that there was a real ground for dispute. If the point is so clear that it can only be answered in one way, the compromise would be invalid as wanting a consideration to uphold it. The adequacy of the consideration cannot be inquired into, but the want of any consideration whatever may be inquired into. The verdict of a jury or the decision of a court depends in a greater or less degree upon the human understanding as to what is right and equitable in a given state of case; but when the given state of case has received such judicial interpretation as to admit of no question, supposing that the judicial mind will continue to run in the same channel (and such supposition should always be indulged in), then there can arise, in a legal and equitable sense, no consideration for a compromise of such matter. It is only in reference to such matters as counsel learned in the law or courts might differ, although the right ultimately turns out to be wholly

on one side, that constitutes a valid consideration for compromising such matters. The question of such consideration cannot be measured; hence its adequacy will not be inquired into."

In *Komp v. Raymond*, 175 N. Y. 102, 67 N. E. 113, which arose over the payment of services to be rendered in Japan, the employé insisted that the contract provided for payment in American dollars while the employer insisted that the payment was to be made in Japanese yen. The employé needing money took payment on the yen basis, but insisted that he was, nevertheless, entitled to payment in American money and said that he would prove it. The employer agreed that if he could show that he was entitled to such payment, that he would pay him the balance which he claimed. The receipt, however, stated the payment to be in full. In the suit at bar for the recovery of the balance, the employer claimed the payment to have been an accord and satisfaction. The court said: "It is also to be observed that the plaintiff offered to prove that the defendant's representative did not act in good faith, as he never believed that he had any valid right to raise the question that the plaintiff's claim for his services was payable in yens instead of dollars, and that he never honestly believed that there was any right to raise that contention. If this proof had been admitted, the jury might have found that there was no genuine dispute between the parties, but that the defendant's refusal to pay the plaintiff's claim was an arbitrary one, made for the purpose of exacting terms which were inequitable, unjust, and, hence, that there was not such a dispute as would support a compromise. With this proof in the case, a jury might have found that the action of the defendant in obtaining the receipt was based upon a fraudulent intent to take advantage of the plaintiff's necessities, and, therefore, upon any view of the case the transaction would have been void, at least so far as the receipt was claimed to bar the plaintiff's right of action, for the amount justly his due."

In *Goodrich v. Sanderson*, 35 App. Div. (N. Y.) 553, 55 N. Y. Supp. 881, the landlord on the first of the month demanded the rent, but the tenant called attention to a claim of certain credits and refused to pay until the matter was adjusted, and the landlord threatened to commence suit. The court held the claim was disputed.

So, also, in *Beardsley v. Davis*, 52 Barb. 159, the court discussed the question whether the claim was disputed so as to form the basis for an accord and satisfaction. In that case the defendants, who were factors, agreed to insure property consigned to them; they obtained insurance only to the extent of forty-one per cent; the consigned property was destroyed by fire; they wrote to the consignees, conceding their liability to account for all they had received from the insurance company; stated the amount received, and regretted that it was not more and hoped it would prove satisfactory. The consignors replied, saying: "We supposed you were nearly insured in full; but if this is all we are entitled to, we must submit," and

drew a draft for the amount reported by the factors. The court held that there was no dispute between the parties either about the facts or the claim.

In *Reid v. McMillan*, 189 Ill. 413, 59 N. E. 948, it was sought to make a statement of an account and the settlement thereof form the basis of an accord and satisfaction of a debt secured by a mortgage, but the court said: "A mere method of bookkeeping in the absence of positive proof of intention, is not enough to overcome the weight and effect of solemn written contracts between parties."

And in *Ostrander v. Scott*, 161 Ill. 345, 43 N. E. 1089, the court said: "It is claimed that the account of the plaintiff was liquidated because its items were not disputed. But if there was a controversy over a setoff, and the balance due the plaintiff was fairly in dispute, the claim could not be treated as liquidated."

In *Tanner v. Merrill*, 108 Mich. 58, 62 Am. St. Rep. 687, 65 N. W. 664, 31 L. R. A. 171, the court held that a claim was disputed within the rule of accord and satisfaction even though there was no dispute as to the amount of wages due to a lumberman under the terms of his employment, where there was, however, a dispute as to whether the employer was entitled to deduct his transportation to the place of employment, the expenses of the transportation having been advanced by the employer, the employé contending that the transportation expenses were not to be deducted from the total amount earned by him.

The fact of a counterclaim being urged against an undisputed claim and thereby making the transaction a disputed claim also occurred in *Hull v. Johnson*, 22 R. I. 69, 46 Atl. 182, wherein the court said: "The second question is whether in this case the plaintiff's claim can properly be regarded as disputed, since his bill is admitted and the defendant's claim is distinct from it, by way of recoupment for injury arising from the plaintiff's service. It is true that there is a technical difference between such a case and one of a controversy as to the amount due, but the principle which governs them is the same. Whatever may be the ground of the dispute, the fact remains that there is one. In order to settle the controversy the defendant offers to pay a certain sum on that condition, and the acceptance of the money so offered is as much an acceptance of the condition in one case as in the other."

So also in *Connecticut etc. Lumber Co. v. Brown*, 68 Vt. 239, 35 Atl. 56, the plaintiff contended that the defendants having accepted the lumber contracted for, that they were precluded from setting up defects in it as a defense and that as the price was fixed by the terms of the contract, the sum due was certain and liquidated, and thus could not form the basis of an accord and satisfaction by reason of part payment by a check to be in full settlement of all demands; but the court said: "We think the defendant's claims were such as could be urged in good faith and with color of right. This is all

that was requisite as a ground for compromise, even though they in fact had no defense to plaintiff's claim."

In *Nassoioy v. Tomlinson*, 148 N. Y. 330, 51 Am. St. Rep. 695, 42 N. E. 715, it was said: "A demand is not liquidated even if it appears that something is due, unless it appears how much is due, and where it is admitted that one of two specific sums is due, but there is a genuine dispute as to which is the proper amount, the demand is regarded as unliquidated, within the meaning of that term as applied to the subject of accord and satisfaction." And in *Bingham v. Browning*, 197 Ill. 135, 64 N. E. 317, the court in discussing what constitutes a demand to be a liquidated one, said: "The mere fact that the original contract was in writing is not conclusive of the question that the damages or demand was a liquidated demand. Practically all written obligations for the payment of money are for a specific sum or a sum that can be made specific by mere calculation, but when it comes to a demand of payment or adjustment of the debt, the obligor or payor may insist that he has paid more upon the debt than the holder has given him credit for, or is entitled to offset or counter-demands, in any of which cases it could not be contended that because a specific sum was stated in the writing of one of the parties the claim was a liquidated one, and that any settlement between the parties, however fairly and understandingly made, by which a less sum was paid by the obligor in the writing than it called for, would not be a bar to the action of the holder of the writing, on the ground that the whole sum called for had not been paid."

**b. Matters Arising from Contractual or Personal Relations.—**

Since most of the cases involving the availability of the defense of accord and satisfaction arise over the payment or adjustment of either express or implied contracts, it is needless to remark that the liabilities arising under a contract are proper subjects of an accord and satisfaction. Contracts involving all sorts of subject matter have been the subjects of accord and satisfaction, from contracts for personal services (*Komp v. Raymond*, 175 N. Y. 102, 67 N. E. 113), to questions involving damages from the bad workmanship of an employé hired to make repairs (*Scully v. Delamater*, 28 Fed. 114), and even the adjustment of the rights arising from a building association contract (*Gray v. United States Savings etc. Co. (Ky.)*, 77 S. W. 200).

It was, however, at one time doubted whether bonds and similar contracts could be the subject of an accord and satisfaction. A distinction seems to be drawn as to bonds to this extent, that before a breach of the covenants they are not so subject, but that they are after a breach of the covenants and the accrual of liability therefrom.

In *Morris Canal etc. Co. v. Van Vorst*, 21 N. J. L. 100, which was an action of debt on a bond for the faithful performance of duty by the cashier of a corporation, a plea of accord and satisfaction was set up, but it was contended that the liability under a bond of that sort



could not be affected by an accord and satisfaction. The court, in holding that the plea was available, reviewed the English and early American authorities on the subject, showing the distinctions which were maintained in such cases where the accord and satisfaction was before, and where it occurred after, the breach of the covenants of the bond. The court said: "The real question on this plea is, whether accord and satisfaction can be pleaded to this action. At common law, according to the old authorities, it seems settled that it could not. The rule was, that a specialty contract could not be discharged by any matter in pais, short of performance, nor could it be altered; it could be altered or discharged only by an instrument of equal force: Broom's Legal Maxims, 408. An obligation by record, at common law, could only be discharged by release under seal: Lit. sec. 507: *Sewell v. Sparrow*, 16 Mass. 26. Therefore, accord and satisfaction was held no plea where the duty accrues by deed only, for, as is said, the deed ought to be avoided by matter of as high a nature; as in debt on a single bond or bill for the payment of money only: Com. Dig., 'Accord,' A, 2. But, even at common law, in case of a bond with conditions for the payment of money, accord and satisfaction before the day may be pleaded, but not after: Com. Dig., 'Accord,' A, 1; Anonymous, Cro. Eliz. 46; but the plea must be pleaded in satisfaction of the money or condition, and not of the deed or obligation: *Preston v. Christmas*, 2 Wils. 86; *Neale v. Sheffield*, Yel. 192. Since the statute of 4 and 5 Anne, chapter 16, it has been reasonably held in this country that accord and satisfaction, as well as payment, may be pleaded in satisfaction of the condition, even after the day: *Strang v. Holmes*, 7 Cow. 224.

"This distinction was taken by the old lawyers, that if the condition of the bond be not to pay a sum certain, but to perform some collateral act, as for personal services, to yield a true account and the like, then accord with execution for money or other thing is no satisfaction to save the forfeiture of the condition. The doctrine is thus stated by Lord Coke: 'There is a diversitie, when the condition is for the payment of money; and when for the delivery of a horse, a robe, a ring and the like; for where it is for the payment of money, there, if the feoffer or obligee accept a horse, etc., in satisfaction, this is good; but if the condition were for the delivery of a horse, a robe, there, albeit the obligee or feoffer accept money or other things for the horse, etc., it is no performance of the condition': Coke on Littleton, 212b. The reason given by the judges, when the question was made by the sergeants in *Peyton's Case*, 9 Coke, 77b, is that money may be satisfied by a horse; but a horse cannot be satisfied by money—*res per pecuniam estimatur; et non pecunia per res*. The answer is curious and not very satisfactory, and now since such bonds, as well as bonds for the payment of money, have become at law, as in equity, mere securities for the damages actually sustained by the nonperformance of the conditions, there seems to be but little reason for the maintenance of this distinction. Sound sense would seem to permit an ob-

ligees to liquidate his damages, and by accord take what he might please to take, in satisfaction of them. It would seem, too, that this plea of accord and satisfaction to the damages on such bond may be admitted without any real and substantial infringement of the rule as to contracts under seal. The bond is not disaffirmed, as the plea goes to the damages and not in discharge of the bond. Now, in the case of covenant after breach, where *amends* are to be recovered, accord and satisfaction has been held to be a good plea. In *Kaye v. Waghorne*, 1 Taunt. 428, it was held as clear upon the old authorities that a covenant under seal before breach could not be discharged by parol agreement; though after breach, accord and satisfaction would be a good defense to the damages; such defense not proceeding on the ground of discharging the covenant, but simply of a satisfaction accepted for the damages. In such cases as these this defense is by no means equivalent to setting up a parol contract in contravention of the specialty contract, the action being founded not merely on the deed, but on the deed and the subsequent wrong, which wrong is the cause of action, and for which damages are recoverable: *Blake's Case*, 6 Coke, 44a; *Peyton's Case*, 9 Coke, 77b. Here the action is for amends simply, and I am willing since the bond has become but security for the damages to waive the ancient distinction, and upon the principles applied to simple covenants last alluded to, sustain the fourth plea, in satisfaction, not of the bond, but of the damages.'

**c. Matters Sounding in Tort.**—The rule that causes of action for damages arising from the commission of torts can be compromised and settled by means of an accord and satisfaction seems to be universally admitted: *Perin v. Cathcart*, 115 Iowa, 557, 89 N. W. 12; *Hinkle v. Minneapolis etc. Ry. Co.*, 31 Minn. 434, 18 N. W. 275; *Jackson v. Pennsylvania etc. R. R. Co.*, 66 N. J. L. 319, 49 Atl. 730; *Rodgers v. Cox*, 66 N. J. L. 432, 50 Atl. 143; *Dibble v. New York etc. Co.*, 25 Barb. 183; *Brundige v. Nashville etc. R. R. Co.* (Tenn.), 79 S. W. 1027; *Gulf etc. Ry. v. Harriett*, 80 Tex. 80, 15 S. W. 556.

The damages arising from the commission of torts being generally of an unliquidated nature and almost invariably disputed, form an ideal subject matter for an accord and satisfaction.

**d. Judgments and Decrees.**—In ancient times, it seems to have been considered that nothing could be pleaded to an action on a judgment which was a matter in pais and not of record; hence it was held under the common law that a parol accord and satisfaction could not discharge a judgment: *Lutterford v. Le Mayre*, Cro. Jac. 579; *Weber v. Couch*, 154 Mass. 26, 45 Am. Rep. 274; *Riley v. Riley*, 20 N. J. L. 114; *Mitchell v. Hawley*, 4 Denio (N. Y.), 414, 47 Am. Dec. 260. In some of the early American cases it was doubted whether a domestic judgment could be the subject of an accord and satisfaction. For instance, in a very early case in Alabama—*Hardwick v. King*, 1 Stew. 314—which was an action on a judgment recovered in Georgia, the court said: "Here a material inquiry arises

whether in this respect judgments obtained in other states of the Union are to be treated according to the common-law doctrine relating to domestic or foreign judgments, or whether they should be viewed in a different light from either. In many respects, they have been held by various adjudications to be essentially different from either. Notwithstanding public acts, records, etc., when properly authenticated, are entitled by the supreme law of the land to the same faith and credit in every court in the United States, that they of right have by law or usage in the courts of the state whence they came, yet it is impracticable to give them precisely the same force and effect; and such seems not to have been contemplated by the act of Congress. Neither judgments nor executions were ever supposed to retain any lien on the defendant's property beyond the jurisdiction of the court. There is not, and cannot, with propriety, be any authority for issuing executions in one state on judgments rendered in another. It may not be extremely inconvenient to procure satisfaction to be entered of record, in cases of judgments rendered in our own courts. To cause satisfaction to be entered on the judgment in another state, at a remote period, might be found difficult and inconvenient; nor is it believed to have been the usage of the courts in the United States to enter on their records any evidence of payment or other satisfaction of judgments except when the money is made in the regular course of execution or when the payment is made to the clerk. Therefore, without intimating any opinion, whether accord and satisfaction, or payment would be a good defense to an action of debt on a judgment rendered in this state, a majority of the court are of opinion that, to a judgment from a sister state, they are available as a matter of defense. By the common law, these matters of defense were disallowed in case of domestic judgments, but in actions on foreign judgments a different principle prevailed. The judgment was only *prima facie* evidence of the debt, on which either debt or *assumpsit* would lie; and where the former was brought, the defendant was permitted to contest the original merits on the plea of *nil debet*."

The strict technicality of the common law regarding the discharge of specialty contracts was adverted to in a previous section relative to what contracts were subject to an accord and satisfaction. The supreme court of the United States, in holding that the common-law rule regarding the discharge of judgments by accord and satisfaction had been abrogated, in *Boffinger v. Tuyes*, 120 U. S. 205, 7 Sup. Ct. Rep. 529, said: "The technicality difficulty, that there can be no satisfaction and discharge of a judgment or decree except by matter of record (*Mitchell v. Hawley*, 4 Denio, 414, 47 Am. Dec. 260), cannot be interposed. At common law actual payment of a debt of record could not be pleaded in bar of an action for the recovery of the debt. This has been changed by statute both in England and in this country, and no reason can be assigned why an accord and satisfaction should not have the same effect."

The rule of the common law disallowing an accord and satisfaction was adhered to in *Riley v. Riley*, 20 N. J. L. 114, but that case was recently distinguished and practically overruled by *Fred v. Fred* (N. J. Eq.), 50 Atl. 778, which allowed a decree for alimony to be satisfied by notes of the judgment debtor for a smaller amount indorsed by a third party.

Although the subject may be regulated in many jurisdictions by statutory provisions, it seems now to be universally admitted that a judgment may be the subject of an accord and satisfaction: *Ransom v. Farish*, 4 Cal. 386; *Fletcher v. Wurgler*, 97 Ind. 223; *Marshall v. Bullard*, 114 Iowa, 462, 87 N. W. 427, 54 L. R. A. 862; *Engbretson v. Seiberling* (Iowa), 98 N. W. 319; *Harper v. Graham*, 20 Ohio, 106; *Savage v. Everman*, 70 Pa. St. 315, 10 Am. Rep. 676; *In re Freeman*, 117 Fed. 680. In several later cases in California, viz., *Deland v. Hiatt*, 27 Cal. 611, 87 Am. Dec. 102, and *Siddall v. Clark*, 89 Cal. 321, 26 Pac. 829, the court held that a judgment could not be satisfied by a part payment although made under an agreement that such payment should operate as a satisfaction in full, but the court did not state that a judgment would not be susceptible to an accord and satisfaction if based on a sufficient consideration.

Many of the cases impliedly admit that judgments may be satisfied by an accord and satisfaction, though denying the sufficiency of the consideration for accord and satisfaction in the case at bar: See *Coblentz v. Wheeler etc. Mfg. Co.*, 40 Ark. 180; *Salmon v. Pixlee*, 2 Day (Conn.), 242; *Wood v. Bangs*, 2 Penne. (Del.) 435, 48 Atl. 189; *Jones v. Ransom*, 3 Ind. 327; *Grayson v. Lilly*, 7 T. B. Mon. (Ky.) 6; *Russell v. Meek*, 22 Ky. Law Rep. 498, 58 S. W. 373; *Bird v. Smith*, 34 Me. 63, 56 Am. Dec. 635; *Hardin v. Campbell*, 4 Gill (Md.), 29; *Campbell v. Booth*, 8 Md. 107; *McCullough v. Franklin Coal Co.*, 21 Md. 256; *Weber v. Couch*, 134 Mass. 26, 45 Am. Rep. 274; *Witherby v. Mann*, 11 Johns. 518; *Boyd v. Hitchcock*, 20 Johns. 76, 11 Am. Dec. 247; *Le Page v. McCrea*, 1 Wend. 164, 19 Am. Dec. 469; *Brown v. Feeter*, 7 Wend. 301; *Evans v. Wells*, 22 Wend. 224; *La Farge v. Herter*, 11 Barb. 159; *Garvey v. Jarvis*, 54 Barb. 179; *Shaw v. Clark*, 6 Vt. 507, 27 Am. Dec. 578; *Reid v. Hibbard*, 6 Wis. 175; *Farmers' Bank v. Groves*, 12 How. (U. S.) 51. See, also, *Freeman on Judgments*, sec. 463.

A judgment, being a liquidated demand, cannot be made the subject of an accord and satisfaction based upon mere part payment, since part payment alone is not ordinarily deemed a sufficient consideration for an accord and satisfaction of a liquidated demand. There must be some circumstances or acts in addition to part payment in order to form a sufficient consideration for an accord and satisfaction of a liquidated demand. An accord and satisfaction of a judgment is governed by the same rule. In most of the cases in which an attempted accord and satisfaction of a judgment is not sustained, the reason for not sustaining the accord and satisfaction is solely for the want of a sufficient consideration, and not because



a judgment is not a proper subject for an accord and satisfaction if based on a consideration which would be deemed sufficient to support an accord and satisfaction of any other sort of liquidated demand. The sufficiency of a consideration to sustain an accord and satisfaction of a liquidated demand will be treated in a subsequent section.

#### IV. Essential Requirements of an Accord and Satisfaction.

##### a. The Accord.

1. **Necessity for an Accord.**—Inasmuch as an accord and satisfaction is the result of an agreement between the parties, and like all agreements must be consummated by a meeting of the minds of the parties, it is axiomatic that an accord or unity of idea as to the settlement or adjustment of the claim under consideration is the first essential to the contract of accord and satisfaction.

##### 2. What Constitutes an Accord.

A. **In General.**—In a general way it may be said that to constitute an accord, the debtor and creditor must mutually agree as to the allowance or disallowance of their respective claims and as to the balance struck upon the final adjustment of their accounts and demands on both sides: *Komp v. Raymond*, 175 N. Y. 102, 67 N. E. 113. Hence the accord being a contract, it is governed in a general way by the rules governing other contracts. As the very word indicates, there must be an agreement as to the subject matter accepted by both the creditor and the debtor: *Hearn v. Kiehl*, 38 Pa. St. 147, 80 Am. Dec. 472. The necessity for a mutual agreement as to the amount to be received in satisfaction of the debt or claim which forms the subject of the accord and satisfaction, and the manner of paying the amount so agreed upon, or the manner of performing the thing agreed to be performed in satisfaction of the debt or claim, is illustrated by the following cases: Thus it was held in *Economy Coal etc. Co. v. Bracewell*, 78 Ill. App. 335, that where the creditor, at the time of receiving the payment, asserts that it is not in full for the debt, that there is no accord and satisfaction; and in *Horwich v. Western Brewing Co.*, 95 Ill. App. 162, it was held that there was no accord where, the claim being disputed, the debtor wrote to the creditor to draw a draft for a certain amount which was less than that claimed by the creditor, but did not state in making the request that the payment should extinguish the whole debt. So in *Western Union Tel. Co. v. Buchanan*, 35 Ind. 429, 9 Am. Rep. 744, it was held that the mere return of the price of a telegram to the sender and his acceptance of the price was not an accord and satisfaction of the sender's claim for damages for the failure to send the telegram; and in *Reinhan v. Wright*, 125 Ind. 536, 21 Am. St. Rep. 249, 25 N. E. 822, 9 L. R. A. 514, it was held that there was no accord under the following circumstances: Plaintiff sent the body of his dead child to be placed in defendant's vaults, but the

defendants negligently sent the corpse elsewhere; plaintiff, on being promised to have the body returned, expressed satisfaction. The court, in holding that there was no accord, remarked that it was the duty of the defendant to return the body, and it was not shown that it was agreed to accept the return in satisfaction of the damages. In *Bird v. Smith*, 34 Me. 63, 16 Am. Dec. 635, the mere offer of the creditor to accept less was held to be no accord where the debtor did not accept the offer; and in *Cooley v. Kinney*, 119 Mich. 377, 78 N. W. 332, the mere acceptance of money paid in court, but not accompanied by any conditions, was not sufficient to constitute an accord. In *Vining v. Franklin Fire Ins. Co.*, 89 Mo. App. 311, it was held that an adjustment of a fire loss under an insurance policy constituted an accord, but not a satisfaction of the loss under the policy. In *Eames Vacuum Brake Co. v. Prosser*, 157 N. Y. 289, 51 N. E. 986, the defendants, as agents, collected money for plaintiff, and when remitting deducted their commissions. The plaintiff objected to the retentions of the commissions, and continued to object until he finally sued for the commissions thus retained. The court held that there was no accord and satisfaction between the parties. In *Girard Fire etc. Ins. Co. v. Canan*, 195 Pa. St. 589, 46 Atl. 115, it was sought to make a check, which read "in full claims v. J. A. Canan," constitute an accord and satisfaction, but it was shown that the secretary of the company to whom it was payable did not notice the "in full" clause when he received the check. He also testified that had he noticed it he would not have accepted the check. The treasurer who cashed the check knew nothing as to the details of the transaction. The court held that the transaction did not constitute an accord and satisfaction. In *Preston v. Grant*, 34 Vt. 201, it was held that there was nothing in the language of a party making a tender upon a promissory note that could fairly convey to the party to whom the tender was made that it was made upon condition of being in full satisfaction where all the party making the tender said was that "he tendered said sum as the balance due upon said note."

**B. Effect of Mere Promise of Creditor.**—A mere promise on the part of the creditor to accept a certain amount or a certain kind of settlement of his debt does not amount to an accord unless accepted as an accord by the debtor: *Briscoe v. Callahan*, 77 Mo. 134. Of course, an accord without satisfaction of the accord is no bar to further action on the original debt or claim. Hence it is stated by the courts that a promise on the part of the creditor to accept less than the amount due by way of a compromise is *nudum pactum* and void: *Keller v. Strong*, 104 Iowa, 585, 73 N. W. 1071; *Young v. Jones*, 64 Me. 563, 18 Am. Rep. 279; *Geiser v. Kershner*, 4 Gill & J. (Md.) 305, 23 Am. Dec. 566; *Clayton v. Clark*, 74 Miss. 499, 60 Am. St. Rep. 521, 21 South. 565, 22 South. 189, 37 L. R. A. 771; *McIntosh v. Johnson*, 51 Neb. 38, 70 N. W. 522; *Daniels v. Hatch*, 21 N. J. L. 391, 47 Am. Dec. 169; *Seymour v. Minturn*, 17 Johns. (N. Y.) 169, 3

Am. Dec. 580; *Hayes v. Davidson*, 70 N. C. 573; *Smith v. Keels*, 15 Rich. (S. C.) 318. The reason for the rule was stated by the court in *Watts v. Freneche*, 19 N. J. Eq. 407, in the following language: "An agreement by a creditor to accept part of a debt as payment of the whole is nudum pactum and void. Were it otherwise a promise by a creditor that he will accept a less sum at any early date to avoid delay and litigation would not be enforced, unless upon payment as stipulated. This is in no sense a forfeiture; the only consideration for the abatement is the punctual payment. It is no more a forfeiture than to withhold the wages of a laborer who does not come to his work. Wages are only due in consideration of work, and here the abatement was only due in consideration of prompt payment at the time agreed."

It seems to us that if a promise of that sort on the part of the creditor be enforceable at all, it ought to be considered in the light of a contract in which time is of the essence, and that a failure on the part of the debtor to avail himself of the option would nullify the agreement. In *Holton v. Noble*, 83 Cal. 7, 23 Pac. 58, it was averred in an answer to an action for rent that the plaintiff had agreed to take less than the amount sued and to make certain other concessions, but it was also shown that this agreement was never executed as to any of its executory terms. The court said: "Unless the agreement to accept the smaller sum in discharge of the larger was carried out the obligation to pay the larger sum was never extinguished or discharged. There was no execution of the agreement or accord, and hence the original obligation remained unaffected. The accord may be binding on the parties, but it does not discharge the obligation it is made to satisfy until it is executed. Execution alone is satisfaction. The averments in the answer set forth no defense to the action in whole or in part."

**C. Necessity for Complete Knowledge of Facts.**—It seems almost axiomatic that there can be no accord as to the settlement of a debt or claim unless the parties are in possession of the knowledge necessary to adjust the matter understandingly. The question sometimes arises in cases where the courts are called on to determine the scope of the accord and satisfaction which was made by the parties. Thus in *Rued v. Cooper*, 119 Cal. 463, 51 Pac. 704, the question was whether an accord and satisfaction of margin transactions with a brokerage firm included an accord and satisfaction of plaintiff's constitutional right to recover all moneys paid on a margin contract. The accord and satisfaction which was entered into was based on the assumption that the margin transactions were regular and legal. The consideration for the accord and satisfaction was the receipt of certain blocks of mining stock of an unknown value. The court, in holding that the accord and satisfaction did not embrace his right to recover under the constitutional provisions moneys paid to the brokers on margin transactions, said, after setting out the code definition of an accord as "an agreement to accept, in

extinction of an obligation, something different from or less than that to which the person agreeing to accept is entitled," that: "There was no dispute or controversy, and hence no agreement to accept something different from, or less than, that to which Macomber [plaintiff's assignee] was legally entitled, and therefore there was no accord; and the payment of a part of the whole debt due is not a good satisfaction, even if accepted, unless the amount of the claim is disputed; and there was not then, or theretofore, any controversy, both parties—so far as the record discloses—having acted upon the supposition that the contract and the transaction thereunder were valid; while the cause of action here involved is for moneys advanced to defendants under a void contract. Unless, therefore, the settlement and receipt of July 19, 1887, operated in some other way to extinguish or bar said cause of action, the judgment appealed from cannot be sustained.

"The testimony of Mr. Macomber was that nothing was said at or before the settlement as to his right to recover back the money he had advanced; and it was then sought to be shown that he did not know that he had such right. The question put for that purpose was objected to upon the ground that it was immaterial—that he was presumed to know the law.

"The discussion of the case by counsel is largely devoted to the question as to whether relief can be granted from such mistake as that made by Macomber, the defendant regarding it as a pure mistake or ignorance of law to which the maxim, *Ignorantia juris neminem excusat*, should be applied.

"As to the general rule that mistake of law, pure and simple, is not adequate ground for relief, there is no controversy; nor is there any serious controversy as to the proposition that there are exceptions to that general rule.

"We do not, however, regard this as a mistake of law, pure and simple, but as belonging to a distinct class recognized by law-writers of acknowledged ability and sanctioned by numerous decisions. This class is defined by a general rule formulated by Professor Pomeroy, concerning which he says: 'The number of decisions which support it, and which it explains, is very great.' That rule is as follows: 'Whenever a person is ignorant or mistaken with respect to his own antecedent and existing private legal rights, interests, estates, duties, liabilities, or other relation, either of property or contract, or personal status, and enters into some transaction the legal scope and operation of which he correctly apprehends and understands, for the purpose of affecting such assumed rights, interests, or relations, or of carrying out such assumed duties or liabilities, equity will grant its relief, defensive or affirmative, treating the mistake as analogous to, if not identical with, a mistake of fact'": 2 Pomeroy's Equity Jurisprudence, sec. 849, p. 1178. See, also, 1 Story's Equity Jurisprudence, sec. 122, p. 151, to the same effect.



So, also, in *Scully v. Delamater*, 28 Fed. 114, it was held that where one party employs another to make certain repairs and upon settlement with the employé retains a certain portion of the agreed price as compensation for bad workmanship or material, the transaction is an accord and satisfaction as to all the damages then known to the employer, but that it was not such an accord of hidden defects unknown to the employer and which he could not, by the exercise of reasonable care, ascertain.

In *Roberts v. Eastern Counties Ry. Co.*, 1 Fost. & F. 460, the plaintiff was injured on defendant's railroad and his hat crushed. He did not know of any injury beyond that to his hat, and accepted two pounds in compensation for that and gave a receipt. The receipt was pleaded in bar of his action for personal injuries. Lord Cockburn, in passing on the case, said: "It cannot be seriously urged that, if plaintiff had been seriously injured, he is precluded from recovering because he agreed to accept two pounds for his hat."

The rules above indicated have been applied by the courts quite frequently. Thus, a voluntary payment of wages by a railway company to an injured employé during his disability was held to constitute no accord and satisfaction for serious personal injuries although the element of fraud on the part of the railway's agent procuring the settlement was raised and evidently believed by the jury: *Sobieski v. St. Paul etc. R. R. Co.*, 41 Minn. 169, 42 N. W. 863. Another instance of the application of the rule was in *Lee v. Tarplin*, 183 Mass. 52, 66 N. E. 431, which was a transaction involving the transfer of the mortgaged premises in order to save the costs of foreclosure proceedings. It was sought to make that transaction an accord and satisfaction of a tort for false representations in the making of the mortgage but the court refused to so hold on the ground that it was not shown to have been contemplated by the conversation of the parties in regard to the matter nor by their agreement. And in *Goodman v. Walker*, 30 Ala. 482, 68 Am. Dec. 134, the acceptance of collections made by an attorney was held no accord and satisfaction for damages resulting from his failure to collect larger amounts through his want of ordinary care and skill, where his failure to use care or skill were unknown to the client at the time of accepting the collections.

In *Withers v. Moore*, 140 Cal. 591, 74 Pac. 159, a coal shipper drew a draft for the agreed price of a cargo of coal, less the existing custom duties, but before the cargo entered the port the custom duties had been lowered. The question of custom in regard to the payment of such duties was also involved in the case, but the court held that the draft was not a settlement of the difference between the old and new custom duties.

In *Markel v. Spittler*, 28 Ind. 488, a mistake was made in the computation of the interest due on a note against an estate, the amount of interest due being in fact much greater than calculated. A receipt was given in full satisfaction of the claim, but the court in an action to recover the balance of the interest held that the settlement

could not be sustained on the ground of being an accord and satisfaction. So, also, in *Goodson v. National Masonic Acc. Assn.*, 91 Mo. App. 339, an insurance policy for five thousand dollars was under a mistake settled for one thousand dollars, but the court refused to hold the parties to the settlement. And in *Jones v. Mills*, 14 Ind. 436, a county judge applied for a mandate to compel the issuance of a warrant for the balance of his salary. The petitioner had drawn his salary upon the basis of its being five hundred dollars a year, whereas it was as a matter of law eight hundred dollars a year. Both the petitioner and the other country officials who had anything to do with the issuing of the warrants for his salary and the cashing of them believed the salary to have been on a basis of five hundred dollars a year. The petitioner had served four years and drew five hundred dollars a year. The court held that the transaction did not amount to an accord and satisfaction.

In *Belt v. American Central Ins. Co.*, 148 N. Y. 624, 43 N. E. 64, an insurance policy had been sent to the insurer a day before the fire for a reduction of rate; several days after the fire it was returned to the insured with an indorsement dated several days before the fire, whereby the rate was reduced, but the coinsurance clause was changed in such a way as to lessen the amount payable under the policy. The loss was adjusted under the terms of the new coinsurance clause and a receipt given for its payment. The insured afterward learned that the changes in the policy were made as a matter of fact several days after the fire and he thereupon brought suit to have the policy reformed and recover the amount under the original policy. The insurer defended on the ground that the settlement of the loss amounted to an accord and satisfaction, but the court refused to entertain the defense.

It seems that an accord will be deemed, where one is attempted, to have embraced all the damages which were ascertainable. This view was entertained by the court in *Woodford v. Marshall*, 72 Wis. 129, 39 N. W. 376, which was an action for the recovery for the balance of the purchase of some pine lands, and in which defendant set up a counterclaim for a shortage in the amount of timber represented as being upon the land. About a year after the sale, when some of the purchase price notes became due, the defendant became aware that there was a shortage, but did not know extent thereof. He informed the plaintiff and agreed with plaintiff upon a certain deduction because of said shortage, though the shortage was merely estimated. The court, in sustaining the accord and satisfaction, said: "There was no reservation of any future ascertainment of such shortage, or of any right to make any future claim on account of the same. The only way the amount of the pine had been ascertained by the plaintiff was by an estimate; and the defendant after full knowledge of the land, made his own estimate; and it is quite probable that no actual measurement of said shortage has yet been made. These facts would seem to make a very strong case of accord and satisfaction."

**D. Acceptance of Money or Check "in Full" as Accord.**—In the principal case it is stated that the simple tender of a "balance" as shown by an account tendered by the debtor does not carry with it an implication or conclusion that by such tender the debtor paid, or the creditor agreed to receive, the same in full of the amount due, where there has been no prior disagreement or discussion as to what was actually due. This rule was recently followed by the same court in *Asher v. Greenleaf* (Kan.), 74 Pac. 633, under somewhat similar circumstances.

It is doubtless correct that there must be some acts or declarations by the parties to the attempted accord and satisfaction which will indicate to the mind of the recipient of a check purporting to be for a balance or in full satisfaction of all claims that there is a dispute as to the amount due, and that the acceptance of the check will signify his approval of the adjustment fixed by the sender of the check.

The general rule in regard to the tender of money (and checks are ordinarily considered in the same light) is that the money should be offered and be accompanied with such acts and declarations as amount to a condition that if the money is accepted it must be in satisfaction of the entire claim, and of such a nature that the party to whom it is offered is bound to understand therefrom that if he takes the money he takes it subject to such condition: *Hillestad v. Lee* (Minn.), 97 N. W. 1055; *Preston v. Grant*, 34 Vt. 203.

In *Fremont Foundry etc. Co. v. Norton* (Neb.), 92 N. W. 1058, a check was sent by the debtor without condition for an amount less than the contract price of a steam boiler, but accompanied by a statement in the nature of a counterclaim, which, if allowed, would, with the check, balance the purchase price of the boiler. The check was accepted and the debtor notified that he had been credited with it, but that his counterclaim would not be allowed, and a demand was made for the balance. The court said: "If there had been a statement in the letter which contained the check that it could only be received in full payment of the purchase price of the boiler or of the amount claimed by the appellee (the creditor), and appellee thereupon accepted the check, its letter of protest would have availed it nothing. Such acceptance would have resulted in an accord and satisfaction. There was no condition, however, stated in the appellant's letter. By the acceptance of the check, appellee did not assent to the validity of appellant's claims or demands set forth in the statement which accompanied it. The contract price for the construction and delivery of the boiler was liquidated. It was a fixed and certain amount agreed upon between the parties. There was no dispute as to this amount. Appellant never objected to it, but when he came to make his remittance he made certain demands or claims against the appellee and sent his check for the balance of the purchase price. This was the first time that he had ever made any claim of the kind in question. The matter had never been in dispute between them,

and until the receipt of the letter appellee never had any information that the appellant made a claim against it on account of the matters stated therein": See, also, *Keck v. Hotel Owners' Mut. Fire Ins. Co.*, 89 Iowa, 200, 56 N. W. 438; *Perin v. Catheart*, 115 Iowa, 553, 89 N. W. 13, and *Lord v. Atkins*, 138 N. Y. 184, 33 N. E. 1035, to the same effect.

In *Hillestad v. Lee* (Minn.), 97 N. W. 1055, before adverted to, the court said: "Ordinarily, the acceptance by a creditor of a check for a part of a disputed claim will not constitute an accord and satisfaction, although the check agrees in amount with the balance due as claimed by the debtor. In order to make it so, the check must recite, in effect, that it is in full payment of the claim, or be so declared, expressly or by necessary implication when the check is tendered": See, also, *Eames Vacuum Brake Co. v. Prosser*, 157 N. Y. 289, 51 N. E. 986, and *Van Dyke v. Wilder*, 66 Vt. 579, 29 Atl. 1016, where the same conclusions were also reached. The cases of *Hodges v. Tennessee Implement Co.*, 123 Ala. 572, 26 South. 490, and *Folsom v. Ballou Banking Co.*, 160 Mass. 561, 36 N. E. 469, have also a general bearing on the subject, though in the Alabama case the check which purported to be in full payment was construed in connection with a statute which provided that all receipts, releases and discharges in writing must have effect according to the intention of the parties.

Practically the same question arose in *Board of County Commrs. v. Kobkirk*, 13 Colo. App. 180, 56 Pac. 993, where it was unsuccessfully sought to sustain a plea of accord and satisfaction in an action by a sheriff for the recovery of a balance of fees for conveying prisoners to the penitentiary. The board of commissioners disallowed a portion of his fees, and an indorsement was placed upon the warrant for the fees that it was in full payment. Though the court did not expressly pass on the question, it intimated that such boards could not affix conditions to legitimate claims nor bind claimants without some definite agreement or actual notice. The question of claims against public bodies will be treated more fully in a later portion of this note.

**E. Receipt as Evidencing an Accord.**—It is said that a receipt in full given without protest upon payment of the undisputed part of a claim, after a refusal to pay another part which is disputed, is conclusive as against the right of the creditor to recover a further sum, in the absence of fraud, mistake, duress or undue influence: *Tanner v. Merrill*, 108 Mich. 58, 62 Am. St. Rep. 687, 65 N. W. 661. And it is also held that while a receipt in full is not conclusive, it is always prima facie evidence of a settlement, and cannot be set aside except for weighty reasons such as fraud, accident, or mistake, but even in such cases the reasons for setting it aside must clearly appear: *Rhoades' Estate*, 189 Pa. St. 460, 42 Atl. 116.

In the case last cited, a father had given his son a receipt "in full for all claims from him," and after the father's death a promissory note of the son, dated prior to the receipt, was found among the



father's effects. Proceedings were brought to enforce payment of the note. The court, in holding the receipt conclusive of a settlement, said: "As Frederick Rhoades is dead and S. Oliver Rhoades is incompetent as a witness, and no one was examined who was present when the receipt was given, we must ascertain the legal effect of such a paper when given in evidence, without explanatory testimony as to what took place when it was executed and delivered. Even receipts in full are not conclusive and are open to explanation, but where there is no explanatory testimony they have a defined legal meaning."

In *Gorden v. Bartlett Illuminating Co.*, 114 Mich. 625, 72 N. W. 622, an employé who had been paid semi-monthly in checks, which read "in full for services to date," and who at the termination of his employment received a similarly worded check and besides gave a receipt in full for services to date, sought to recover for extra services and alleged that he signed the receipt without reading it, on being told that if he did not sign it, he would not get a cent. The court held the transaction amounted to an accord and satisfaction.

In *Marshall-Wells Hardware Co. v. Moody* (Minn.), 99 N. W. 356, the court held that a receipt in full for a certain amount, to be in full of account if a certain claim for credit was just, was a conditional settlement and not an accord and satisfaction. And in *Armour v. Ross*, 110 Ga. 403, 35 S. E. 787, it was held that a receipt in full of all claims to date, of whatsoever nature, did not show an accord and satisfaction where there were several distinct claims, and one of those claims was not mentioned in the settlement.

**b. Necessity for Consideration.**—The agreement of accord and satisfaction being governed in its essentials by the same rules governing the making of other contracts, a consideration is a necessary element to the agreement: *Deland v. Hiatt*, 27 Cal. 611, 87 Am. Dec. 102; *Ness v. Minnesota etc. Co.*, 87 Minn. 413, 92 N. W. 333; *Shaw v. Clark*, 6 Vt. 507, 27 Am. Dec. 578. The main contention in cases of this kind is whether certain acts or circumstances are sufficiently important to constitute a sufficient consideration for the accord and satisfaction. The sufficiency of such acts or circumstances to form the basis of an accord and satisfaction will be treated in the next section.

### c. Sufficiency of Consideration.

#### 1. General Rule.

**A. Rule Applicable to All Cases.**—It may be stated as a rule applicable to all cases of accord and satisfaction, whether affecting liquidated or unliquidated claims, that the consideration for the agreement of accord and satisfaction must be something which is of benefit or advantage to the creditor: *Warren v. Skinner*, 20 Conn. 559; *Rusk v. Gray*, 83 Ind. 589; *Merry v. Allen*, 39 Iowa, 235; *Bullen v. McGillicuddy*, 2 Dana (Ky.), 90; *White v. Jordan*, 27 Me. 370; *Maddux v. Bevan*, 39 Md. 485; *Smith v. Bartholomew*, 1 Met. (Mass.) 276,

35 Am. Dec. 365; Marion v. Heimbach, 62 Minn. 214, 64 N. W. 386; Watson v. Elliott, 57 N. H. 511; Daniels v. Hatch, 21 N. J. L. 391, 47 Am. Dec. 169; Komp v. Raymond, 175 N. Y. 102, 67 N. E. 113; Diller v. Brubaker, 52 Pa. St. 498, 91 Am. Dec. 177; Eve v. Mosely, 2 Strob. (S. C.) 203; Clark v. Brown, 22 How. (U. S.) 270. Sometimes it is said that the consideration must be something new or different from that to which the creditor was already entitled but that it will be immaterial whether it be more or less valuable than that which the creditor relinquishes: Martin v. Frantz, 127 Pa. St. 391, 14 Am. St. Rep. 859, 18 Atl. 20. And it has also been stated that the consideration should be something to which the creditor had no previous right. Hence that where the creditor had a perfect and acknowledged right to that which was given as consideration of the alleged accord and satisfaction that the agreement for the accord will fail for want of a consideration: Ness v. Minnesota etc. Co., 87 Minn. 413, 92 N. W. 333; Mintzer v. Supreme Council, 41 Misc. Rep. (N. Y.) 512, 85 N. Y. Supp. 23. And it is also held that where it is uncertain as to which of two parties is liable for a debt of a fixed amount, and both of the parties deny liability, a settlement with one for a less amount is based on a sufficient consideration: Chicago etc. Ry. Co. v. Brown (Neb.), 97 N. W. 1038.

**B. Distinction Between Liquidated and Unliquidated Claims.**—It is the universal rule that mere part payment of a liquidated claim, unaccompanied by any other moving consideration, is an insufficient consideration to support an accord and satisfaction: Pearson v. Thomason, 15 Ala. 700, 50 Am. Dec. 159; Cavaness v. Ross, 33 Ark. 572; Deland v. Hiett, 27 Cal. 611, 87 Am. Dec. 102; Rose v. Hall, 26 Conn. 392, 68 Am. Dec. 402; Spann v. Baltzell, 1 Fla. 338, 46 Am. Dec. 346; Pusheck v. Frances E. Willard etc. Assn., 91 Ill. App. 192; Myers v. Green, 21 Ind. App. 138, 69 Am. St. Rep. 344, 51 N. E. 942; Sullivan v. Finn, 4 G. Greene (Iowa), 544; St. Louis etc. R. R. Co. v. Davis, 35 Kan. 464, 11 Pac. 421; Jones v. Bullitt, 2 Litt. (Ky.) 49; Grayson v. Lilly, 7 T. B. Mon. 6; Russell v. Meek, 22 Ky. Law Rep. 498, 58 S. W. 373; Bird v. Smith, 34 Me. 63, 56 Am. Dec. 635; Austin v. Smith, 39 Me. 203; Geiser v. Kershner, 4 Gill & J. (Md.) 395, 23 Am. Dec. 566; Smith v. Bartholomew, 1 Met. 276, 25 Am. Dec. 365; Tuttle v. Tuttle, 12 Met. 554, 46 Am. Dec. 701; Donohue v. Woodbury, 6 Cush. 148, 52 Am. Dec. 777; Twitchell v. Shaw, 10 Cush. 48, 57 Am. Dec. 80; Weber v. Couch, 134 Mass. 26, 45 Am. Rep. 274; Specialty Glass Co. v. Daley, 172 Mass. 460, 52 N. E. 633; Leeson v. Anderson, 99 Mich. 247, 41 Am. St. Rep. 597, 58 N. W. 72; Sease v. Gillett-Herzog Mfg. Co., 55 Minn. 349, 57 N. W. 58; Sheibley v. Dixon Co., 61 Neb. 409, 85 N. W. 399; Blanchard v. Noyes, 3 N. H. 518; Daniels v. Hatch, 21 N. J. L. 391, 47 Am. Dec. 169; Murphy v. Kastner, 50 N. J. Eq. 214, 24 Atl. 564; Harrison v. Close, 2 Johns. 450, 3 Am. Dec. 444; Seymour v. Minturn, 17 Johns. 169, 8 Am. Dec. 380; Russell v. Lytle, 6 Wend. 390, 22 Am. Dec. 537; Bunge v. Koop, 48 N. Y. 225,

8 Am. Rep. 546; *Mitchell v. Sawyer*, 71 N. C. 70; *Martin v. Frantz*, 127 Pa. St. 389, 14 Am. St. Rep. 859, 18 Atl. 20; *Rose v. Daniels*, 8 R. I. 381; *Eve v. Mosely*, 2 Strob. (S. C.) 203; *Bowden v. Robinson*, 4 Tex. Civ. 626, 23 S. W. 816; *Rotan Grocery Co. v. Noble* (Tex. Civ.), 81 S. W. 586; *Rising v. Cummings*, 47 Vt. 345; *Seymour v. Goodrich*, 80 Va. 304; *Smith v. Chilton*, 84 Va. 840, 6 S. E. 142; *Prairie Grove etc. Co. v. Luder*, 115 Wis. 20, 89 N. W. 138, 90 N. W. 1085; *Henderson v. Moore*, 5 Cranch (U. S.), 11; *Foakes v. Beer*, L. R. 9 App. Cas. 605.

But, on the other hand, it is also universally acknowledged by the same and other authorities that mere part payment is a sufficient consideration where the claim is unliquidated or in dispute and also where some extraneous consideration, even though slight, exists: *Webster v. Wyser*, 1 Stew. (Ala.) 184; *Berdell v. Bissell*, 6 Colo. 162; *Rosenmueller v. Lampe*, 89 Ill. 212, 31 Am. Rep. 74; *Hayes v. Massachusetts Mutual Life Ins. Co.*, 125 Ill. 626, 18 N. E. 322, 1 L. R. A. 303; *Cool v. Stone*, 4 Iowa, 219; *Works v. Hershey*, 35 Iowa, 340; *Stockton v. Frey*, 4 Gill, 406, 45 Am. Dec. 138; *Tanner v. Merrill*, 108 Mich. 58, 62 Am. St. Rep. 687, 65 N. W. 664, 31 L. R. A. 171; *McCall v. Nave*, 52 Miss. 494; *Perkins v. Headley*, 49 Mo. App. 556; *Slade v. Swedeburg Elevator Co.*, 39 Neb. 600, 58 N. W. 191; *Hilliard v. Noyes*, 8 N. H. 312; *Booth v. Smith*, 3 Wend. 66; *Brooks v. Moore*, 67 Barb. 393; *Mathis v. Bryson*, 49 N. C. 508; *McDaniels v. Bank of Rutland*, 29 Vt. 230, 70 Am. Dec. 406.

In *Kellogg v. Richards*, 14 Wend. 116, the court said: "The rule that the payment of a less sum of money, though agreed to be received in full satisfaction of a debt exceeding that amount, shall not be so considered in contemplation of law, is technical and not very well supported by reason; courts, therefore, have departed from it on slight distinctions." Somewhat similar language was used in *Johnson v. Brannan*, 5 Johns. 272, and *Brooks v. White*, 2 Met. 283, 37 Am. Dec. 95.

The technical distinctions drawn by the earlier cases have resulted in the courts laying down many rules as to what extraneous acts or under what circumstances a part payment may be considered a sufficient consideration for an accord and satisfaction, which the courts and the business world knew was for the best interests of both the creditor and the debtor. The strictness of the rule undoubtedly worked many hardships in preventing a creditor, who needed the money, from making an accord and satisfaction with his debtor or in preventing a debtor who might be temporarily embarrassed from settling with his creditor for less than the fixed amount of his debt. Hence, the courts, though bound by precedent, from time to time enlarged the exceptions to the rule so that now the exceptions might almost be said to form the rule itself. For instance, in *Pinnel's Case*, 5 Coke, 117, one of the leading early English cases, the court, in holding that payment of a less sum before the debt fell due would dis-

charge the debt, said: "Peradventure parcel of the sum before the day it fell due would be more beneficial to him than the whole at the day; and the value of the satisfaction is not material."

The later American decisions are being adjusted to suit the conveniences of commercial dealings, and hence a very slight consideration is deemed sufficient to sustain an accord and satisfaction based upon a part payment of the debt.

## 2. Part Payment.

**A. In Money.**—It does not seem to be questioned but, where the claim is unliquidated or where if liquidated its recovery is doubtful, that any sum of money, no matter how small, may form the consideration for its compromise by an accord and satisfaction, no matter how large the demanded sum was, if the transaction is performed in good faith: *Bull v. Bull*, 43 Conn. 469; *Tuttle v. Tuttle*, 12 Met. 554, 46 Am. Dec. 701; *Pierce v. Pierce*, 25 Barb. 243; *United States v. Child*, 12 Wall. 244.

**B. In Property.**—The right to accept property in satisfaction of an obligation calling for payment in money has been recognized ever since the days of Lord Coke: *Coke on Littleton*, 212 b. In *Peyton's Case*, 9 Coke, 77b, it was said that a bond calling for payment in money may be satisfied by the giving of a horse, but that a bond calling for the payment of a horse could not be satisfied by a payment in money.

So, also, in *Pinnel's Case*, 5 Coke, 117, it was said: "And it was resolved by the whole court that payment of a lesser sum on the day, in satisfaction of a greater, cannot be any satisfaction for the whole because it appears to the judges that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum; but the gift of a horse, hawk, robe, etc., might be more beneficial to the plaintiff than the money, in respect of some circumstances, or otherwise the plaintiff would not have accepted it in satisfaction."

In *Howard v. Norton*, 65 Barb. 169, the rule in regard to effecting an accord and satisfaction by the giving of property in satisfaction was stated in the following language: "When, however, the debtor delivers to his creditor, and the creditor receives property at a price agreed upon by them, and the amount thus paid is less than the debt, it is not an accord and satisfaction, notwithstanding the creditor agrees to take it as full payment of the debt. Such a delivery of property is in law equivalent to the payment of so much money, and we have seen that the payment of a less sum than the whole debt is not a satisfaction, although it may be agreed so to be. It is only when property is received in satisfaction, without any price being agreed upon at which it is to be estimated between them, that it becomes a valid accord and satisfaction. Such a delivery and acceptance is held to be binding on the creditor, because the parties have the right to determine, for themselves, the value of property transferred from the



one to the other; and when once it is determined, they are, in the absence of fraud, bound by such agreement.

"There is no reason why, if the parties so agree, a horse intrinsically worth but fifty dollars may not be received in satisfaction of a debt of one thousand dollars. No tribunal is authorized to repudiate the arrangement and fix a price on the animal for them." See, also, the case of *Blinn v. Chester*, 5 Day (Conn.), 359, where a promissory note was satisfied by carpenter work.

The right to effectuate an accord and satisfaction by the giving of property of an unascertained value does not seem to have been often questioned, for most of the adjudicated cases proceed, tacitly, upon the theory that it can properly be done.

**C. Combination of Property and Money.**—The same reasons which are urged in support of a settlement of a debt in property are urged in support of a settlement which is made up of a combination of both money and property. In *Neal v. Handley*, 116 Ill. 418, 56 Am. Rep. 784, 6 N. E. 45, a judgment of two hundred dollars was settled by an accord and satisfaction whereby the judgment debtor gave one hundred dollars in cash and a cow in satisfaction of the judgment. There was a conflict in the evidence in the case as to whether the value of the cow had been fixed or not, and on the other hand it was claimed that the judgment creditor was to have his choice among the judgment debtor's cows. And it was also disputed as to whether the transaction was to be a full satisfaction. The court, however, said: "But even if this were so, it is contended it would not be a discharge of the judgment inasmuch as the one hundred dollars and the value of the cow were of a less amount than the judgment, and authorities are cited upon the point that the payment of a less sum of money cannot be pleaded in satisfaction of a larger sum. The doctrine of these authorities is confined to the case of the payment of, or agreement to pay, a less sum of money merely, and does not apply to the case of the payment of a less sum of money and some other thing."

So, also, in *Rose v. Hall*, 26 Conn. 392, 68 Am. Dec. 402, a debt of forty thousand dollars was satisfied by a combination of money and property which only aggregated about twenty-six thousand dollars in value. It was argued that it amounted merely to a part payment of a fixed obligation. The court, after adverting to the well-known rule in regard to such part payments, said: "But, where a new duty is undertaken by the debtor which is, or may be burdensome to him or beneficial to the creditor, a new consideration arises out of such undertaking and sustains the agreement of the creditor; as when the debtor undertakes to pay and pays part, at an earlier day, or at another place, or in another article, than required by the original obligation.

"In these and like cases, a new duty is assumed by the debtor which may be more burdensome to him and more beneficial to the

creditor than the full performance of the original obligation according to its terms would have been. In this case the debt was indeed due, and it was more than twenty-six thousand dollars, but it was by the original contract due only in money. By the new agreement it was to be paid, and was paid, partly in bills of exchange, partly in goods on hand, and partly in goods to be manufactured by the defendant for that particular purpose. And although the quantity of goods was to be and was measured by their market value, yet it is obvious that they might be in fact worth more to the plaintiff than their market value. It might be desirable for him to obtain possession of the whole stock of that particular kind or style of goods, in order to control the market and speculate on its rise. The bills of exchange, too, gave him the security of the acceptor's name in addition to his debtor's. So that the plaintiff received, or might have received, some benefit under the new agreement, to which he was not entitled under the old. The defendant also undertook new duties. He agreed to manufacture cloths, which might cost, in their manufacture, more than their fair market value, the price at which they were to be paid and received. So that under the new arrangement the hazard of loss, trouble and inconvenience was assumed, and might have been suffered on the one side, as well as the prospect or possibility of profit or advantage secured on the other, either of which was consideration enough to support the promise of the plaintiff founded thereon."

A combination of money and medical attendance frequently comprises the consideration for the accord and satisfaction of personal injuries. See *Stockton v. Frey*, 4 Gill, 406, 45 Am. Dec. 138, *Hinkle v. Minneapolis etc. Ry. Co.*, 31 Minn. 434, 18 N. W. 275, and *Gulf etc. Ry. v. Gordon*, 70 Tex. 85, 7 S. W. 695, for instances of such accords.

#### **D. Combination of Money, Notes or Executory Agreements.**

**1. Money and Notes.**—The question whether a part payment, made up of money and promissory note of the debtor, would operate as an accord and satisfaction, would seem to depend upon whether the debt or claim to be thus satisfied was a liquidated or an unliquidated claim. If the claim is unliquidated an accord and satisfaction of that sort would be operative, but if the claim is liquidated it would not be operative. Thus in *Lapp v. Smith*, 183 Ill. 183, 55 N. E. 717, the rule just stated in regard to unliquidated claims was recognized. The court said: "Though the items of appellee's claim were not disputed, yet a setoff was asserted, and that the demand had become and was a matured liability was denied. The amount of appellee's claim being in dispute and that it was due being denied, it was an unliquidated demand: *Ostrander v. Scott*, 161 Ill. 339, 43 N. E. 1089. The letter written by appellants was an offer to adjust the differences between the parties by the substitution of the check and the three notes for the appellee's claim or demand and in satis-

faction thereof. It was so understood by appellees, who replied that such an arrangement was not satisfactory to them. The offer was indivisible, covered the whole claim, was clearly to be accepted as an entirety in satisfaction of the whole claim or rejected as a whole. If accepted it would constitute a bar to a right of action on the demand: 1 Beach on Contracts, secs. 441, 442; White v. Jones, 38 Ill. 169; Rayburn v. Day, 27 Ill. 46. The check was not tendered as a payment upon the original claim, but it and the notes were offered together for acceptance, as in compliance with a proposed new undertaking and agreement then submitted for acceptance in discharge of the unliquidated and disputed claim. The appellees were called upon to accept the proposition as an entirety as made or reject it in toto."

The doctrine that such an accord and satisfaction would not be operative where the claim was a liquidated one was laid down in the very recent case of Shanley v. Koehler, 80 App. Div. 566, which was affirmed by the New York court of appeals in a memorandum opinion in 178 N. Y. 556, 70 N. E. 1109. In that case a judgment had been obtained against the judgment debtor for two hundred and twenty-six dollars and twenty-nine cents and was docketed. The judgment debtor and creditor made an arrangement whereby the creditor agreed to satisfy the judgment upon receiving from the debtor fifty dollars in cash and his unindorsed promissory note for fifty dollars, payable in three months with interest. The debtor complied with all the conditions of the arrangement and paid the note at maturity thereupon receiving a receipt stating that the payment was "in full settlement of his account." The judgment creditor, however, refused to satisfy the judgment of record, and the debtor brought the proceeding at bar to compel him to satisfy the judgment. The court held that the transaction did not amount to an accord and satisfaction. The court, after reviewing *Moss v. Shannon*, 1 Hilt. 175, where the precise question was involved, *Waydell v. Luer*, 5 Hill, 448, subsequently reversed in 3 Denio, 412, *Parrott v. Colby*, 6 Hun, 55, *Ludington v. Bell*, 77 N. Y. 138, 33 Am. Rep. 601, *Bliss v. Shwartz*, 65 N. Y. 444, where somewhat similar questions were involved, said: "To sustain the contention of the plaintiff that there was an accord and satisfaction of this judgment, the plaintiff must establish that there was a consideration for the promise to accept cash payment of fifty dollars and a promissory note for an additional fifty dollars, which, upon payment of the note, was to satisfy and discharge the judgment. Whether or not such payment would be sufficient to discharge an unliquidated demand for a greater amount it is not necessary to determine. It clearly would, where there was any real dispute as to the amount due, and it may be that giving a creditor a promissory note for a portion of an amount resting in an open account, placing the creditor in a position which would enable him to more speedily obtain payment of the amount represented by the note, would be an advantage

to the creditor, or a disadvantage to the debtor, which would be a sufficient consideration to support the agreement to accept a lesser sum than claimed by the creditor, but in this case the defendant had obtained a judgment for his demand, and the amount due was then actually liquidated and determined. He could enforce that judgment at any time by execution. A receipt by him of the whole one hundred dollars in cash would clearly not have been a sufficient consideration for an agreement to discharge the remainder of the judgment, and the receipt of the judgment debtor's own promissory note for fifty dollars would put the judgment creditor in no better position than he was in at the time the note was accepted. No possible advantage could accrue to him upon the receipt of this note which he did not have at the time the note was given. He had a judgment which he could enforce by execution. If the note was not paid he could enforce it in no other way than by a new action against the plaintiff which would result in a new judgment which would be no better security for the defendant than the judgment he had already obtained. Nor was the giving of this note in any sense an injury to the plaintiff. Whether or not there is a consideration must appear from the facts of each particular case, and in this case it is quite evident that there was no consideration for the agreement."

The acceptance of money and the note of a third person, the money and notes aggregating in amount less than the debt which was to be satisfied, were held to be a sufficient consideration to support an accord and satisfaction of the debt in *Roberts v. Brandies*, 44 Hun, 468, and *Lincoln etc. Safe-Deposit Co. v. Allen*, 82 Fed. 148.

**2. Money and Executory Agreements.**—In *Worden v. Houston*, 92 Mo. App. 371, the holder and maker of a note differed as to the extent of the maker's liability thereon, the maker claiming that a certain portion of the interest was usurious, but they finally agreed to adjust the note by the maker paying a certain amount in cash and a certain further sum within a given time, the promise being verbal, and the aggregate amounts being less than the sum claimed by the holder of the note as being due. The court held that the transaction amounted to an accord and satisfaction.

The same principle was recognized in *Traphagen v. Vorhees*, 44 N. J. Eq. 21, 12 Atl. 895, where a mortgage was held satisfied by an accord and satisfaction had between the parties. In that case the mortgagee was a very old lady, and the mortgagor had for a number of years previous to the accord attended to a portion of her business affairs, she being possessed of considerable real estate and mortgage securities, and he continued to do so after the date of the accord. The agreement was evidenced by a receipt for a stated amount, and provided that the mortgage was to be canceled after the mortgagee's death. The receipt was not under seal.

But in this connection see the old case of *Bank of the Commonwealth v. Letcher*, 3 J. J. Marsh. (Ky.) 196, which held the view



that one note could not be the subject of an accord and satisfaction effected by a small payment in money and the execution of new notes. It appears, however, in that case, that the new notes were for the balance. But see the next section.

### **E. Acceptance of Notes or Executory Agreements.**

1. **Mere Note of Debtor.**—In *Jackson v. Brown*, 102 Ga. 89, 66 Am. St. Rep. 156, 29 S. E. 149, a negotiable promissory note was given in settlement of an open account. The creditor afterward sued upon the account, and the debtor set up the giving of the note as an accord and satisfaction in bar. The court said: "The question then is, whether where one accepts from another in liquidation of an open account, a negotiable promissory note, he can recover in a suit upon the original cause of action, unless upon the trial he produces the note, or satisfactorily accounts for its absence. We think the authorities answer this question in the negative. If the note were in point of fact given, and is unpaid, it may be in the hands of an innocent holder for value. If that be true, such holder could enforce payment from the maker of the note. The consequence is, that the defendant may be twice subjected to the payment of the same debt. He would certainly be liable to the holder of the note and the payment of the judgment rendered upon the open account, which was the consideration of the note, would not absolve him from liability to the holder. We do not think the law will subject him to this twofold responsibility. It will not suffer the plaintiff to collect the open account while the note may be still in the hands of a bona fide holder. It seems to be a well-established rule of law, that where a bill of exchange or negotiable note is taken for a prior debt, a party cannot recover upon the original consideration unless the bill or note is produced to be canceled at the trial, or unless it appears that it cannot be enforced by a third person." See in this connection *Costar v. Davies*, 8 Ark. 215, 46 Am. Dec. 311; *Brabazon v. Seymour*, 42 Conn. 553; *Salomon v. Pioneer etc. Co.*, 21 Fla. 374, 58 Am. Rep. 667; *Morrison v. Smith*, 81 Ill. 221; *McMurray v. Taylor*, 30 Mo. 263, 77 Am. Dec. 611; *Young v. Hibbs*, 5 Neb. 433; *Elwood v. Dieferdorf*, 5 Barb. 398; *Holmes v. D'Camp*, 1 Johns. 34, 3 Am. Dec. 293; *Winsted Bank v. Webb*, 39 N. Y. 325, 100 Am. Dec. 435; *Brown v. Scott*, 51 Pa. St. 357; *Street v. Hall*, 29 Vt. 165; *Williams v. Ketchum*, 21 Wis. 432. The subject, however, is more properly a matter of payment and not a subject of accord and satisfaction, unless the note accepted be for a less sum than the amount of the indebtedness where it is a liquidated amount. Of course, where the note would be given in settlement of an unliquidated claim it would properly be an accord and satisfaction.

In *Foster v. Collins*, 53 Tenn. (6 Heisk.) 1, it was said that it is a sufficient accord and satisfaction to show that a note was executed for that purpose without showing that it was paid: See, also, *Brown v. Kencheloe*, 3 Cold. 199, to the same effect. And in *Allen v. Hud-*

son, 78 Ill. App. 376, it was said that where a note is given to, and accepted by, another with whom the maker has had dealings, that the presumption is that it was an accord and satisfaction.

The principle upon which the accord and satisfaction of a debt by a note for a less amount is sustained is that the negotiability of the note makes it in fact a different thing from a mere part payment in money, and that on account of its negotiability it is more advantageous to the creditor than the non-negotiable debt: See *Godard v. O'Brien*, 9 Q. B. Div. 37, and *Bidder v. Bridges*, 37 Ch. Div. 406, the two leading English cases on the subject.

**2. Note by One Joint Debtor or Copartner.**—The principle just stated in the last paragraph was applied in *Ludington v. Bell*, 77 N. Y. 138, 33 Am. Rep. 601, where the individual note of one copartner after dissolution of the firm for one-half of a partnership debt was held to be a good discharge of the obligation of the maker of the note. In response to the argument that there was a want of consideration, the court said: "Indeed, the additional obligation assumed by one of its debtors, by becoming responsible severally for the entire debt, would of itself render it a valid agreement. It is not necessary that there should be a benefit. Damage or loss by one party, sustained at the request of the other, is sufficient. As it is expressed by Chancellor Kent: 'A valuable consideration is one that is either a benefit to the party promising or some trouble or prejudice to the party to whom the promise is made': 2 Kent's Commentaries, 2d ed., 465." And continuing the court remarked: "The claim made that there was no consideration for the alleged agreement to collect the remainder, is fully answered, as already shown, by the fact that the notes given added to the security of the defendant's debt. Something was parted with, and something received, beyond the security which the plaintiff had; and however slight this may have been, it was an advantage and benefit conferred, upon which a sufficient consideration might be founded. In view of the fact that a new consideration existed for the contract, the rule that a release of one or two or more joint debtors must be under seal, has no application."

The same principle was applied in another New York case which is much cited, the case of *Waydell v. Luer*, 3 Denio, 410, wherein the court said: "It is evident, therefore, that it may frequently occur that a claim against a firm may in fact be worth less than if held against one of its members, not merely on account of the means of enforcing payment, but as to the availability of the fund out of which it is to be made." This language was also approved in *La Farge v. Herter*, 11 Barb. 171.

**3. Note of Third Person.**—Another rule which seems not to be disputed is that the acceptance by the creditor of the note of a third person, though for a less amount than the debt, will form a sufficient consideration for an accord and satisfaction of the debt: *Wippenman*

v. Hardy, 17 Ind. App. 142, 46 N. E. 537; Lee v. Oppenheimer, 32 Me. 253; Brooks v. White, 2 Met. 283, 37 Am. Dec. 95; Le Page v. McCrea, 1 Wend. 164, 19 Am. Dec. 469; Kellogg v. Richards, 14 Wend. 116; Howard v. Norton, 65 Barb. 169; Smith v. Ballou, 1 R. I. 496. And of course the indorsement by a third party of the debtor's own note is also viewed as the note of a third person: Boyd v. Hitchcock, 20 Johns. 76, 11 Am. Dec. 249. And in Bliss v. Schwartz, 64 Barb. 215, it was held that the acceptance of a negotiable bill of exchange of a third person for a part of the debt and the debtor's own note for another portion was a good consideration for an accord and satisfaction. And in Watson v. Tanner (R. I.), 36 Atl. 715, the court held that the notes of a wife could be satisfied by notes of her husband given under an agreement that if they were paid at maturity they should satisfy the wife's notes, even though they were not in fact so paid at maturity, but the payee having accepted part payments on the husband's notes thereafter, the conditions of the accord as to payment at maturity being thereby waived.

4. **Substitution of New Executory Agreement.**—While it is a general rule that an accord, in order to operate as a discharge of the debt, must be executed, yet it is equally well established that where the creditor accepts the mere promise of the debtor to perform some act in the future in satisfaction of the debt, the mere promise itself without satisfaction is sufficient to extinguish the debt: Smith v. Elrod, 122 Ala. 269, 24 South. 994; Price v. Price, 111 Ky. 771, 64 S. W. 746, 66 S. W. 529; Gowing v. Thomas, 67 N. H. 399, 40 Atl. 184; Billings v. Vanderbeck, 23 Barb. 546; Nassoioy v. Tomlinson, 148 N. Y. 326, 51 Am. St. Rep. 695, 42 N. E. 715. The same rule is substantially asserted in Guldager v. Rockwell, 14 Colo. 459, 24 Pac. 556; Goodrich v. Stanley, 24 Conn. 613; Sanford v. Abrams, 24 Fla. 181, 2 South. 273; Brunswick etc. R. R. Co. v. Clem, 80 Ga. 534, 7 S. E. 84; Knowles v. Knowles, 128 Ill. 110, 21 N. E. 196; Moon v. Martin, 122 Ind. 211, 23 N. E. 668; Potts v. Polk County, 80 Iowa, 401, 45 N. W. 775; Peace v. Stennet, 4 J. J. Marsh. 450; White v. Gray, 68 Me. 579; Yazoo etc. R. R. Co. v. Fulton, 71 Miss. 385, 14 South. 271; Todd v. Terry, 26 Mo. App. 598; Frick v. Joseph, 2 N. Mex. 138; Oregon etc. R. R. Co. v. Forrest, 128 N. Y. 83, 28 N. E. 137; Christie v. Craige, 20 Pa. St. 430; Gulf etc. Ry. v. Harriett, 80 Tex. 73, 15 S. W. 556; Babcock v. Hawkins, 23 Vt. 561.

Sometimes the doctrine is stated to be that mutual promises which give a right of action are a good consideration for an accord and satisfaction of the prior obligation: Kromer v. Heim, 75 N. Y. 574, 31 Am. Rep. 491; French v. Raymond, 39 Vt. 623. But, of course, if the performance of the executory agreement and not the mere agreement itself is to be the discharge, the mere agreement without the performance is insufficient: Whitney v. Cook, 53 Miss. 551; Kromer v. Heim, 75 N. Y. 574, 31 Am. Rep. 491; Piper v. Kingsbury, 48 Vt. 480; Robertson v. Campbell, 2 Call (Va.), 421.

**F. Acceptance of Security.**—It does not seem to be questioned that the giving of security for the payment of a less sum is a good consideration for an accord and satisfaction. The rule comes squarely within the requirements constituting a consideration for an accord and satisfaction: *Mason v. Campbell*, 27 Minn. 54, 6 N. W. 405; *Pulliam v. Taylor*, 50 Miss. 251; *Le Page v. McCrea*, 1 Wend. 164, 19 Am. Dec. 469. So, also, the acceptance of other or additional security for a debt already secured is held to be a good consideration for an accord and satisfaction: *Post v. Springfield First Nat. Bank*, 138 Ill. 559, 28 N. E. 978; *Kemmerer v. Kokendifer*, 65 Ill. App. 31.

The reason for the rule was briefly stated in *Boyd v. Hitchcock*, 20 Johns. 76, 11 Am. Dec. 247, as being the beneficial interest acquired by the creditor in having a security for his unsecured debt, a larger assurance of receiving something in payment from his debtor.

**G. Payment or Advancement of Funds by Third Person.**—The rule in this regard was clearly stated in *Clark v. Abbott*, 53 Minn. 90, 39 Am. St. Rep. 577, 55 N. W. 542, by Justice Collins, in the following language: "Where one not the debtor, nor under any legal or moral obligation to pay a debt, agrees to pay, and does pay, a sum less than the whole debt, in consideration of an agreement on the part of the creditor to satisfy and discharge the whole, no action will lie against the debtor to recover the balance of his indebtedness": Citing *Sonnenberg v. Riedel*, 16 Minn. 85 (Gil. 72); *Mason v. Campbell*, 27 Minn. 54, 6 N. W. 405; *Schmidt v. Ludwig*, 26 Minn. 87, 1 N. W. 803; *Laboyteaux v. Swigart*, 103 Ind. 596, 3 N. E. 373; *Varney v. Conery*, 77 Me. 527, 1 Atl. 683; *New York State Bank v. Fletcher*, 5 Wend. 85; *Brooks v. White*, 2 Met. 283; *Welby v. Drake*, 1 Car. & P. 557; *Henderson v. Stobart*, 5 Ex. 99.

In the recent case of *Marshall v. Bullard*, 114 Iowa, 462, 87 N. W. 427, 54 L. R. A. 862, an execution was issued against one of two judgment debtors, the judgment creditor, however, knowing that the judgment debtor against whom it was issued was insolvent and that he could not satisfy the execution. Before the levy of the execution the judgment creditor agreed with a third party that if he would pay one-half of the judgment that it would be deemed a satisfaction of the whole. The court, in holding that money so furnished by a third person would constitute a sufficient consideration for the accord and satisfaction of the judgment, said: "The money paid never belonged to the debtor, but was the property of and paid by a third party in reliance on the agreement to release plaintiff. True, repayment was secured by the other judgment debtor, but on the faith of this same promise. This, however, did not affect the title in any way to the money borrowed by said third party for the express purpose of releasing the plaintiff from liability on the judgment. It may be, as contended, that there was no consideration moving from plaintiff, but as the agreement contemplated furnishing money by a third party, and it was so furnished, a new consideration moved from said third party for his benefit, and the agreement will be upheld."



In *Dalrymple v. Craig*, 149 Mo. 360, 50 S. W. 884, the money with which the accord and satisfaction was effectuated was borrowed by the debtor for that express purpose, the court, in giving its reasons for sustaining the settlement, said: "But chiefly the one thousand dollars that was paid them was not paid out of their debtor's funds or out of funds at his absolute disposal. When defendant went to Mr. Bunton, the banker, to borrow this one thousand dollars, he told him what he wanted it for, and it was loaned to him for that purpose. Bunton was familiar with his affairs, had been lending him money to use in his cattle business for years, regarded him at the time as insolvent, but had confidence in him and agreed to lend him this one thousand dollars. It is fair to presume that the purpose for which this money was to be used lifting the mortgage from his customer's homestead, entered largely into the banker's estimate as an inducement to make the loan. At all events, the money was put at defendant's disposal for that purpose, and the plaintiffs got by this settlement a fund that was to them otherwise unattainable."

A distinction seems, however, to be drawn where the debtor has agreed with the creditor that he will make an effort to obtain the money by loans from his friends and the money is thus obtained and paid over by the debtor himself. Thus in *Bunge v. Koop*, 48 N. Y. 229, 8 Am. Rep. 546, the court said: "The defendants alleged in their answer, and gave evidence tending to show, that it was the agreement that the compromise and extension should be effected, if they could induce their friends to raise for and loan to them the three thousand five hundred dollars. They proved on the trial that to enable them to make the compromise their friends loaned them three thousand dollars, and that, with five hundred dollars of their own money, they paid the three thousand five hundred dollars to the plaintiffs. This agreement to thus get the money from their friends was chiefly relied upon by the defendants in their answer and upon the trial as furnishing the new consideration for the compromise. I cannot assent to this claim. The money, when paid, was to belong, and in fact did belong, to the defendants. It was to be paid and was paid as their money. Suppose a debtor agreed to go to work and earn the money, or to dig for it in the earth, would this furnish a new consideration to uphold an agreement of the creditor to take less than his conceded due? In all cases, an embarrassed debtor must make some effort to procure the money to make a compromise, but no case can be found holding that the fact that he had agreed to make such effort furnishes any consideration to uphold the compromise. The debtor is legally bound to pay, and it is utterly indifferent to the creditor where he gets the means to do it; that is the matter of the debtor, and all his efforts are expended in simply endeavoring to discharge a legal obligation. Hence the fact that the defendants agreed to induce their friends to loan them the money, and that they did induce them to loan it, furnishes no new consideration to uphold the compromise. It matters not that the

three thousand dollars which the defendants received from their friends was in checks, which they handed over to the plaintiff."

So, also, in *Harriman v. Harriman*, 12 Gray, 344, the court said: "The agreement of the plaintiff, upon which the defendant relies to sustain the defense of accord and satisfaction was simply an agreement 'that if the defendant, who was then poor and unable to pay, would raise and pay the plaintiff the sum of twenty dollars, he would receive the same in full satisfaction of the judgment.' This was merely an agreement to accept twenty dollars in full of a judgment for a much larger sum. It was exactly the case of the acceptance of a less sum of money than was actually due. The payment in bank bills was, as treated by the parties, a payment in cash, and must so be held: *Phillips v. Blake*, 1 Met. 158. It was no part of the agreement made by the plaintiff that if a stranger would lend the defendant twenty dollars, he would receive that sum in full of the judgment. Nor is there anything in the case to show that the plaintiff knew that any portion of the money had been borrowed of a third person. The defendant was 'to raise' the twenty dollars. But this implied nothing more than that he proposed to collect it, or obtain it from his own funds. He was unable to pay the whole debt, but that does not import an inability to pay twenty dollars or raise that sum upon his own resources."

In connection with this subject see, also, *Reed v. Bartlett*, 19 Pick. 273, *Hinekey v. Arey*, 27 Me. 362, and *Steinman v. Magnus*, 11 East, 390. Part payments by embarrassed or insolvent debtors have also a relevancy to the subject: See the next section.

**H. By Insolvent or Embarrassed Debtor.**—It seems to be the rule that an acceptance of part payment from an insolvent or embarrassed debtor in full satisfaction of the claim is founded on a sufficient consideration to operate as a discharge of the whole claim.

The rule just stated was held in the very recent case of *Engbretson v. Seiberling*, 122 Iowa, 522, 101 Am. St. Rep. 000, 98 N. W. 519, where the subject was the only issue before the court.

In *Curtiss v. Martin*, 20 Ill. 577, in discussing the subject, the court said: "But if a smaller sum be taken by way of compromise of a controverted claim or from a debtor in failing circumstances, in full discharge of the debt, no reason is perceived why it should not be binding on the parties." And in *Pettigrew Machine Co. v. Harmon*, 45 Ark. 290, it was also held that part payment by an assignee for the benefit of creditors, made in full satisfaction, would be binding. In *Rice v. London etc. Mortgage Co.*, 70 Minn. 77, 72 N. W. 826, it was held that an acceptance of part payment from the administrator of an estate, which was supposed by the parties to be insolvent, was a sufficient consideration for the accord and satisfaction, even though it subsequently proved not to be insolvent.

In *Hinekey v. Arey*, 27 Me. 365, the debtor contemplated filing a petition in bankruptcy and consulted an attorney for that purpose,

but the attorney advised him to make an effort at compounding his debts with his creditors. It does not appear that he attempted to make any composition with all his creditors, but in consideration of his taking no further steps toward going into bankruptcy, he settled with one of creditors for a less sum. The court, in sustaining the accord and satisfaction, gave the reason for the sufficiency of the consideration, under those circumstances, in the following language: "In this case, the plaintiff was informed that the defendant contemplated taking the benefit of the bankrupt act, which was then in force. If this intention had been carried out, the plaintiff would lose the whole debt, beyond what he might receive as a dividend; and the latter, judging from his letter, he did not consider as very valuable. To save himself from a greater loss under the law, he agreed upon the terms of composition offered. The defendant, upon the agreement and payment to Hubbard [plaintiff's agent], took no further steps to obtain relief under the bankrupt law."

It would seem from the foregoing and from the cases which will be presently adverted to, that the waiver of an insolvent person's right to avail himself of the general assignment or bankruptcy laws is the real basis of the consideration for the lesser payment in such cases. Thus in the very recent case of *Rotan Grocery Co. v. Noble* (Tex. Civ.), 81 S. W. 586, the court, after adverting to the general rule that mere part payment was insufficient, said: "The least consideration, however, in such a case, is sufficient to make the agreement binding. The question then is, Was there a sufficient consideration to support the agreement of appellant to release and discharge appellee from the remaining portion of the indebtedness in question upon the payment of the fifteen hundred dollars. We think so. Appellee was unable to pay his debts, and contemplated making a general assignment for the benefit of his creditors, or taking the benefit of the bankrupt law. This was communicated to appellant, and known to it at the time of the payment and acceptance by it of the fifteen hundred dollars in full satisfaction of its debt. Appellee would have made such assignment if appellant had declined to accept the fifteen hundred dollars, and appellant knew that fact; and it would have realized less on its debt, had appellee made the assignment. The fact that such assignment would have been made was some inducement to appellant to make the settlement. The settlement having been made with appellant, appellee was relieved of the necessity of making the assignment contemplated, or of seeking relief in bankruptcy proceedings and no further steps were taken by him in that respect."

So, also, in *Herman v. Schlesinger*, 114 Wis. 382, 91 Am. St. Rep. 922, 90 N. W. 460, it was held that "the giving up of the valuable right of respondent to the benefit of the federal bankruptcy laws was a substantial consideration" for the accord and satisfaction had in that case. The same holding was also made in *Dawson v. Beall*, 68 Ga. 328. See, also, *Harper v. Graham*, 20 Ohio, 106, where the

question of the debtor's insolvency was also raised, though not made a prominent issue in the case.

A contrary view to that shown by the preceding authorities was advanced in *Robert v. Barnum*, 80 Ky. 29, where it was said: "An agreement by the creditor with his debtor to take less than his debt based on no other consideration than to relieve him from his pecuniary embarrassment, cannot be enforced," though it might be questioned whether the statement was not dicta in the case at bar.

But in *Pearson v. Thomason*, 15 Ala. 700, 50 Am. Dec. 159, the issue was squarely met, and court held that the debtor's insolvency was no consideration for such a part payment. The court saying: "For whether he was insolvent or not, the obligation to pay was not impaired and the moral duty remained in full force."

### I. As Dependent upon Time or Place of Payment.

1. **Before Time When Obligation is Due.**—In *Weiss v. Marks*, 206 Pa. St. 515, 56 Atl. 59, the court said: "The rule that payment of a smaller sum is not a consideration to support an accord and satisfaction in regard to a larger sum due, has always been regarded as more logical than just or business like, and even small circumstances of variation have always been held sufficient to prevent its application. Hence a payment in advance, no matter how short a time, has been uniformly held to constitute a good consideration."

And the same court in *Ebert v. Jones*, 206 Pa. St. 398, 55 Atl. 1064, in stating the reasons for the rule, very pertinently said: "In the business methods of the present it has come to be recognized that money, like other commodities, has fluctuations of value not only in the general market, but also and more especially to the individual. To a merchant with a note coming due, five thousand dollars before 3 o'clock to-day, which will save his commercial credit, may well be worth more than twenty thousand dollars to-morrow after his note has gone to protest. The recognition of this business condition had led to a statutory change of the rule [part payment in general] in some states." The rule has been recognized in *Pearson v. Thomason*, 15 Ala. 700, 50 Am. Dec. 159; *Cavaness v. Ross*, 33 Ark. 572; *Martin-Alexander Lumber Co. v. Johnson*, 70 Ark. 215, 66 S. W. 924; *Spann v. Baltzell*, 1 Fla. 301, 46 Am. Dec. 346; *Hutton v. Stoddart*, 83 Ind. 539; *Boyd v. Moats*, 75 Iowa, 151, 39 N. W. 237; *Fenwick v. Phillips*, 60 Ky. (3 Met.) 87; *Brooks v. White*, 2 Met. (Mass.) 283; *Harriman v. Harriman*, 12 Gray, 341; *Bowker v. Childs*, 3 Allen, 434; *Sonnenberg v. Riedel*, 16 Minn. 83 (Gil. 72); *Schweider v. Lang*, 29 Minn. 254, 45 Am. Rep. 202, 13 N. W. 33; *Jones v. Perkins*, 29 Mass. 139, 64 Am. Dec. 141; *Dalrymple v. Craig*, 149 Mo. 345, 50 S. W. 884; *Blanchard v. Noyes*, 3 N. H. 518; *McKenzie v. Culbreth*, 66 N. C. 534; *Eve v. Mosely*, 2 Strob. 203; *Russell v. Stevenson* (Wash.), 75 Pac. 627; *Pinnel's Case*, 5 Coke, 117, the leading early English case.



2. **After Commencement of Suit.**—Inasmuch as the placing of a claim in suit is a very strong indication that a controversy exists in regard to it, the right to settlement of such claims after commencement of suit has not often been raised. The settlement of such claims would naturally be sustained on the ground that the claim is unliquidated or disputed. The acceptance of a less sum than claimed as due, after commencement of suit, was held to be a good consideration in *Mitchell v. Wheaton*, 46 Conn. 315, 33 Am. Rep. 24; *Gates v. Steele*, 58 Conn. 316, 18 Am. St. Rep. 268, 20 Atl. 474; *Baum v. Buntyn*, 62 Miss. 110. It has undoubtedly been recognized in many other cases.

3. **At Different Place than Stipulated.**—After what has already been said in regard to the effect of a slight new consideration to support a part payment it can be readily seen that payment at a different place than that originally stipulated will be sufficient to support an accord and satisfaction based upon a part payment under such circumstances. It is one of the technical rules which was even recognized in the days of Lork Coke: *Pinnel's Case*, 5 Coke, 117. It has been recognized in *Cavaness v. Ross*, 33 Ark. 572; *Fenwick v. Phillips*, 3 Met. (Ky.) 87; *Jones v. Perkins*, 29 Miss. 139, 64 Am. Dec. 136; *Blanchard v. Noyes*, 3 N. H. 518; *McKenzie v. Culbreth*, 66 N. C. 534; *Seymour v. Goodrich*, 80 Va. 304.

In *Harper v. Graham*, 20 Ohio, 115, the court, after commenting upon the absurdities in the early English cases upon the subject of part payment, justified its holding that the part payment of the judgment at bar was supported by a sufficient consideration by the fact that the money was paid at a place elsewhere than where the judgment was payable.

So, also, in *Jones v. Perkins*, 29 Miss. 139, 64 Am. Dec. 136, the rule was also applied. In that case a contract to pay fifteen hundred dollars in New York in discharge of the sum of two thousand dollars, payable in Mississippi, was held supported by a sufficient consideration. The court seemed to lay considerable stress upon the idea that the presumption of law is, where no place of performance is specified, that the contract is to be performed at the place where made, and that the party who is to perform an act under the contract is not obliged to go outside of the state to do so. And the court also adverted to the fact that there would be certain expenses in having the contract, which was a note in the case at bar, paid in New York.

The question also arose in *Saunders v. Whitcomb*, 177 Mass. 457, 59 N. E. 192, and the court in that case held that the part payment in Massachusetts of a bill of exchange, which was payable in London, was not an accord and satisfaction where the bill was dishonored. But this case is distinguishable, for as the court said: "The acceptance made the bill payable at London; but when it was dishonored the defendant became bound to pay the bill wherever he might be, upon presentation to him of the bill for that purpose, and

it was neither an advantage to the owner of the bill nor a detriment to the defendant to have payment made in Worcester, where the defendant resided, he not showing that he had made any arrangements, or been put to any expense to place funds for its payment in London.”

**4. In Different Kind of Money than Stipulated.**—The only American cases which we have observed in which the question as to the partial payment of the debt in a different kind of money was raised or discussed, were those of *Saunders v. Whitcomb*, 177 Mass. 457, 59 N. E. 192, and *Komp v. Raymond*, 175 N. Y. 102, 67 N. E. 113.

In the Massachusetts case, the question arose over a bill of exchange payable in London in pounds sterling, which after being dishonored was sent to a Massachusetts bank for collection, where a payment of one-half of the face of the bill was made in dollars by one of the acceptors on an agreement that the payment should be accepted in liquidation of that acceptor's proportion of the debt which the bill of exchange represented. In a suit on the bill of exchange it was, among other defenses, contended that the payment in dollars instead of pounds sterling called for in the bill discharged the whole liability. The court, in refusing to sustain this defense, said: “The part payment seems to have been in fact made by a transfer of dollars and cents from one bank account to another, no money having passed from hand to hand. But neither the fact that the payment was reckoned in dollars at the rate of eighty-eight and a half cents to the pound sterling, nor that it was made at Worcester would furnish a legal consideration for an agreement that the payment should discharge the whole debt. The bill called for money, and the payment was effected by a transfer of something which the parties mutually considered to represent money, and also to be one-half of the money for which the bill called. Assuming that the owner of the draft was entitled to be paid a certain amount of sterling money, his acceptance of its equivalent in dollars, rather than in sterling money, was not an advantage to himself nor was the payment of the equivalent in dollars rather than in sterling a detriment to the defendant.”

In *Komp v. Raymond*, 175 N. Y. 102, 67 N. E. 113, the question arose only in an incidental manner and was not passed upon from the standpoint of furnishing any consideration for the accord and satisfaction which was claimed as existing in the case. The case arose over a contract for services to be performed in Japan, the contract being made in New York. The employé contended that the payment was to be on the basis of American dollars, while the employer contended it was to be reckoned in Japanese yens. The gist of the case seems to have been whether the employer's contention was made in such good faith as would make the contention of such a nature as to form a bona fide dispute which could furnish the basis for an accord and satisfaction effectuated by a part payment in money.

**J. Waiver of Rights by Either Debtor or Creditor.**

1. **Where Result of Litigation Doubtful.**—The rule in regard to the settlement of doubtful claims, often called a compromise, was stated very clearly in *Daly v. Busk Tunnel Ry. Co.*, 129 Fed. 513, where it was said: "The law favors the compromise of doubtful claims, and the avoidance of litigation is a sufficient consideration to support such agreements, even though it eventually appears that, if the demand had been litigated, no recovery could have been had. It will not suffer them to be set aside on slight grounds": Citing *Cleaveland v. Richardson*, 132 U. S. 318, 10 Sup. Ct. Rep. 100; *Hager v. Thompson*, 1 Black, 80; *Graham v. Meyer*, 99 N. Y. 611, 1 N. E. 43; *Swem v. Green*, 9 Colo. 358, 364, 12 Pac. 202; *Brooks v. Hall*, 36 Kan. 697, 14 Pac. 236; *Grandin v. Grandin*, 49 N. J. L. 508, 514, 60 Am. Rep. 624, 9 Atl. 756.

And in the case of *Creutz v. Heil*, 89 Ky. 429, 12 S. W. 926, in speaking of the character of claims which would be considered proper subjects of such an adjustment, the court said: "It seems that the inquiry is whether the party relying on the agreement had reasonable and proper cause for believing that the question was doubtful, and that the right might ultimately prove to be with him. In other words, it is sufficient that there was an honest claim on his part, asserted without fraud, and that there was a real ground for dispute. If the point is so clear that it can only be answered in one way, the compromise would be invalid, as wanting a consideration to uphold it. The adequacy of the consideration cannot be inquired into, but the want of any consideration whatever may be inquired into." See, also, *Continental Nat. Bank v. McGeoch*, 92 Wis. 314, 66 N. W. 606, and *Harland v. Staples*, 79 Ill. App. 72, to the same effect. The rule, of course, has been applied in many instances, for instance in adjustment of claims of attorneys against the state for services in collecting proceeds of misappropriated bonds, where it was a question of making a certain settlement for their fees or fighting the question with the legislature: *Merrick v. Giddings*, 115 U. S. 300, 6 Sup. Ct. Rep. 65; and in land transactions where the deeds were questioned on account of confidential relations existing between the parties: *German Savings etc. Soc. v. De Lashmutt*, 83 Fed. 33. But of course there are many instances where the settlement has been overturned for want of a consideration, such as was done in *Martin v. White*, 40 Ill. App. 281, where the dispute arose over the amount of rent payable under the terms of the lease, and the tenant made a settlement by paying no more than in any event he was bound to pay; and also in *House v. Callicott* (Miss.), 35 South. 761, where a party not taking under a will threatened to contest if no settlement was made with a certain legatee by allowing said legatee a larger share, the court overturned the settlement for want of consideration, on the ground that the threatening party had no right to make a contest. But, on the other hand, the court, in *Gray v. United*

States Savings etc. Co., 25 Ky. Law Rep. 1120, 77 S. W. 200, sustained a settlement with a building and loan association although its claim was ultimately held to be usurious where at the time of the settlement the courts of several states had given variant decisions in regard to the usurious character of the claims in questions.

**2. Waiver of Right of Appeal.**—The rule in regard to the waiver of a party's right of appeal constituting a good consideration for an accord and satisfaction of the judgment based on a part payment of the judgment was stated in *Boffinger v. Tuyes*, 120 U. S. 198, 7 Sup. Ct. Rep. 529, as follows: "The right of the defendants to appeal from the decree, and the fact that they had declared their intention to do so, created such a dispute in respect to their liability as made it a proper subject of compromise."

The same rule was also declared in *Clay v. Haysradt*, 8 Kan. 74, *Williams v. Blumenthal*, 27 Wash. 24, 67 Pac. 393, and *In re Freeman*, 117 Fed. 684. See, also, *Freeman on Judgments*, sec. 463.

**3. Waiver of Contractual Rights.**—In *Emmitsburg R. R. Co. v. Donoghue*, 67 Md. 383, 1 Am. St. Rep. 396, 10 Atl. 233, it was held that a discharge of an obligation bearing interest by an acceptance of the principal alone was not supported by a sufficient consideration, the court stating as a reason for its holding that: "The interest was as much a part of the debt as the principal, and it was necessary that an agreement to waive it should be sustained by a valuable consideration. The agreement was simply a contract to pay a portion of the sum due in satisfaction of the whole. A debt cannot be discharged in this way."

A contrary view was, however, expressed in *Wescott v. Waller*, 47 Ala. 496, where a judgment was the subject of the accord and satisfaction. The court justified its holding on the ground that: "Interest is really no part of the debt, but is a mere incident to the debt given by statute, and is only recoverable as damages for its detention." There were additional circumstances in the case which were also considered by the court, viz., the insolvent condition of the judgment debtor.

So also it was held in *Tenth Nat. Bank v. Mayor*, 4 Hun, 429, that the acceptance of the principal debt as such in full discharges all claims for interest. There was, however, no express contract in this case on the part of the city to pay interest, and the court said that the interest "was recoverable, if at all, only as damages, upon some usage to be shown, from which a contract might be implied."

The true distinction in this class of cases was probably shown in *Fake v. Eddy*, 15 Wend. 79, which was a suit on an interest-bearing bond. The court said: "There must, therefore, have been some interest due, at least upon the second and third installment of principal, when this suit was commenced; and the counsel for the plaintiff in error are wrong in supposing that the rule of law that an ac-



tion cannot be sustained for the interest of a demand after the principal has been paid, is applicable to this case. The cases of *Til-lottson v. Preston*, 3 Johns. 229, *Johnson v. Brannan*, 5 Johns. 268, and *People v. County of New York*, 5 Cow. 331, were all cases in which there was no contract for the payment of interest, and it could only be recovered as damages for the nonpayment of the principal debt when it became due. In such cases, if the party to whom the money is payable accepts the amount agreed to be paid, in full satisfaction of the principal debt, without requiring the debtor to pay interest from the time the debt became payable, he cannot afterward maintain an action for the mere incidental damages which he has sustained by reason of the debt not being paid upon the very day when it became due. But where there is an express agreement to pay the interest as well as the principal of the plaintiff's demand, I apprehend that the performance of one part of the agreement would be no bar to an action for the nonperformance of another part thereof. It is a case of very frequent occurrence, that the interest is made payable before the principal becomes due; and no one ever doubted that, in such a case, an action could be maintained for the nonpayment of the interest merely": See, also, *Watkins v. Morgan*, 6 Car. & P. 661, where the distinction was also drawn.

The subject is, however, more of the nature of payment than a matter of accord and satisfaction, and hence will not be pursued further in this note.

In *Lewis v. Donohue*, 27 Misc. Rep. 514, 58 N. Y. Supp. 319, the surrender of the unexpired term under a lease was held sufficient to support a part payment of a default judgment for rent of the premises.

**K. Release or Discharge of Mutual Obligations or Counter-claims.**—Inasmuch as the bona fide assertion of a counterclaim always indicates that the amount due on the original claim is in dispute, it naturally follows under the well-established rule regarding the sufficiency of part payment where the amount is in dispute, that part payment in connection with a settlement of the counterclaim is supported by a sufficient consideration.

This principle was applied in *Jackson v. Volkening*, 81 App. Div. 36, 80 N. Y. Supp. 1102, which was affirmed by the court of appeals in (N. Y.), 70 N. E. 1101. In that case the defendant had purchased marble of a certain quality from the plaintiff, but a portion of the marble being of an inferior quality, the defendant, when called on to pay for it, asserted a rebate or offset on account of the inferior quality of the marble. The defendant, in sending his check for what he claimed to be due after deducting his offset, detailed at length the details of the inferior quality, and stated that the check was sent only "in full settlement of all claims against us to date, and to be used by you only under those conditions." The court held the transaction was supported by a sufficient consideration.

So, also, in *Alden v. Thurber*, 149 Mass. 271, 21 N. E. 312, there was a mutual rescission of contracts and return of money paid, which the court held to be a sufficient consideration. In this a firm had agreed to sell pure raspberry jam to a customer. Upon receiving the job lot of the jam the customer remitted a part of the agreed price. Afterward the customer claimed that the jam was not of the character represented, and the seller thereupon agreed to take it back and return the money paid on it and did so. The court said: "This was a mutual rescission of the contract. The letter of the defendants was an offer to settle and compromise the controversy between the parties. The acts and conduct of the plaintiff were an acceptance of that offer. This was a waiver of the right to sue for any preceding breach of the contract. The performance by the defendants of the agreement operated as an accord and satisfaction for any breach, and discharged the old contract. Such was clearly the intention of the defendants and as the plaintiff accepted their offer unconditionally, and thus induced them to perform it, he cannot now say that he had a concealed intention not to discharge the prior breaches of the contract. This would be bad faith." The suit at bar was based on damages resulting from the breach of the contract to furnish pure raspberry jam.

But in *Stone v. Lewman*, 28 Ind. 97, it was held that the release of a fixed and ascertained debt was not of itself a sufficient consideration to support an accord and satisfaction of an ascertained debt for a larger amount.

**d. Effect of Illegal Consideration.**—The rule in regard to the effect of an illegal consideration upon an accord and satisfaction was stated in *Goodrich v. Sanderson*, 35 App. Div. 554, 55 N. Y. Supp. 881, in the following language: "The weight of authority seems to be in favor of the proposition that a valid accord and satisfaction may be founded upon an untenable claim (*Union Bank of Georgetown v. Geary*, 5 Pet. 99, 114; *Pitkin v. Noyes*, 48 N. H. 294, 97 Am. Dec. 615, 2 Am. Rep. 218; *Fisher v. May's Heirs*, 2 Bibb (Ky.), 449, 5 Am. Dec. 626), though not upon an illegal claim, such as a note founded upon a transaction forbidden by statute (*Kidder v. Blake*, 45 N. H. 530), or one utterly without foundation and known to be so: *Pitkin v. Noyes*, 48 N. H. 294, 97 Am. Dec. 615, 2 Am. Rep. 218."

Hence each case must depend upon whether the consideration in the case at bar was predicated on an illegal consideration.

In *Gordon v. Mitchell*, 68 Ga. 11, the rule was applied, and an attempted accord and satisfaction was not sustained because it was based upon a contract to sublet or hire out convicts leased from the state, which was an illegal act. And in *Walan v. Kerby*, 99 Mass. 1, an accord and satisfaction effectuated by a settling of mutual accounts was held void because the credits on the part of one of the parties consisted of the price of intoxicating liquors sold in violation of law.

The question is sometimes raised in usury cases, but inasmuch as that subject is generally regulated by statute we will merely mention several cases. In *Gray v. United States Savings etc. Co.*, 25 Ky. Law Rep. 1120, 77 S. W. 200, the question of usury was raised with a view to overthrowing an accord and satisfaction as to the liabilities under a certain building and loan association contract. The court, in sustaining the accord and satisfaction, said: "There is no magic in the word 'usury' which forbids a question as to its existence being settled between the parties, the same as any other disputed and doubtful claim. In the case at bar, at the time the compromise was made, it was doubtful as to what would be the ultimate outcome of the claim on the part of the corporation that its contract was a Minnesota contract, valid and binding by the laws of that state, and which should be valid and binding here. This court had made no ruling upon that question, and at that time the judicial utterance of the circuit court was in favor of the contention of appellee (the building association). Subsequently this court has settled the question adversely to the contention of appellee, but this does not render nugatory the settlement between the parties. There is no more reason now to upset the settlement, in favor of appellant, because this court has finally decided adversely to the claim of the appellee, than there would have been to upset it in favor of the appellee, so as to permit it to collect the full amount of the judgment originally rendered, if this court had adjudged the contract to have been a Minnesota contract, enforceable by the laws of this state. As has been well said, it does not matter upon which side the right ultimately appears to have been, if at the time the settlement was made there was a bona fide controversy between the parties, about which the lawyers and courts might differ." For other cases involving questions of usury in this connection, see *Rogers v. Ball*, 54 Ga. 15; *Green v. Frank*, 63 Ga. 78; *Morehouse v. Second Nat. Bank*, 98 N. Y. 503.

**e. Necessity for Both Accord and Satisfaction.**

**1. Necessity for Satisfaction.**—It is uniformly held by all the authorities that it is an essential requisite to an accord and satisfaction that the accord agreed upon by the parties be satisfied by an execution of the accord: *Martin-Alexander Lumber Co. v. Johnson*, 70 Ark. 215, 66 S. W. 924; *Tabor etc. Co. v. Newell* (Colo. App.), 72 Pac. 804; *Woodward v. Willard*, 33 Iowa, 542; *Bragg v. Pierce*, 53 Me. 65; *Young v. Jones*, 64 Me. 563, 18 Am. Rep. 279; *Flack v. Garland*, 8 Md. 188; *Cary v. Bancroft*, 14 Pick. 315, 25 Am. Dec. 393; *Prest v. Cole*, 183 Mass. 283, 67 N. E. 246; *Hoxsie v. Empire Lumber Co.*, 41 Minn. 548, 43 N. W. 476; *Burrus v. Gordon*, 57 Miss. 93; *Gerhart Realty Co. v. Northern Assurance Co.*, 94 Mo. App. 356, 68 S. W. 86; *Slover v. Rock*, 96 Mo. App. 335, 70 S. W. 268; *Russell v. Lytle*, 6 Wend. 390, 22 Am. Dec. 537; *Brooklyn Bank v. De Grauw*,

23 Wend. 342, 35 Am. Dec. 569; *Mitchell v. Hawley*, 4 Denio, 414, 47 Am. Dec. 260; *Kromer v. Heim*, 75 N. Y. 574, 31 Am. Rep. 491; *Arnett v. Smith*, 11 N. Dak. 55, 88 N. W. 1037; *Frost v. Johnson*, 8 Ohio, 393; *Hearn v. Kiehl*, 38 Pa. St. 147, 80 Am. Dec. 472; *Overton v. Conner*, 50 Tex. 113; *Memphis v. Brown*, 20 Wall. 309.

In *Bryant v. Gale*, 5 Vt. 420, the court, in discussing the necessity for a satisfaction of the accord, gave the reason for the rule in the following language: "An accord without satisfaction is no bar, simply because there is no consideration and no mutuality to support it; because the creditor has no means of obtaining satisfaction by enforcing it, and of course derives no satisfaction directly nor indirectly from it. The authorities all put the subject on this ground. The want of consideration not only appears, but is assigned as the ground of the decision. Much stress has been laid upon the necessity of mutuality in a contract. This term is often used in the books in connection with 'consideration.' It is difficult, however, to find any distinction in their import. It would be difficult to find any case where a consideration exists in which there is no mutuality, or a case of mutual legal obligations without a consideration. The terms, when applied to this subject, are synonymous."

When the courts say that the accord must be satisfied by an execution of the accord, they refer only to such cases of accord in which some act or thing is to be performed, and the accord itself contemplates that the debt or claim shall not be extinguished until the act or thing is in fact performed, and not to such accords in which, by contemplation of the parties, the mere act of the accord itself is deemed the satisfaction of the old debt or claim. Thus, it was said in *Babcock v. Hawkins*, 23 Vt. 563, in a case of this kind: "We think it must be regarded as fully settled that an agreement upon sufficient consideration, fully executed so as to have operated, in the minds of the parties, as a full satisfaction and settlement of a pre-existing contract or account, between the parties, is to be regarded as a valid settlement, whether the new contract be ever paid or not, and that the party is bound to sue upon the new contract, if such were the agreement of the parties. This is certainly the common understanding of the matter. It is reasonable, and we think it is in accordance with the strictest principles of technical law."

The same distinction was remarked upon in *Bennett v. Hill*, 14 R. I. 324, where the court said: "There is a distinction between an agreement which is itself satisfaction and one which is to become satisfaction when performed. The former satisfies the debt, the creditor getting the agreement in lieu of the debt: *Whitney v. Cook*, 53 Miss. 551, 559; *White v. Gray*, 68 Me. 579; *Babcock v. Hawkins*, 23 Vt. 561; *Goodrich v. Stanley*, 24 Conn. 613, 620; *Kinsler v. Pope*, 5 Strob. 126; *Lyth v. Ault*, 7 Ex. 669; *Evans v. Powis*, 1 Ex. 601; *Crowther v. Farrer*, 15 Q. B., N. S., 677. The agreement here was of that character, and being of that character, the discharge of the



defendant's claims on the plaintiff was a good consideration for it, for the discharge, though no benefit to Burrough, was a detriment to the defendant. The agreement is expressly alleged to have been accepted in lieu of the claims, the claims being discharged in consideration of it." The executory agreement which was an accord and satisfaction was an agreement on the part of the defendant to continue a certain pottery business and from the profits pay the plaintiff certain sums in payment of the debt for which the executory agreement was substituted.

The same distinction was stated in *Kromer v. Heim*, 75 N. Y. 577, 31 Am. Rep. 491, and also in *Whitney v. Richards*, 17 Utah, 226, 53 Pac. 1122. Some aspects of this subject were treated in a former part of this note, when discussing the requirements of an accord.

**2. Effect of Waiving Conditions of Accord.**—In *Cary v. McIntyre*, 7 Colo. 173, 2 Pac. 916, the court held that the conditions of an accord agreement might be waived by the parties in the same manner that conditions might be waived in other contracts. So, also, in *Prest v. Cole*, 183 Mass. 283, 67 N. E. 246, the court said: "The essence of an accord and satisfaction is that it should be executed as agreed. It is, of course, competent for the parties as in the case of any other contract to vary it by subsequent agreement, or either party to it may waive stipulations in his favor."

**3. Time for Making Satisfaction.**—If the agreement of accord has fixed no time for the executory performance of the acts provided by it to be performed, it has been held that a performance within a reasonable time will be deemed a sufficient satisfaction: *Jones v. Peet*, 1 Swan (Tenn.), 293. But if the agreement itself has fixed the time for doing whatever acts are to be performed under its terms, then, of course, the performance must be according to the terms of the accord: *Makepeace v. Harvard College*, 10 Pick. 298; *Piper v. Kingsbury*, 48 Vt. 480.

Inasmuch as the terms of an agreement of accord and satisfaction may be varied by a subsequent agreement or its executory terms be waived (*Prest v. Cole*, 183 Mass. 283, 67 N. E. 246), it naturally follows that the time for performing the terms of the accord could be extended by a proper agreement of the parties to that effect.

**4. What Constitutes Satisfaction.**—In the principal case it is said that "a satisfaction, in its legal significance in this connection, is a performance of the terms of the accord; if such terms require a payment of a sum of money, then that such payment has been made."

Where the terms of the accord and satisfaction are executory a partial performance of the terms is not sufficient to constitute such a complete satisfaction as will extinguish the original debt or claim: *Long v. Scanlan*, 105 Ga. 427, 31 S. E. 436; *Kromer v. Heim*, 75 N. Y. 574, 31 Am. Rep. 491; *Whitney v. Richards*, 17 Utah, 226, 53 Pac. 1122. The question of what constitutes an execution of the terms

of the agreement for the accord and satisfaction is naturally a question dependent upon the facts in each particular case to be decided in the same manner that the question would be decided in the case of any other contract. Sometimes it may be a mere question of fact, and sometimes it may involve the construction of the contract of accord and satisfaction. Naturally, the intent of the parties as evidenced by the contract of accord and satisfaction is of paramount importance.

Thus, in *Campbell v. May*, 31 Ala. 567, the application of the rule was illustrated. In that case the agreement of accord and satisfaction of a judgment provided for a transfer of a certain claim of the judgment debtor to the judgment creditor, and that they were "to be a full satisfaction of the judgment if the sum of seven hundred dollars is [was] allowed and realized on said claim," but that if said sum was not realized, "whatever less sum may be realized and allowed is to be applied, as far as it will go, to the satisfaction of said judgment." The court, in construing the contract, said: "There was only the sum of five hundred dollars allowed for said services. Hence, the event, on the happening of which this allowance was to be 'a full satisfaction of the judgment,' never happened. It is no answer to this view that the remaining two hundred dollars were paid by the petitioner. That payment did not bring the case within the terms of the contract, and consequently does not authorize the supersedeas in this case. Each party has the clear right to stand on the terms of his contract; and we have no authority to engraft other stipulations upon it, upon the idea that such stipulations would be equally beneficial with those actually agreed upon. We sit here to enforce, not to create or modify, contracts."

A somewhat similar agreement of accord and satisfaction was construed in *Segal v. Heuer*, 33 Misc. Rep. 601, 68 N. Y. Supp. 924.

**5. Effect of Tendering Satisfaction.**—The decisions in regard to whether a tender of satisfaction is equivalent to satisfaction are not harmonious. The distinction seems to be that if the accord is to do a thing in satisfaction at a future day and the contract of accord is founded on a new consideration and is thus enforceable as a new agreement that the rule of tender will apply in the same manner as in other contracts, but that where the accord is to accept a less sum in satisfaction of the debt or claim that the satisfaction must be actually executed. The reason for the distinction seems to be based on the idea that in the case of the executory contract founded on the new consideration, the creditor has a remedy by way of enforcing it, and in the latter case the agreement until executed is a nudum pactum.

The arguments pro and con as to this question were set out in *Whitsett v. Clayton*, 5 Colo. 476, where many of the authorities were reviewed. In that case the court said: "The question to be considered is, in case of a demand due, where an agreement is entered

into between the creditor and his debtor, the terms of which are, that the debtor is to execute a new promise with a surety, at a future day, in a smaller sum payable in one year, the creditor agreeing to accept the new promise in satisfaction of the old one, provided he ascertains the surety to be sufficient (which upon inquiry he ascertained to be the fact) and the new promise is accordingly executed and tendered in pursuance of the agreement, the tender being kept good, whether such performance and tender constitute a bar to the action on the original demand.

“That such an agreement contains all the elements of a valid and binding contract cannot be seriously questioned. It is an agreement with mutual promises, rests upon a sufficient consideration, and is not within the statute of frauds. It is beneficial to both contracting parties. The debtor obtains a reduction of his debt, and an extension of time for payment. The creditor obtains surety for the amount of the demand agreed upon: 1 *Smith’s Leading Cases*, 444; *Billings v. Vanderbeck*, 23 *Barb.* 546; *Kellogg v. Richards*, 14 *Wend.* 118.

“It would seem upon the principle of the obligation of contracts, as well as upon the principles of equity and good conscience, and in order to avoid circuitry of action, that the performance of the accord by the debtor ought to operate as a satisfaction. We have been cited to several cases, however, wherein the point arose, which hold that such performance is no bar to a suit upon the original claim, and to several other cases announcing the same doctrine, but turning upon some other point, and therefore not necessarily involving an investigation of this precise question.

“These cases hold that it is not enough that the contract be obligatory upon both parties and that the debtor has executed it upon his part, nothing remaining but an acceptance on part of the creditor of the matter or thing which he agreed to receive in satisfaction; that the creditor may refuse to accept the thing agreed upon, and proceed upon the original indebtedness, leaving the debtor to his remedy by action for damages against the other party for the violation of the agreement.

“This line of authorities carries the doctrine to a still greater extent, holding, that if by the terms of the new agreement the payment thereby stipulated is to be made in installments at stated times, and when completed shall constitute a satisfaction, the creditor may receive all installments without objection or notice, until the last one is tendered, and may refuse to receive the last installment in satisfaction and proceed upon the original account; that in such case he is only required to give credit for the payments made, as if made upon the original indebtedness. The authorities in point which sustain this doctrine are *Russell v. Lytle*, 6 *Wend.* 390, 22 *Am. Dec.* 537; *Hawley v. Foote*, 19 *Wend.* 516; *Kromer v. Heim*, 75 *N. Y.* 574, 31 *Am. Rep.* 491; *Tilton v. Alcott*, 16 *Barb.* 598.”

Then after reviewing a number of authorities bearing on the point (*Brooklyn Bank v. De Grauw*, 23 *Wend.* 342, 35 *Am. Dec.* 569; *Frost v.*

Johnson, 8 Ohio, 393; Young v. Jones, 64 Me. 563, 18 Am. Rep. 279; White v. Gray, 68 Me. 579; Overton v. Conner, 50 Tex. 113; Smith v. Keels, 15 Rich. (S. C.) 318; Pettis v. Ray, 12 R. I. 344; Hearn v. Kiehl, 38 Pa. St. 147, 80 Am. Dec. 472; Keen v. Vaughn, 48 Pa. St. 477; Blackburn v. Ormsby, 41 Pa. St. 97; Coit v. Houston, 3 Johns. Cas. 243), the court, after citing Mr. Parson's statement of the rule, that "the party holding the claim may agree to take a new promise of the other in satisfaction of it; or he may agree to receive a new undertaking when the same shall be executed, as a satisfaction. In either case he will be held to his bargain, and only to that" (2 Parsons on Contracts, 681)—then continued the discussion, saying: "In speaking of promises performable at a future day, he makes a distinction between those which are supported by a new consideration and those which are not. The former he denominates as valid and binding, and says their effect is to suspend the original right of action until the day comes. If the promise is then duly performed this right of action is destroyed; otherwise, it revives. If this is correct doctrine, it necessarily follows that the debtor has the right to perform his promise when the day comes, and to avail himself of such performance, since the law never requires a useless thing to be done. Unless the debtor has this right, why stay the action until the day arrives? Mr. Story says: 'Whether an accord with an unaccepted tender of satisfaction be a sufficient defense does not seem to be settled. If the accord be to accept a lesser sum than the debt in satisfaction of it, there must be an actual acceptance in order to constitute a defense to the debt and a mere tender is insufficient. Thus an agreement by creditors to accept five shillings sixpence in the pound, in full satisfaction of their claims, was held to create no bar to an action for the full debt, there being no consideration to support the agreement. But where there is a sufficient consideration to support the agreement, it seems that a tender, though unaccepted, would be a bar to an action. So, also, where a different mode of payment from that reserved by the original claim is substituted for it by agreement, a tender according to such agreement will be sufficient if it appear to have been a complete satisfaction'"; Story on Contracts, sec. 982b.

And later in the opinion the court remarked: "I have searched the authorities diligently, but in vain, for a satisfactory reason for the rule which permits a creditor to reject the accord after it has been performed by his debtor, and maintain his original action. The only reason advanced appears to be that 'a contrary rule would overthrow all the books.' I think the old maxim applies, 'cessante ratione legis, cessat ipsa lex.' If no better reason can be assigned for a rule so technical and unreasonable, would it not be better that the books be overthrown, and that there be established in the language of Judge Livingston, 'a rule founded in good sense.' But, as already shown, such a rule as here contended for has often been recognized. It is not a new doctrine, but one only in respect to which author-



ities differ. It was applied by Lord Ellenborough in *Bradley v. Gregory*, 2 Camp. 383, a case very similar to the one now before us."

As bearing pro and con on this question, in addition to those cited in the opinion quoted from, see, also, *Prest v. Cole*, 183 Mass. 283, 67 N. E. 246; *Heirn v. Carron*, 11 Smedes & M. 361, 49 Am. Dec. 65; *Jones v. Perkins*, 29 Miss. 142, 64 Am. Dec. 136; *Mitchell v. Hawley*, 4 Denio, 414, 47 Am. Dec. 260; *Bayley v. Homan*, 3 Bing. (N. C.) 915; *Foster v. Collins*, 6 Heisk. 1; *Bradshaw v. Davis*, 12 Tex. 536; *Babcock v. Hawkins*, 23 Vt. 561; *Good v. Cheeseman*, 2 Barn. & Ald. 335.

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### ADAMS v. GILBERT.

[67 Kan. 273, 72 Pac. 769.]

**HOMESTEADS—Conveyance—Insane Grantor.**—A conveyance of a homestead made by a husband and the guardian of his insane wife is ineffectual, and does not convey anything so long as the property remains a homestead. (p. 457.)

**HOMESTEADS.—Equitable Estoppel** may be invoked to defeat the operation of the homestead law. (p. 457.)

**HOMESTEADS—Abandonment.**—The protection to a homestead, afforded by constitutional and statutory provisions lasts no longer than the occupancy of the premises as a homestead. (p. 457.)

**HOMESTEADS—Ratification of Void Deed.**—A conveyance of a homestead, void because not joined in by the wife of the grantor, may become effective after her death by being recognized and adopted by the grantor, and he may be estopped by his acts and conduct from claiming that such deed does not convey the title. (p. 458.)

Ejectment by Adams, who, together with his family, had occupied the premises as their homestead, prior to October 20, 1893, at which time he conveyed the premises without consideration to one Foster. This deed was executed by Adams and one Burson as guardian of the estate of Adam's insane wife. Adams continued with his children to occupy the premises as a home up to November 8, 1894, when he abandoned them as shown by the opinion.

T. W. Sargent, for the plaintiff in error.

T. B. Wall and J. V. Daugherty, for the defendants in error.

**275 CUNNINGHAM, J.** The deed to Foster was ineffectual at the time of its execution as a muniment of title, the property conveyed then being the homestead, and the deed not hav-

ing received the joint consent of husband and wife. While the marriage relationship continued and the property was occupied as a homestead, no act of the husband could be efficient to ratify or confirm such deed. The husband might by his actions, words, or silence, when he should have spoken, confirm a deed to the homestead executed by himself alone, or estop himself from denying its validity, so as to make it convey title, after its homestead character had ceased, or after the death of the wife.

The principle of equitable estoppel may be invoked to defeat the operation of the homestead law: *McAlpine v. Powell*, 44 Kan. 411, 24 Pac. 353; *Sellers v. Crossan*, 52 Kan. 570, 35 Pac. 205; *Sellers v. Gay*, 53 Kan. 354, 36 Pac. 744. The protection to a homestead afforded by constitutional and statutory provisions last no longer than the occupancy of the premises as a homestead.

In this case it was shown that Adams abandoned the property in question with his family as early as 1895. It may be his deed executed at or after that time would have conveyed the same subject, of course, to whatever inchoate interests the wife might have had had she survived him. Why might not a deed which had been executed by him prior to that time have <sup>276</sup> taken effect after the death of his wife, and become as effective as one then executed by him, if he had intended it should do so, or if by his acts he was estopped to deny that he so intended? He surrendered possession to the one holding under a deed which he had executed. This was because he had executed such deed, and to confirm the same. Having executed the deed which, had he continued to occupy his premises as a homestead, would have conveyed nothing, he did more—he abandoned the homestead, surrendered the premises, put the grantee into possession, gave effect to a deed which while the premises remained a homestead had no effect, but when they ceased to be a homestead might and did operate. He thereby made efficient what was theretofore inefficient: *Hall v. Fullerton*, 69 Ill. 448; *Thompson on Homesteads and Exemptions*, sec. 483. That he did not then know that his deed to Foster was at the time of its execution ineffectual to convey title made no difference. Doran, the then purchaser, and in fact the first real and bona fide purchaser, had a right to suppose that Adams, knowing the invalidity of the Foster deed, was willing to give it force, so far as he could by removing the obstacle thereto, to wit, its homestead character. Adams not only put Doran

into possession, but he received at least part of the purchase price in the payment of his seven hundred dollar note, and then stood by while the purchaser expended large sums of money in making permanent improvements and paying taxes.

Again, Adams said while testifying, on November 15, 1900, in answer to the question: "This suit was not instituted until September, last; when did you first commence to make claim to it? [Referring to the property in question.] A. I have been talking to Mr. Sargent [his attorney] about bringing suit for <sup>277</sup> two or three years." That is, he had known for some length of time before Gilbert purchased the property, on March 4, 1898, the infirmity of his deed to Foster. Notwithstanding this knowledge he remained silent and gave no warning to Gilbert, but permitted him not only to purchase, but to go on expending money in the payment of taxes and in making improvements thereon. During all this time he asserted no claim to the property.

It seems to us that these facts embrace all the necessary elements of equitable estoppel. Admit that Adams, because of his ignorance of the invalidity of the Foster deed, was not estopped as against Doran, and that the title came to Gilbert as Doran had it, still, with the knowledge which he had as above indicated, he is now estopped, as Gilbert, in view of Adams' silence, had a right to presume that he was intending and expecting to confirm and make effective his invalid deed. In any event, after the death of the wife, the homestead character of the property ceased. At that time Adams was as fully informed as to the facts and the law as he was when this action was brought. He certainly might, even by his silence and inactivity, in time confirm and make efficient his former deed. We are not in a position to say the delay of about nine months was not sufficient for that purpose. At least Adams is now estopped from asserting that he did not intend so to confirm and ratify it.

It would be gross injustice to permit Adams by his belated action to recover the property with all of these improvements and its enhanced value after he had received what appears to have been a fair value at the time of the execution of his deed, and after he had stood quietly by with his knowledge of his rights, which he himself shows he had, permitting the expenditure <sup>278</sup> by Gilbert of money in the purchase price, improvements, and taxes. This equity will not permit.

Under all of the circumstances of the case, we are fully persuaded that the judgment of the court below was correct. It will be affirmed.

All the justices concurring.

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*The Principal Case* is cited at page 922 of the monographic note to *Jerde v. Furbush*, 95 Am. St. Rep., in a discussion of the doctrine of estoppel as applied to the conveyance or encumbrance of homesteads. See pages 937, 938, of this note for a consideration of the insanity of one spouse as affecting the authority of the other to dispose of or encumber the homestead.

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## NORTON v. REARDON.

[67 Kan. 302, 72 Pac. 861.]

**JUDICIAL SALES—Execution Sales.**—A sale by a sheriff under a general execution is not a judicial sale, strictly speaking. (p. 462.)

**JUDICIAL SALES—Special Execution Sales.**—The execution for a sale of property under a decree of foreclosure of a mortgage is special and must conform to the order of the court. (p. 463.)

**JUDICIAL SALES—Return of Special Execution.**—An execution for the sale of property under a decree of foreclosure of a mortgage is special, and a statute requiring the sheriff to return a general writ of execution within sixty days from its date has no application to special executions. (p. 463.)

**JUDICIAL SALES—Sale After Return Day—Confirmation.**—If a special execution issues for the sale of property under a decree foreclosing a mortgage, and such sale is made six days after the return day named in the execution, the subsequent confirmation of the sale, as made by the court, renders it valid, as being an approval of that which, as to time of performance, the court had power to order in the first instance. (p. 464.)

**JUDICIAL SALES—Confirmation—Collateral Attack.**—An order of a court of competent jurisdiction confirming a judicial sale cannot be collaterally attacked for any irregularity in the proceedings under which such sale was made. (p. 464.)

W. A. Randolph and J. G. Egan, for the plaintiffs in error.

R. M. Hamer, for the defendant in error.

**304 SMITH, J.** It is the contention of counsel for plaintiffs in error that the final process issued by the clerk to the sheriff, commanding him to appraise and sell the mortgaged real estate decreed by the court to be sold, should have been executed within sixty days from its date, and that a sale after the return day was void and conveyed no title to the purchaser. This is



followed by the argument that a void sale could not be given effect or validity by an order of confirmation.

The nature of the suit in which the decree was entered leads to an inquiry whether section 4915 of the General Statutes of 1901, providing that the sheriff to whom any writ of execution is directed shall return such writ within sixty days from its date, has application to sales under a decree of foreclosure. A careful examination of the different statutory provisions relating to executions and execution sales is necessary to arrive at a correct solution of the question. Section 4848 of the General Statutes of 1901, provides that, in actions to enforce a mortgage or other lien, judgments shall be rendered for the amount due "and for the sale of the property charged and the application of the proceeds." The several sections of the statute referring to executions, necessary to be considered, read:

"Sec. 4891. Executions shall be deemed process of the court, and shall be issued by the clerk and directed to the sheriff of the county. They may be directed to different counties at the same time.

"Sec. 4892. Executions are of four kinds: 1. Against the property of the judgment debtor; 2. <sup>305</sup> Against his person; 3 For the delivery of the possession of real or personal property, with damages for withholding the same, and costs; 4. Executions in special cases."

"Sec. 4896. The writ of execution against the property of the judgment debtor, issuing from any court of record in this state, shall command the officer to whom it is directed that of the goods and chattels of the debtor he cause to be made the money specified in the writ; and for want of goods and chattels, he cause the same to be made of the lands and tenements of the debtor; and the amount of the debt, damages and costs for which judgment is entered shall be indorsed on the execution."

"Sec. 4898. The officer to whom a writ of execution is delivered shall proceed immediately to levy the same upon the goods and chattels of the debtor; but if no goods and chattels can be found, the officer shall indorse on the writ of execution, 'No goods,' and forthwith levy the writ of execution upon the lands and tenements of the debtor which may be liable to satisfy the judgment; and if any of the lands and tenements of the debtor which may be liable shall be encumbered by mortgage or any other lien or liens, such lands and tenements may be levied upon and appraised and sold subject to such lien or liens, which shall be stated in the appraisalment."

"Sec. 4905. Lands and tenements taken on execution shall not be sold until the officer causes public notice of the time and place of sale to be given for at least thirty days before the day of sale, by advertisement in some newspaper regularly printed and published and having a general circulation in the county, to be designated by the party ordering the sale, or in case no newspaper be printed in the county, in some newspaper in general circulation therein, and by putting up an advertisement on the courthouse door and in five other public places in the county, two of which shall be in the township where such lands and tenements lie. All sales made without such advertisement <sup>306</sup> shall be set aside, on motion, by the court to which the execution is returnable. And no greater sum shall be taxed as costs for advertising in any case than the amount received or to be received by the publisher, printer or editor of the paper doing the printing, and which shall not exceed the amount prescribed by the law for such publication."

It will be noted that in the first two of the three sections set out above the process is designated as a "writ of execution," and in section 4905 at least thirty days' notice of sale is required to be given by the officer in cases where land is "taken on execution." Section 4915 of the General Statutes of 1901 provides: "The sheriff or other officer to whom any writ of execution shall be directed shall return such writ to the court to which the same is returnable, within sixty days from the date thereof."

Does this have reference to executions in special cases authorized in section 4892, *supra*? The nature of a special execution is stated in section 4994 of the General Statutes of 1901, as follows: "In special cases not hereinbefore provided for, the execution shall conform to the judgment or order of the court. When a judgment for any specified amount, and also for the sale of specific real or personal property, shall have been rendered, and an amount sufficient to satisfy the amount of the debt or damages and costs be not made from the sale of the property specified, an execution may issue for the balance, as in other cases."

Special executions are again mentioned in sections 4927, 4928, 4947, and 4949 of the General Statutes of 1901, relating to the redemption of real estate. In the sections cited "orders of sale" are also referred to.

Those sections of the statute which provide for a levy of an execution on real estate of the judgment debtor before its

sale by the officer can have no application <sup>307</sup> to judicial sales ordered by the court, like that in the present case, where the property on which a lien was fixed was designated in the decree, and ordered sold to satisfy the amount of the charge against it. In *Smith v. Burnes*, 8 Kan. 197, 202, it was said: "There was no formal levy of the order of sale on said lot. This we think was not necessary. The court had complete jurisdiction of the property without any formal levy. The court ordered that it be sold; and the sheriff had no power to seize or sell any more or less than the specific lot which he was ordered to sell: *Wheatly v. Tutt*, 4 Kan. 195. The order of sale was not a general execution which the sheriff could levy on any property."

For the reasons stated, the language of section 4909 of the General Statutes of 1901, providing that if lands or tenements levied on are not sold on one execution an alias may be issued to sell the property, is to be restricted to those executions where a levy is necessary.

A sale by a sheriff under a general execution which he has levied on real or personal property is not a judicial sale, strictly speaking. Such a sale is a ministerial act, and, at common law, if the officers conformed to the established regulations, the sale was final and valid as soon as made. Confirmation was required only in chancery sales: *Rorer on Judicial Sales*, 2d ed., sec. 9, and note 4, p. 6; also, sec. 16. In *Freeman on Void Judicial Sales*, section 1, the distinction between judicial and execution sales is pointed out. It is said: "Execution sales are not judicial. They must, it is true, be supported by a judgment, decree, or order. But the judgment is not for the sale of any specific property. It is only for the recovery of a designated sum of money. The court gives no directions, and can give none, concerning what property shall be levied upon. It usually has no control over the sale <sup>308</sup> beyond setting it aside for noncompliance with the directions of the statutes of the state. The chief differences between execution and judicial sales are these: the former are based on a general judgment for so much money, the latter on an order to sell specific property; the former are conducted by an officer of the law in pursuance of the directions of a statute, the latter are made by the agent of a court in pursuance of the directions of the court; in the former the sheriff is the vendor, in the latter, the court; in the former the sale is usually complete when the property is struck

off to the highest bidder, in the latter it must be reported to and approved by the court."

By our statute certain restrictions have been imposed on chancery sales unknown to strict equity procedure. All executions, whether general or special, must be issued by the clerk and directed to the sheriff: Gen. Stats. 1901, sec. 4891. Sales hereunder must also be held at the courthouse in the county where the lands are situated: Gen. Stats. 1901, sec. 4908. Sheriff sales made under execution or order of sale must be confirmed by the court: Gen. Stats. 1901, sec. 4952.

Section 4994 of the General Statutes of 1901, set out above, directs that, "in special cases not hereinbefore provided for, the execution shall conform to the judgment or order of the court." Looking back to the preceding sections, we find that the only one which prescribes a public notice of the time and place of sale has relation to the sale of lands and tenements "taken on execution," referring obviously to a general execution where there had been a seizure or levy. The requirement of section 4915, that the writ shall be returned by the officer within sixty days from its date, does not impose a limitation on the power of the court in cases like the present, where the interests of all parties to the suit might demand that an enlargement of the <sup>309</sup> time for a return be ordered. In other words, a special case arises in a foreclosure suit, which is in the nature of a proceeding in rem, where the decree of the court operates directly on the mortgaged property, and where no levy or seizure is necessary.

Our position on the question involved is fortified by a reference to the statute directing the manner of making sales in attachment cases. It is provided that after judgment the attached property "shall be sold by order of the court under the same restrictions and regulations as if the same had been levied on by execution": Gen. Stats. 1901, sec. 4669. There is no such provision in respect to the sale of property to satisfy a mortgage lien.

Where large tracts of land or other valuable property are involved, not likely to find a purchaser at an adequate price if sold under short notice, three or six months' advertisement might be advisable and necessary, and we think that under section 4994 of the statute it would be within the power of the court ordering the sale to fix the duration of the notice, and give such publicity to it as the necessities of the case might require, and to that end postpone the return day of the special execution to a time beyond sixty days from the date of its issue.



We do not think, however, that in any case the notice should be shortened by the court to less than thirty days before the day of sale, in view of the legislative policy to provide for thirty days' notice in ordinary execution sales.

The conclusion we have reached is supported by the case of *Southern California etc. Co. v. Ocean Beach Hotel Co.*, 94 Cal. 217, 28 Am. St. Rep. 115, 29 Pac. 237. The statutory requirements there passed on were substantially like ours. The trial court set aside a decretal sale for the reason that the property was advertised and sold after the <sup>310</sup> return day of the writ. This ruling was held to be erroneous. It was decided that the time within which an order of sale based on a decree foreclosing a mechanic's lien should be executed was directory merely: See *Amoskeag Sav. Bank v. Robbins*, 53 Neb. 776, 74 N. W. 261; *Jarrett v. Hoover*, 54 Neb. 65, 74 N. W. 429.

Holding this view of the law, a confirmation of the sheriff's sale in the present case was an approval of that which as to the time of performance the court had power to order in the first instance, and the case comes within the rule stated in the second paragraph of the syllabus in *Thompson v. Burge*, 60 Kan. 549, 72 Am. St. Rep. 369, 57 Pac. 110. In the case of *Shultz v. Smith*, 17 Kan. 306, the court did not distinguish between ordinary execution sales and those specially ordered by the court.

The ruling of the court below will be affirmed.

All the justices concurring.

Cunningham, J., not sitting, having been of counsel.

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*An Order Confirming a Judicial Sale* generally cures all irregularities in the proceedings under which the sale was made, and is not subject to collateral attack. Confirmation, however, cannot validate a void sale: See the monographic note to *Watson v. Tromble*, 29 Am. St. Rep. 495-499; *Freeman on Void Judicial Sales*, sec. 44; *Dennis v. Bint*, 122 Cal. 39, 68 Am. St. Rep. 17, 54 Pac. 378; *Thompson v. Burge*, 60 Kan. 549, 72 Am. St. Rep. 369, 57 Pac. 110; *Noland v. Barrett*, 122 Mo. 181, 43 Am. St. Rep. 572, 26 S. W. 692; *Dakota Investment Co. v. Sullivan*, 9 N. Dak. 503, 81 Am. St. Rep. 584, 83 S. W. 233; *Robertson v. Smith*, 94 Va. 250, 64 Am. St. Rep. 723, 26 S. E. 579; note to *Hammond v. Caileaud*, 52 Am. St. Rep. 176-179. As to the setting aside of a judicial sale because made after return day, see *Southern Cal. Lumber Co. v. Ocean Beach Hotel Co.*, 94 Cal. 217, 28 Am. St. Rep. 115, 29 Pac. 627.

## BANKERS' UNION OF THE WORLD v. CRAWFORD.

[67 Kan. 449, 73 Pac. 79.]

**CORPORATIONS—Powers.**—A corporation has only such power as is conferred upon it by its charter, either expressly or by implication, to enable it to carry out the objects of its creation. The exercise of any other power by it is ultra vires. (p. 469.)

**CORPORATIONS—Powers.**—The right of a corporation to act must be conferred expressly or by necessary implication, or it does not exist. It is not sufficient to authorize it to act that no limitation is found in the law forbidding the act. (p. 469.)

**BENEFIT ASSOCIATIONS** have no Right to Consolidate. (p. 469.)

**BENEFIT ASSOCIATIONS—Limitation of—Powers.**—Benefit associations must be administered for the sole benefit of their members and their beneficiaries, by means of assessments and dues collected from their members, and such associations have power to make payment of benefits only to their members or their named beneficiaries. (pp. 469, 470.)

**BENEFIT ASSOCIATIONS—Consolidation—Contract Ultra Vires.**—A contract by one benefit association to pay an already accrued death loss of another similar association, in consideration of the transfer to it of the membership and offices of such other association, is unauthorized, ultra vires, and void. (p. 470.)

**BENEFIT ASSOCIATIONS—Contract Ultra Vires—Estoppel.** A contract by a benefit association to pay an already accrued death loss in another benefit association, in consideration of the transfer to it of the membership and offices of other association, is ultra vires and void, and such association is not estopped to plead the invalidity of such contract because the transfer of such membership and offices has been made to it. (p. 471.)

E. A. Austin and O. E. Hungate, for the plaintiff in error.

W. E. Atchison, for the defendant in error.

**450** CUNNINGHAM, J. Leathie P. Crawford sought to recover from the Bankers' Union of the World. Its demurrer to her petition was overruled. Did the court err in so doing? The material portions of her petition are substantially as follows: The National Aid Association is a fraternal insurance or beneficiary corporation, organized under the laws of Kansas; W. A. S. Bird is receiver of this association, and as such receiver has the custody, control and possession of all its records and assets; the Bankers' Union of the World is a fraternal insurance corporation organized under the laws of the state of Nebraska, and doing **451** business under the laws of the states of Nebraska and Kansas; William H. Crawford, who was the husband of the plaintiff, joined the National Aid Association, and as a member thereof received a beneficiary certificate con-

taining stipulations as follows: "This certificate of membership witnesseth, that in consideration of the representations made by William H. Crawford in his application for membership in said National Aid Association, which is hereby made a part of this contract, said member further complying with the by-laws, rules and regulations governing said National Aid Association, then and in that case the said National Aid Association hereby promises and binds itself that, upon satisfactory evidence, in accordance with its by-laws, of the death of William H. Crawford, the person named and described in the application for which this certificate is issued, to pay to his wife, Leathie P. Crawford, the beneficiary mentioned in said application, the sum of one thousand dollars, or such a sum as shall be derived from the benefit fund upon an assessment made for said death on all its members, as provided in its by-laws, less the amount which has been paid to said member on account of loss of eye or limb or the old age benefit; and said sum, not to exceed the amount of one thousand dollars, shall be received by said beneficiary in full of all claims against the said National Aid Association by virtue of this certificate."

It was further alleged that said William H. Crawford died in good standing in said National Aid Association on the 5th of October, 1901, the plaintiff being his beneficiary named in said certificate; that due and timely proof of his death was made; that afterward, no amount having been paid on the certificate, the officers of the National Aid Association became convinced that on account of the low rate of assessment and the slow growth of the National Aid Association, for the protection of its membership and to guarantee the payment of its <sup>452</sup> death losses, it was necessary to combine with some other fraternal order whose rate of assessment was higher, and whose growth was more rapid; that it could not continue in business with its low rate of assessment and meet its death losses promptly; that it was necessary for the protection of its members to consolidate with some growing order that was larger and had a higher rate of assessment; that the Bankers' Union of the World presented to the officers of the National Aid Association a proposition to consolidate the two orders; that this proposition was accepted by the latter, and a formal agreement entered into between these two associations, whereby the Bankers' Union undertook to pay certain liabilities for death losses which had accrued under the beneficiary certificates issued by the National Aid Association, of which that due to the plaintiff was one. The writing containing

this agreement, so far as it refers to this matter, was evidenced by the memorandum of date October 12, 1901, and is as follows: "Liabilities of which the National Aid has official notice, not exceeding twenty-seven thousand three hundred and thirty dollars, uncontested, and seven thousand dollars contested, to be assumed and agreed to be paid by the Bankers' Union of the World and Spinney [its president], according to the constitution and by-laws of the National Aid."

Afterward this memorandum was put in a more formal shape and this contract of assumption appears therein as follows: "5. The said E. C. Spinney and the Bankers' Union of the World, upon the consummation of said consolidation and as a part of said consolidation, shall agree to assume and agree to pay all the just and lawful claims for death losses against the said association of which the said association has official notice, not exceeding twenty-seven thousand three hundred and thirty dollars uncontested liabilities and seven thousand dollars contested <sup>453</sup> liabilities. By the term 'uncontested liabilities' is meant such liabilities as are not known to be spurious or fraudulent, but the said the Bankers' Union of the World and E. C. Spinney reserve the right to contest any of said liabilities for any reasons which may be deemed sufficient by competent and reliable counsel. The said officers of said association, or either of them, shall preclude the said E. C. Spinney and the Bankers' Union of the World from their right of contest as aforesaid.

"By the term 'contested liabilities' is meant such claims against said association as the officers thereof may deem to be and have classified as spurious and illegal, and such claims shall not be deemed to be liabilities of said association until established to be such by judgment of court. Said liabilities to be assumed and paid by said E. C. Spinney and the said Bankers' Union of the World according to the constitution and by-laws of the National Aid Association."

This contract provided that the general officers of the National Aid Association should do all they could to secure a transfer of the management of that association to the Bankers' Union, and to accomplish the same should resign from their respective positions, and procure persons selected by the Bankers' Union to be elected officers of the National Aid Association; that they should devote their time until the 1st of January, 1903, to the consummation of such consolidation, by procuring members of the National Aid Association to become members of the Bankers' Union, and for their services they were to receive the sum



of two thousand five hundred dollars, if consolidation should be consummated, and a less sum if through no fault of theirs it should not be; that they should receive the further sum of ten thousand dollars which was evidenced by notes given, and payable at intervals commencing on the 1st of November, 1901; that when consolidation should be accomplished, the National Aid Association should <sup>454</sup> turn over to the combined management all the furniture and supplies owned by it, and thirteen hundred dollars which was then on deposit to its credit.

The petition further alleged that all of the conditions of this agreement were complied with by both parties thereto, the National Aid Association officers resigning their offices and procuring the selection of officers indicated by the Bankers' Union to fill the same, and all of the business of the former to be placed under the control of officers so selected by the Bankers' Union, which paid to the retiring officers the sum of two thousand five hundred dollars as agreed; that by reason of such consolidation the Bankers' Union obtained an increase in its membership of about four thousand, who paid into the treasury the sum of four thousand dollars per month; that this plan and its consummation received the approval of the insurance commissioner of the state of Kansas.

The demurrer contained several grounds, the most meritorious ones being that the agreement counted upon was ultra vires as to both associations, and that the petition did not state facts sufficient to constitute a cause of action.

It will be observed that the plaintiff below sought to recover against the Bankers' Union, not by virtue of a contract which it had made with her or her husband, but by virtue of a contract which had been made with the National Aid Association, and the fulfillment of which, as was claimed, had been assumed by the Bankers' Union, so that the questions, as logically presented are: 1. Has the agreement entered into by these associations any force or binding effect upon the Bankers' Union, so far as it requires a payment to Mrs. Crawford? Or, put in another form, was the agreement, so far as it concerned her, within the power of these associations, and is the Bankers' <sup>455</sup> Union bound to her thereby? 2. If this agreement is within the power of the Bankers' Union, so far as Mrs. Crawford is concerned, what was its extent, and what liability was incurred by it thereby?

Taking up the question of power, we suggest that the statutes of Nebraska are not pleaded; hence, the presumption is

that they are the same as found in Kansas. That they are so in fact is admitted by the attorneys for both parties. We need take small space in the discussion of the universally recognized rule that a corporation has only such power as is conferred upon it by its charter, either expressly or by implication, to enable it to carry out the objects of its creation, and that the exercise of powers outside and beyond these is an act *ultra vires* and not binding upon the corporation. The implication authorizing the exercise of a power must be one necessarily arising from a granted power, as distinguished from what might be convenient or desirable. It is not sufficient to authorize a corporation to act that no limitation is found in the law forbidding the act. The right to act must be conferred expressly or by necessary implication, or it does not exist.

We have searched the statute in vain to find adequate warrant therein for a transaction such as is stated in plaintiff's petition. It is claimed that section 3575 of the General Statutes of 1901, relating to fraternal beneficiary societies, which authorizes such societies to make and enforce contracts in relation to their business, implies the right to make the contract in question. It is suggested that the increase of members is the chief object of the existence of these beneficiary associations; hence, an agreement made to promote that end would be one in relation to the business of the corporation. While, of course, no <sup>456</sup> corporation, much less one of this character, could exist without persons connected therewith, nor could one like this long exist without a constant accession to its membership, it surely is a misuse of terms to say that the obtaining of members is the business of the corporation. Members enable it to pursue its business, but the obtaining of members is not its business. Its business is defined in the statute to be the making of provision for the payment of benefits in case of death, sickness, or temporary disability, and this business must be carried on for the sole benefit of its members and their beneficiaries. For the purpose of carrying on this business, such associations are authorized by the statute to create a fund "from which the expenses of such association shall be defrayed," which "shall be derived from assessments, premiums or dues from its members, and interest accumulations thereon." Thus, it appears clearly that these associations are to be administered for the sole benefit of their members and their beneficiaries, by means of assessments and dues collected from such members; that is, that only members may be called upon to contribute, and only they or their beneficiaries may receive indemnity.

These associations are not permitted to go out and engage generally in the business of furnishing indemnity. Their distinct characteristics and charter life would be destroyed in so doing. The agreement counted upon in the case at bar contemplates the payment of money to one not a member of the Bankers' Union from moneys not received from the association of which plaintiff is not a beneficiary. Such a transaction is wholly outside the letter and spirit of the charter act and in excess of any power conferred upon <sup>457</sup> the association; the making and procuring of it is therefore ultra vires and not to be enforced.

The contract upon which plaintiff counts, as she claims it to be, is entirely different from that which she had with the National Aid Association. That was one to pay the proceeds of one assessment, up to one thousand dollars; this is to pay one thousand dollars absolutely. It is, however, granted by the defendant in error that, while the Bankers' Union would not be permitted to collect money from an assessment upon its members for the purpose of paying the death loss of one who had never been a member, yet it is competent for it to pay this death loss out of the expense fund which the association is authorized to accumulate; that the obtaining of members of any association costs approximately ten dollars a piece, and that by this arrangement a large number of members were added without expense, so that the payment of this claim, which is in fact a mortuary one, might be made out of the expense fund in lieu of paying a canvasser or deputy for accomplishing the same result. We are not disposed to give this suggestion serious consideration. To permit that to be accomplished indirectly which cannot be done directly is to encourage indirect and reprehensible means rather than open and fair dealing. Besides this, we find no allegations in the petition upon which to base this claim.

It is further suggested that, even though this contract be ultra vires, still the Bankers' Union is estopped from so pleading. Authorities are cited supporting the proposition that a corporation may be estopped from pleading the invalidity of its contracts as against one who has made part performance of such contract. We are free to grant the correctness of the principle, but find no opportunity for its application <sup>458</sup> here, because there has been no part performance. There was no consolidation or merger; there could be none under the statute. No authority therefor is given. That four thousand of the members of the

National Aid Association chose to become members of the Bankers' Union constituted no part performance on the part of the former association. It could not transfer a single member. Each individual acted for himself. The petition contains no allegation that any of the property of the National Aid Association ever came to the possession of the Bankers' Union. On the contrary, it does allege that all of the records and assets of the National Aid Association are in the hands of the receiver, Bird. Had the assets of the National Aid Association gone into the hands of the Bankers' Union, such assets, perhaps, in a proper action, could have been subjected to plaintiff's claim, but we do not see how an estoppel by reason thereof could be invoked in favor of Mrs. Crawford. She never has paid anything for or lost anything by reason of the agreement upon which she counts. We must hold that the agreement which is sought to be enforced is ultra vires, and that the Bankers' Union is not estopped so to assert it.

The case of *Twiss v. Guaranty Life Assn.*, 87 Iowa, 733, 43 Am. St. Rep. 418, 55 N. W. 8, was very like the one at bar. The court, discussing the questions of ultra vires and estoppel, used the following language (page 736): "That the making of the contract was in excess of the power of the appellant there should be no question. We need not set out the articles of incorporation or the by-laws. It is enough to say that the contract, so far as it attempts to bind the appellant, is contrary to the whole scope and purpose of the corporation. The payment of these losses would be a <sup>459</sup> diversion of trust funds to other objects than those authorized by the charter, and would be a crime: Code, sec. 1072. Both of these companies were organized upon the assessment plan. The assessments were made quarterly, and a fixed amount was required to be paid. A certain amount was set aside for an expense fund, and the remainder was designated as the mortuary fund. The articles of the association explicitly provide as to the disposition to be made of these several funds. There is not one word in the whole record which, by the remotest implication can be construed as authorizing the secretary, or even the board of directors, to use any part of the proceeds of these quarterly payments for such a purpose as paying the death losses of any other insurance company. It is unnecessary to further discuss this question. It appears to us that the undertaking to pay the losses of the Guaranty company is plainly in excess of the power of the appellant or any of its officers. The facts of the case bring it



within the rules announced in *Lucas v. White Line Transfer Co.*, 70 Iowa, 542, 59 Am. Rep. 449, 30 N. W. 771; *Davis v. Old Colony Ry. Co.*, 131 Mass. 258, 41 Am. Rep. 221. And see, also, 2 Morawetz on Private Corporations, secs. 580, 581, 591, 607, 609.

"But it is claimed in behalf of the appellee that the contract is executed and that the appellant is estopped from questioning its validity. As we have said, where an ultra vires contract is made and performed on one side, the other party cannot be permitted to enjoy the benefits received, but will be required in a proper action to account; in other words, the doctrine of a want of power to contract cannot be invoked to aid a party to perpetrate wrong and injustice. But this case presents no such features. It is conceded that the Guaranty company was bankrupt when the contract in question was made. Complaint had been made to the state auditor that it was not paying its death losses promptly, and it was unable to obtain a certificate authorizing it to continue in business. It is said by counsel for the <sup>460</sup> appellee, in argument, that for the payment of these death losses the Guaranty had no means whatsoever, except its annual premiums, payable in quarterly installments. It had no certificate authorizing it to do business after March, 1889. The death losses had been such as to require the proceeds of the mortuary calls to meet the claim, and, in addition, had used up the reserve fund. It was in this condition when the insured, David M. Twiss, died, and the claim of the plaintiff accrued.

"It is urged with apparent confidence that, as there were some five hundred and sixty-seven members of the Guaranty company when it failed, the appellant should be required to pay its death losses upon the ground that by the contract it acquired some four hundred new members. We have already said that the appellant was not authorized to buy members in this way and on any such terms. Let us see whether there is any ground for the alleged estoppel. If there is any reason for such a claim it must be because the appellant, by seeking a transfer of the membership, put it out of the power of the plaintiff to compel payment by the Guaranty company. The wrong and injury to the plaintiff, if any, consists in taking away the membership, so that the members did not pay their quarterly dues to the Guaranty company, by the payment of which the plaintiff would have received the amount due on the policy. It appears to us that this is a most unwarranted as-

sumption. It is based upon the theory that, if the contract had not been made, the five hundred and sixty-seven members would have continued to pay quarterly installments to the Guaranty company until all of the death claims were satisfied and all other claims paid. That this would have occurred is not only not probable, but highly improbable. Members of such organizations are not more likely to pay money for nothing than other people. The fact is, the record shows beyond all question, that if the contract had not been made between the two companies the plaintiff's claim was absolutely worthless. That the position of the plaintiff was in any manner changed to her prejudice by the contract not <sup>461</sup> only does not appear, but the face of the transaction shows that it was not."

Defendant in error insists that this case is not authority here, as it proceeds upon the assumption of antecedent bankruptcy of the absorbed association. We think there is no fair ground for drawing this distinction. It appears that the National Aid Association had forty-four uncontested and unpaid losses, amounting to forty-four thousand three hundred and fifty dollars, and nine contested ones, amounting to seven thousand dollars, at the time of the making of this agreement; and, in the language of the petition, the officers of the association had then "become convinced that on account of the low rate of assessment and the slow growth, . . . for the protection of its membership and to guarantee the payment of its death losses, it was necessary to combine with some other fraternal order; that it could not continue business and meet its death losses promptly." If this does not plead bankruptcy it pleads what is equivalent; for an association of this sort to declare that it could not meet its death losses promptly was to announce its death: *Home Friendly Society v. Tyler*, 9 Pa. Co. Ct. Rep. 617; *Borghaeve v. Knights of Honor*, 26 Mo. App. 218, 223.

Taking up the second question propounded above, and admitting that the agreement is within the power of the Bankers' Union to make, what would be Mrs. Crawford's right thereunder? It will be noted that the beneficiary certificate which is the basis of her claim does not provide for the absolute payment of the sum of one thousand dollars, but for only so much of it, up to that amount, as should be derived from an assessment made upon the members of the National Aid Association as provided in its by-laws. These by-laws are not pleaded, but we shall assume, however, that they <sup>462</sup> provide for an assessment upon all of the members of the association at the time of the

death of the insured; so that all that Mrs. Crawford was entitled to thereunder was to have this assessment made, and to receive the proceeds of it up to the amount of one thousand dollars. The liability which the Bankers' Union assumed was that the provisions of this beneficiary certificate should be carried out according to the constitution and by-laws of the National Aid Association. Hence, at the very most, Mrs. Crawford would have only the right to have an assessment made upon the members of the National Aid Association and to receive the proceeds of such assessment up to the amount of her certificate. Beyond any question, this was an agreement *ultra vires*, for the Bankers' Union could not make an assessment upon the members of the National Aid Association. Mrs. Crawford has yet, so far as it now appears, all the rights she ever had under this certificate. She is entitled to have the officers make this assessment for her benefit and to receive its proceeds. We are fully persuaded that the agreement counted upon was beyond the power of the Bankers' Union to make, and that the same conferred no rights whatever upon Mrs. Crawford.

The judgment of the court below will be reversed, with direction to sustain the demurrer to the petition.

All the justices concurring.

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*The Effect of the Consolidation of Corporations* is the subject of an extended note to *Morrison v. American Snuff Co.*, 89 Am. St. Rep. 604-656. In *Twiss v. Guaranty Life Assn.*, 87 Iowa, 733, 43 Am. St. Rep. 418, 55 N. W. 8, it is held that a contract whereby a guaranty life association undertakes to pay losses which may accrue against another similar association, is an attempt to divert the funds to the objects not authorized by its charter, and is therefore *ultra vires* and void.

BOARD OF EDUCATION *v.* PHILLIPS.

[67 Kan. 549, 73 Pac. 97.]

**CONSTITUTIONAL LAW—Impairment of Obligation of Contracts.**—One legislature has no power to prohibit a subsequent legislature from changing, altering or annulling existing laws, when, in the judgment of the latter, the public interests require it, although such change may impair the obligation of a contract. (p. 476.)

**CONSTITUTIONAL LAW—Impairment of Obligation of Contracts.**—The rule that no statute can be enacted impairing the obligation of a contract does not apply to a contract made by persons dealing with a department of the government, concerning the future exercise of governmental powers conferred for public purposes by legislative acts, when the subject matter of the contract is one which affects the safety and welfare of the public. (p. 477.)

C. F. W. Dassler, J. H. Atwood and W. W. Hooper, for the plaintiff in error.

Baker & Baker, for the defendant in error.

**549** GREENE, J. This is a proceeding in error to reverse an order of the district court of Leavenworth county refusing to set aside a temporary injunction **550** theretofore granted, restraining the board of education of the city of Leavenworth from issuing bonds to purchase a site and erect a high school building thereon.

In 1879 the board of education of the city of Leavenworth refunded its then bonded indebtedness, under chapter 81 of the Laws of 1879. The plaintiff is the owner of one of such unmatured bonds. In 1903 the school board of said city, having complied with all the preliminary statutory requirements provided in chapter 196 of the Laws of 1891, for the issuance of bonds for the purpose above stated, this proceeding was commenced challenging the power of the board to issue such bonds before payment of the refunding bonds issued under the act of 1879.

Plaintiff contends that under the provision of section 5, chapter 81 of the Laws of 1879, and especially the following sentence therein, "said board shall issue no bonds hereafter, except the refunding bonds provided for by this act," no other bonds can be issued by said board until such refunding bonds shall have been paid in full; that this provision is a part of the contract between the board and the purchasers of these bonds, and that the act of 1891 authorizing the board to issue additional bonds before the refunding bonds shall have been paid in full is an impairment of the plaintiff's contract, and within



the inhibition of section 10 of article 1 of the constitution of the United States, which declares that "no state shall pass any law impairing the obligation of contracts." Chapter 196 of the Laws of 1891 fully authorizes the board to issue the bonds in question, and unless it falls within the inhibition of said section 10 of the federal constitution the injunction should not have been granted.

Admitting the contention of the plaintiff, however, <sup>551</sup> that the act of 1879, prohibiting the future issuance of bonds by the board of education until its refunding bonds shall have been paid, entered into and became a part of his contract, and that to permit the issuance of the present bonds would in some degree be an impairment of his contract, the question arises whether one legislature has the power to prohibit a subsequent legislature from changing, altering or annulling existing laws when, in the judgment of the latter, the public interest requires it, although such change may impair the obligation of some contracts. The answer to this question depends, we think, entirely upon the subject of legislation and the subject matter of the contract. In determining the application of this principle to the present case, it must be borne in mind that the maintenance of public schools is an exercise of governmental power in the interest of public morals and the general welfare of the people, and is as necessary for the self-preservation of a republican form of government as the maintenance of insane hospitals, reformatories and penal institutions. In fact, one of the objects of the former is to decrease and eliminate as nearly as possible the necessity for the latter.

The duty of a state in respect to its public school system is ever increasing and recurring. New or changed conditions arise which demand immediate relief; conflagrations and destruction by the elements must be met when they arise, if the system is to be maintained. These recognized emergencies demand not only that the state reserve the power to perpetuate itself in this respect, but also that the doors of expediency be left open. The fact that authority to carry on this department of government has been delegated to minor governmental functionaries, such as school districts, cities and boards of education, make the obligation <sup>552</sup> for their maintenance none the less the duty of the state. The power to carry on this department of government, or to perform any other strictly governmental duty, cannot be contracted or legislated away. All parties dealing with a sovereign power, or one of its functionaries

in the exercise of governmental power, the subject of which pertains to government, do so knowing it cannot contract away the power conferred for self-protection or self-preservation.

The rule, therefore, that the legislature can pass no law impairing the obligation of contracts does not apply to parties dealing with a department of government concerning the future exercise of powers conferred for public purposes by legislative acts, where the subject matter of the contract is one which affects the safety and welfare of the public. In such cases "the presumption is that when such contracts are entered into it is with the knowledge that parties cannot, by making agreements on subjects involving the rights of the public, withdraw such subjects from the police power of the legislature": *Chicago etc. R. R. Co. v. Nebraska*, 170 U. S. 57, 72, 18 Sup. Ct. Rep. 513.

Controlled as we are by these fundamental principles of government, we are led to the conclusion expressed in *Buffalo etc. R. R. Co. v. Buffalo St. R. R. Co.*, 111 N. Y. 132, 140, 19 N. E. 63: "The same authority which confers upon one body the power of legislation authorizes its successors, in the exercise of their duty, to change, alter and annul existing laws when, in their judgment, the public interest requires it. In the performance of their duty of legislating for the public welfare, each successive body must, from necessity, be left untrammelled except by the restraints of the fundamental law."

The principle was stated in *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 746, 753, 4 Sup. Ct. Rep. 652, in the following language: "No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them. For this purpose the legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself."

Notwithstanding the provisions in the refunding act of 1879, that "said board shall issue no bonds hereafter, except the refunding bonds provided for by this act," the plaintiff in purchasing the bonds did so knowing that the board could not contract away its power to exercise in the future the authority conferred upon it by the state for the administration of its public affairs.

It is urged by the defendant that this question was settled by this court in *Board of Education v. State*, 26 Kan. 44. An examination of that case will show that the question involved in the present one was not presented to the court in that case. The only contention there made was that the title of the act contained two distinct subjects, and it was upon that ground that the case was determined. Whatever else was said in that opinion was dictum.

The decisions in the case of *Smith v. City of Appleton*, 19 Wis. 492, to which our attention has been called, is only the construction of the court of a special act passed authorizing the city of Appleton to refund its bonds, which seems to have contained many stringent provisions to secure their prompt payment. The <sup>554</sup> construction of that special act can have no application to the question presented in this case.

The judgment of the court below is reversed, and it is ordered that the judgment awarding a temporary injunction be set aside and the injunction refused.

Johnston, C. J., Cunningham, Pollock, Burch and Mason, JJ., concurring.

Smith, J., dissenting.

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*Contracts*, within the meaning of the constitutional provision prohibiting the impairment of the obligations of contracts, are voluntary agreements of minds upon a sufficient consideration to do or not to do certain things. Contracts granting immunity from taxation have been held to be within the provision of the federal constitution: *Ladd v. Portland*, 32 Or. 271, 67 Am. St. Rep. 526, 51 Pac. 654. But it seems that a judgment is not: *Livingston v. Livingston*, 173 N. Y. 377, 93 Am. St. Rep. 600, 66 N. E. 123, 61 L. R. A. 800.

## IN RE LEWIS.

[67 Kan. 562, 73 Pac. 77.]

**SEDUCTION—Subsequent Marriage as Bar.**—In the absence of statute to that effect, the subsequent marriage of the accused to the injured female is not a bar to a prosecution under a statute providing a penalty for obtaining illicit connection with any female of good repute under the age of twenty-one years. (pp. 482, 483.)

W. S. Hyatt, for the petitioner.

C. C. Coleman, attorney general, E. L. Burton, county attorney, and J. W. Iden, for the respondent.

**562** MASON, J. Oscar Lewis was arrested on a warrant issued April 2, 1903, charging him with having, on June 1, 1902, obtained illicit connection, under promise of marriage, with Nellie Meador she being of good repute and under twenty-one years of age. Upon a preliminary examination he was held to answer the charge. It is shown that on November 27, 1902, he was married to said Nellie Meador, and he now asks his discharge upon habeas corpus on the ground that such marriage is a complete bar to the prosecution. The state claims, and the claim is supported by the evidence, that the defendant abandoned his wife on the morning after the marriage, but this does not affect the legal aspect of the matter.

In the following cases it has been held that a subsequent marriage is a bar to a prosecution for seduction: *Commonwealth v. Eichar*, 4 Pa. L. J. 326; **563** *People v. Gould*, 70 Mich. 240, 14 Am. St. Rep. 493, 38 N. W. 232; *State v. Otis*, 135 Ind. 267, 34 N. E. 954. The law is so stated in Wharton on Criminal Law, tenth edition, volume 2, page 1760, and Lawson's Criminal Defenses, volume 5, page 780. The statements of the text-writers, however, are based solely upon the cases just cited, and therefore add little to their authority. The Michigan and Indiana cases, moreover, merely followed the reasoning in *Commonwealth v. Eichar*, 4 Pa. L. J. 326, so that the soundness of the doctrine in principle can be determined from an examination of the opinion in that case. Its full text upon this point is as follows: "The evidence fully establishes the fact that, six months previous to the finding of this indictment by the grand jury, the defendant was legally married by the Reverend Mr. Rugan, of the Lutheran church, to the female whom he is charged with having seduced. She is by the laws of God and man his wife, and as such is entitled to all the rights



which are incident to that relation. Can he now be convicted and punished for her seduction before marriage? It is not the carnal connection, even when induced by the solicitation of the man, that is the object of this statutory penalty, but it is the seduction under promise of marriage which is an offense of so grievous a nature as to require this exemplary punishment. What promise? One that is kept and performed? Clearly not, but a false promise, broken and violated after performing its fiendish purpose. The evil which led to the enactment was not that females were seduced and then made the wives of the seducer, but that after the ends of the seducer were accomplished his victim was abandoned to her disgrace. An objection to this construction is that it places within the power of the seducer a means of escaping the penalty. So be it. This is far better than by a contrary construction to remove the inducement to a faithful adherence to the promise which obtained the consent."

564 Our attention has not been called to any actual adjudication against this doctrine, nor have we discovered any. However, in *State v. Bierce*, 27 Conn. 319, 324, in considering the question whether it could be shown in defense that the promise of marriage was made in good faith, and broken only by reason of the subsequent misconduct of the complaining witness, the court said: "Even if he had performed his promise to marry her, we do not perceive how it could plausibly be urged that it would be any answer to the charge of the previous seduction; however, such partial reparation might be viewed as a circumstance to mitigate the punishment. As to the claim founded on the misconduct of the female subsequent to the illicit connection between her and the defendant, it is a sufficient answer that the offense was committed and complete before such misconduct took place, and that, whatever effect it might have upon a claim by her upon him for the breach of his promise of marriage, or however it might be considered by the court in affixing the punishment for the offense charged upon the defendant, it could not relate back to render legal or innocent a violation of the statute for which he had already become amenable."

In *State v. Wise*, 32 Or. 280, 282, 50 Pac. 800, it was said: "But, as we take it, the gravamen of the offense is the act of seducing and debauching an unmarried female, of previous chaste character, under or by means of a promise of marriage; and the crime is complete as soon as the act is accomplished, although a subsequent marriage is by statute a bar to a prosecution."

In *People v. Hough*, 120 Cal. 538, 65 Am. St. Rep. 201, 52 Pac. 846, the court held: "When a man induces an unmarried female of previous chaste character to submit her person to him by reason of a promise of marriage upon his part, the <sup>565</sup> seduction has taken place—the crime has been committed. The succeeding section, which provides that the marriage is a bar to a prosecution, clearly recognizes that the crime has been committed when the promise has been made and the intercourse thereunder has taken place. There may be incidental references in some cases indicating that a refusal upon the part of the man to carry out the promise is a necessary element of the offense: *People v. Samonset*, 97 Cal. 448, 32 Pac. 520; *State v. Adams*, 25 Or. 172, 42 Am. St. Rep. 790, 35 Pac. 36. But such is not the fact."

In *Clark and Marshall's Law of Crimes*, page 1122, the authors say: "By express provision of the statutes in most states, the subsequent intermarriage of the parties is a bar to a prosecution for seduction. But this is not the case in the absence of such a provision, for, as was shown in another place, the person injured by a crime cannot prevent a prosecution by afterward condoning the offense."

Notwithstanding the authorities cited in support of the contention of defendant, we are not disposed to yield assent to it. Being based upon the Pennsylvania case, they depend for their force, as it does, upon the soundness of the reasoning by which it is supported, and this reasoning is based less upon the language of the statute than upon considerations of public policy, and the decision borders upon judicial legislation.

While the following language of Mr. Justice Johnston in *State v. Newcomer*, 59 Kan. 668, 54 Pac. 685, was used in a case of statutory rape, it is equally applicable here, and is a satisfactory refutation of every argument advanced in the opinion in the Eichar case: "In behalf of the defendant it is argued that the <sup>566</sup> evil consequences of the unlawful act have been averted by the marriage; that when the parties to the act voluntarily, and in good faith, entered into the marriage relation, the offense was condoned, and that the welfare of the parties and their offspring requires the interests of the public will be best subserved by the ending of the prosecution.

"The difficulty with this contention is that the law does not provide that the offense may be expiated by marriage or condoned by the injured female. Her consent to the sexual act constitutes no defense, and neither her forgiveness nor anything

which either or both will do will take away the criminal quality of the act or relieve the defendant from the consequences of the same. The principle of condonation which obtains in divorce cases where civil rights are involved has no application in prosecutions brought at the instance of the state for the protection of the public and to punish a violation of the law. It is true, as stated, that society approves the act of the defendant, when he endeavors to make amends for the wrong done the injured female, by marrying her, and usually a good-faith marriage between the parties to the wrong, prevents or terminates a prosecution; but the statute which defines the offense and declares punishment therefor makes no such provision. If the defendant has acted in good faith in marrying the girl, and honestly desires to perform the marital obligation resting upon him, and is prevented from doing so by the influence and interference of persons other than his wife, it may constitute a strong appeal to the prosecution to discontinue the same, or to the governor for the exercise of executive clemency, but as the law stands it furnishes no defense to the charge brought against the defendant."

Moreover, the doctrine of the Pennsylvania, Michigan and Indiana courts, if accepted as sound, would not necessarily control here, since it has arisen under statutes for the punishment of offenses that include the element of seduction, properly so called, and the <sup>567</sup> decisions supporting it are based to some extent upon that fact. The Kansas statute here involved (Gen. Stats. 1901, sec. 2021) does not use the word "seduce," and, while the offense it creates is commonly and conveniently called "seduction," this does not imply that the term is technically correct. It makes criminal the act of obtaining illicit connection under promise of marriage with any female of good reputation under twenty-one years of age. This does not constitute seduction as the word is used in the statutes of other states. In *State v. Reeves*, 97 Mo. 668, 676, 10 Am. St. Rep. 349, 10 S. W. 841, the trial court gave this instruction: "If the jury believe beyond a reasonable doubt that the defendant, at the county of Callaway, Missouri, and within three years of the finding of the indictment, promised Zerelda Hall to marry her if she would permit him to have sexual intercourse with her, and if she did so on the faith of that promise, and she was at the time under the age of twenty-one years, and unmarried and of good repute, they will find defendant guilty."

This we conceive would be a good instruction under the Kansas statute. Yet of it under the Missouri statute, which reads; "If any person shall, under promise of marriage, seduce and debauch any unmarried female of good repute," etc., the supreme court of Missouri said: "The vice of that instruction consists in not requiring the female in question to be 'seduced,' to be drawn aside from the path of virtue, but simply that if without any such arts and wiles as are calculated to operate upon a virtuous female and to lead her astray, the defendant made to the prosecutrix a plain business offer that he would 'marry her if she would permit him to have sexual intercourse with her, and if she did so on the faith of that promise,' that then <sup>568</sup> he was guilty. No one can, with any degree of plausibility, contend that a virtuous female could be seduced without any of those arts, wiles and blandishments, so necessary to win the hearts of the weaker sex. To say that such a one was seduced by simply a blunt offer of wedlock in futuro, in exchange for sexual favors in praesenti, is an announcement that smacks too much of bargain and barter, and not enough of betrayal. This is hire, or salary, not seduction. Any construction of the statute which would sanction the fifth instruction aforesaid would strike from the statute the word 'seduce,' and render anyone guilty of a felony who should, under promise of marriage, debauch any unmarried female."

The substance of the foregoing excerpt is quoted with approval in *Putnam v. State*, 29 Tex. App. 454, 25 Am. St. Rep. 738, 16 S. W. 97. The case is cited in the definition of the word "seduction" in Bouvier's Law Dictionary. So, in *Wilson v. State*, 58 Ga. 328, 330, it was said: "Where consent to criminal intercourse is part of the original betrothal, and is procured solely by the undertaking to marry, the transaction may be mere coarse and corrupt traffic; but where consent is given, pending a virtuous engagement, in consequence of a repetition of a promise to marry already made and accepted, the woman yielding in reliance on the plighted faith of her lover, and he intending that she shall trust and be deceived, the case is one of seduction": See, also, *Merrell v. State*, 42 Tex. Cr. Rep. 19, 57 S. W. 289.

We are not advised as to the origin of the Kansas statute. It was not a part of the original crimes act, nor was it adopted from the laws of any other state, so far as we have discovered. It is worthy of note that at the time of its adoption the statutes of many states, including New York, Wisconsin, Texas,



Georgia, Iowa, and Oregon, provided in express terms that subsequent marriage should be a bar to <sup>569</sup> prosecutions for seduction. This fact makes it reasonable to suppose that the Kansas legislature did not intend that this rule should obtain here, or such a provision would have been embodied in the act.

We hold that a subsequent marriage to the injured female is not a bar to a prosecution under section 2021 of the General Statutes of 1901.

The petitioner is remanded.

All the justices concurring.

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*The Question Passed upon in the Principal Case* will be found discussed in the monographic note to *Bradshaw v. Jones*, 76 Am. St. Rep. 677, 678.

CASES  
IN THE  
SUPREME COURT  
OF  
LOUISIANA.

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AGURS v. BELCHER & CRESWELL.

[111 La. 378, 35 South. 607.]

**DEED—Signing by Mark, Error in Name.**—When the grantor in a deed, being unable to write, signs by his mark, and the notary undertakes to write the grantor's name, the true signature is the grantor's act in making his mark, and not what the notary writes. An error in the name as written by the notary does not, therefore, vitiate the instrument. (p. 487.)

**DEED—Error in Grantor's Name—Registration.**—If the name of the grantor is correctly written in the body of a deed, which he signs by his mark, but the notary, undertaking to write the grantor's name as a signature, makes an error in such name, which is carried into the index to conveyances, the instrument imparts notice, and the error does not deprive the grantee of his property. (p. 487.)

**RECORDS.**—The Index to Conveyance Records is no part of the record. (p. 487.)

Murff & Webb, for the appellants.

Alexander & Wilkinson and Thigpen & Foster, for the appellee.

**379** NICHOLLS, C. J. Plaintiff, alleging himself to be the owner of certain lots of ground in the city of Shreveport, and that the same had been seized under execution issued on a judgment that Belcher & Creswell, a commercial firm, had recovered against one Willie Johnson, and were being advertised for sale under said judgment, brought the present action to enjoin the sale. Upon issue joined in the court below, judgment was rendered perpetuating the injunction which had issued. Defendants appeal.

The substantial facts are these: In March, 1901, Willie Johnson appeared before a notary public and two witnesses, and executed an act of sale to W. C. Agurs of the lots of ground in question. Agurs was present and accepted the sale. The price was six hundred dollars. Willie Johnson, being unable to write, could not sign his name, and the notary undertook to write his name, and then have him make his mark, thus, "X," between his given name and his surname. But while the name of Willie Johnson was written all right in the act of conveyance as the appearer, when the notary came to write his name at the foot of the act he wrote it "Willie Jones." This error was not noticed by any of the parties, and thus the deed appeared signed in this way: "Willie <sup>his</sup> X Jones."

But the man who actually appeared and touched the pen in making his mark was Willie Johnson. The notary in question was the deputy clerk of the court. When he came to make the customary indorsement on the folded act, he carried the error further by indorsing it, "Willie Jones to W. C. Agurs." The deed as thus indorsed he then marked, "Filed and recorded." It was inscribed in the conveyance book, the name of Willie Johnson appearing in the body of the inscription, while that of Willie Jones appeared at the foot of the deed and on the margin of the page; the latter thus: "Willie Jones to W. C. Agurs." And when the deputy clerk came to index the act he indexed it as "Willie Jones to W. C. Agurs."

The following year (1902) Willie Johnson became indebted to Belcher & Creswell. They recovered judgment against him for <sup>380</sup> seventeen hundred and fifty dollars, and caused the same to be inscribed in the mortgage book. Subsequently to this, Agurs, the vendee of Willie Johnson, having discovered the error above referred to, took Willie Johnson to the deputy clerk, who, as ex-officio notary public, had passed the act, and, causing the deputy to exhibit to them the original act, pointed out to him the error, and requested its correction; whereupon the deputy made the correction by erasing the name "Willie <sup>his</sup> X Jones," and substituting for it <sup>mark</sup>

"Willie <sup>his</sup> X Johnson." Like changes, to correspond, were <sup>mark</sup> made in the conveyance records and also on the index. This was before the fi. fa. issued on the judgment which Belcher & Creswell had recovered against Willie Johnson, and under

which they caused the lots to be seized. The fi. fa. issued subsequently the same day.

The first answer of Belcher & Creswell to the injunction petition of Agurs was that the instrument relied upon by the latter as showing his ownership of the lots was not binding on them for the reasons: 1. That the act of sale as executed between Agurs and Willie Johnson in March, 1901, and, as recorded, was not such notice to the public as the law requires; and 2. That the changes made in the act after registry of their judgment were ex parte, without notice, and could not affect them, or impair their rights already existing.

These defenses are not tenable. Johnson did actually convey the property to Agurs. His was the hand that made the mark which stood for his signature. The proper man, therefore, signed the deed. The true signature was his act in making his mark, not what the notary wrote: See *Zacharie v. Franklin*, 12 Pet. 151; *Tagiasco v. Molinari*, 9 La. 512; *Madison v. Zabriski*, 11 La. 251.

Had defendants read the act, they would have learned from its recitals that it was Willie Johnson who appeared before the notary and made the sale. At least, they would have been put on guard. <sup>381</sup> Their position, therefore, that the instrument conveying the property was not sufficient notice to them is not sound. Because the deed was indexed erroneously cannot be given the effect of depriving Agurs of his property: *Swan v. Vogel*, 31 La. Ann. 38. The index is no part of the record; it is simply for the convenience of those examining the records: *Swan v. Vogel*, 31 La. Ann. 40. See, also, *Caldwell v. Prindell*, 19 W. Va. 669.

The deputy clerk, who officiated as ex-officio notary, testified he wrote the name "Willie Jones" at the foot of the deed through inadvertence; that it was Willie Johnson who actually appeared before him and touched the pen, and whose name he intended to write.

The second answer of Belcher & Creswell to the injunction petition was that the sale to Agurs was not intended by the parties as a sale, but as a mortgage to secure the loan of six hundred dollars, which sum was named as the consideration of the sale.

The only testimony found in the record touching upon this issue is that given by Agurs on cross-examination by defendants' counsel. He swears positively to have purchased the prop-



erty outright for six hundred dollars cash, and that the transaction was a sale, and not a mortgage.

Judgment affirmed.

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*The Signature* to a will may be by the testator's mark: *Robinson v. Brewster*, 140 Ill. 649, 33 Am. St. Rep. 265, 30 N. E. 683. And although the scrivener writes the wrong name opposite the mark, the will is sufficiently signed: *Bailey v. Bailey*, 35 Ala. 687. As to the attestation of a will by a witness by his mark, see *Appeal of Reaver's Executors*, 96 Md. 735, 94 Am. St. Rep. 610, 54 Atl. 875.

*The Defective Recording* of legal instruments in its effect upon the rights of third persons is discussed in the monographic note to *Koch v. West*, 96 Am. St. Rep. 397-406.

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## SHARP v. NEW ORLEANS CITY RAILROAD COMPANY.

[111 La. 395, 35 South. 614.]

**STREET RAILWAY—Starting Car Before Passenger is Seated.**—A street railway company is negligent if it starts a car before a passenger has gained a secure foothold on the platform, but it is not required to wait until he has taken his seat, or even has entered the doorway, before starting. (p. 489.)

John F. C. Waldo and Dinkelspiel & Hart, for the appellant.

Denégre, Blair & Denégre and Victor Leovy, for the appellee.

**395 PROVOSTY, J.** Plaintiff, a man over seventy years old, and weighing two hundred and twenty pounds, hailed a street-car at the corner of Basin and Canal streets, in the city of New Orleans. He was accompanied by his wife. He carried an umbrella. Whether he did not also have a paper bag of grapes in his hands is a disputed point in the case. The car was on Basin street, the river side, and was going toward Canal. The tracks go into Canal by a wide, easy curve, turning to the left, or toward the river. The car stopped just short of the crossing, or prolongation of the Canal street sidewalk across Basin street. Plaintiff was on the wrong side of the car for getting in, so that he and his wife had <sup>396</sup> to go around the car. In doing so they passed around the rear end of the car. The witnesses do not differ as to where plaintiff and his wife stood in hailing the car, but they disagree somewhat as to whether the car was short of the crossing, or stood on it, or had passed it, when plaintiff attempted to get on. We adopt the statement of the motorman, who says he stopped

at the usual place—short of the crossing. Plaintiff's wife got on, and plaintiff followed or attempted to follow. At this point begins the serious divergence in the testimony, and arises the question upon which the case must turn.

Plaintiff says the car was started before he had gained a secure foothold on the platform, and while he had one foot on the platform and was in the act of lifting the other foot from the step, and that he lost his balance from the jerk of the car, and could not maintain his hold on the car as it rounded the curve, and so he fell. Defendant says that plaintiff was already on the platform and in the act of stepping into the doorway.

Accordingly as the one or the other of these statements is accepted, the case must be decided. If the car was started before plaintiff had gained a secure footing on the platform, the defendant company was negligent and is responsible: *Wardle v. New Orleans etc. R. R. Co.*, 35 La. Ann. 202; *Howell v. St. Charles St. R. R. Co.*, 22 La. Ann. 603; *Lehman v. Louisiana etc. R. R. Co.*, 37 La. Ann. 705; *Nash v. Canal etc. R. R. Co.*, 52 La. Ann. 1199, 27 South. 661; *Kelly v. Vicksburg etc. R. R. Co.*, 108 La. 423, 32 South. 388; *Kennon v. Vicksburg etc. R. R. Co.*, 51 La. Ann. 1599, 26 South. 466; *Boikins v. New Orleans etc. R. R. Co.*, 48 La. Ann. 831, 19 South. 737. On the other hand, if plaintiff was on the platform and about to enter the doorway, the defendant is not responsible; for it is not charged in the petition, and it is not shown, that the movement of the car, either in starting or after getting under way, was negligent or out of the ordinary; and certainly it is not necessary to wait until the passenger has taken his seat, or even has entered the doorway, before starting a car. Such a rule would preclude the carrying of passengers on the platform, and would materially affect the expeditious operation of the cars; and to no purpose, since experience shows that the contrary practice is not usually attended with any danger. It has been <sup>397</sup> decided that street-cars need not wait until passengers are seated before starting: *Herbich v. North Jersey St. Ry. Co.*, 65 N. J. L. 381 47 Atl. 427. If defendant exercised due care in the operation of the car, it is clearly not responsible for plaintiff's fall and injury. Cars cannot be started without some jerk, and cannot be run in a curve without developing a centrifugal force. The dangers from these causes are incident to traveling on the cars, and a traveler assumes the risk of them: *Aiken v. Southern R. R. Co.*, 104

La. 163, 29 South. 1; Gretzner v. New Orleans etc. R. R. Co., 105 La. 270, 29 South. 496; Black v. Third Ave. R. R. Co., 2 App. Div. 387, 37 N. Y. Supp. 831.

In this statement regarding the untimely starting of the car, plaintiff is corroborated by the witnesses Dennis and Levy; and the conductor, in his statement that plaintiff was already on the platform and was entering the doorway, is corroborated directly by plaintiff's witness Phelan, and inferentially by the two witnesses Oster, uncle and nephew.

The witness Dennis is a colored man, who at the time of the accident was a driver for the New Orleans Excavating Company, and at the time of the trial had lost his job. He was on his wagon, driving across Canal street toward the car. The car had come up Basin street into Canal, and he had come down Basin street into Canal, Canal and Basin being intersecting streets. While plaintiff was in the act of entering at the rear end of the car on the wood side, it is doubtful whether the body of the car was not interposed between him and the witness. The track is two and one-half feet from the curb; the side of the car, therefore, was about six inches from the curb. Placing the wheel of the wagon equally close to the curb, the wagon and the car would be on a line fronting each other. Even placing the witness on the side of the wagon next to the curb (and the probability is that he was on the further side, since he was driving, and had a companion with him), and his opportunity for seeing, as he claims he did, was scant indeed.

The witness Levy was on the other side of Canal street, which is one hundred feet wide. His attention was centered on his two little boys who were playing in the street, when it was attracted to the plaintiff by some one hallooing, "Oh, my God!" He saw plaintiff <sup>398</sup> hanging onto the car with one foot on the step, and saw him fall as the car was swinging around the curve. Plaintiff's witness Phelan was at the corner near the car; that is to say, within a few feet. He says plaintiff was on the platform, in the act of entering the doorway. The two witnesses Oster, uncle and nephew, were driving a covered wagon across Canal street, and were passing the car when plaintiff fell right in front of their horse, eight or ten feet ahead. They saw plaintiff fall out of the car, but did not see him hanging to the side of the car, as he would have been if plaintiff and Dennis and Levy were correct in their statement of how plaintiff fell.

We have, then, plaintiff and Levy and Dennis testifying one way, and the conductor, Phelan, and the two Osters testifying the other way, with Dennis so located that his having been in a position to see is doubtful, and the witness Levy at some distance, and his attention attracted only after the accident had sufficiently progressed for the cries of distress to begin. In this condition of the case we have to agree with the judge a quo, by whom the case was tried, jury having been waived, that the proof preponderates on the side of defendant, or, at any rate, that plaintiff has not made his case sufficiently certain, although we must say that it is singular that plaintiff should have fallen—a man accustomed to riding on the cars and holding with one hand, as we find he was—and the car moving slowly. But we have to take the case as we find it.

The judgment is affirmed.

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*The Starting of a Street-car* before a passenger is seated is not, under ordinary circumstances, a negligent act: *Herbieh v. North Jersey St. Ry. Co.*, 65 N. J. L. 381, 47 Atl. 427; *Ayres v. Rochester Ry. Co.*, 156 N. Y. 104, 50 N. E. 960. This rule may be modified, however, by the infirmity of the passenger by reason of infancy, old age, or other cause: *Herbieh v. North Jersey St. Ry. Co.*, 67 N. J. L. 574, 52 Atl. 357.

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### MCBRIDE v. LEDOUX.

[111 La. 398, 35 South. 615.]

**SLANDER—Communications, Concerning a Man, to Relatives of his Fiancée.**—If the wife of a half-brother of a woman engaged to be married communicates to the latter's sister a serious charge which she has heard against the woman's fiancé, in order to have the charge brought to the attention of the woman's mother that she may investigate it, the communication is privileged; and it is not necessary that the one making it should have such information on the subject as to make her believe the charge, nor is she responsible for the injudicious action of a member of the family in speaking of the charge outside the family circle or councils. (p. 495.)

Perry Thompson Ogden, John N. Ogden, and Edward Simon, for the appellant.

Mounton & Simon and Martin & Voorhies, for the appellees.

**399 NICHOLLS, C. J.** Plaintiff appeals from a judgment of the district court in favor of all the defendants, based upon the verdict of a jury. The action was brought against Angel



Ledoux and her husband, Edmund Pellerin, and against Laurence Martin and her husband, Joseph Pellerin, praying for a solidary judgment against them for damages sustained by reason of certain false and slanderous charges against plaintiff, which he alleges were maliciously originated and circulated by the wives of the said Edmund and Joseph Pellerin. The husbands were charged with "having aided and assisted their wives in the utterance, publication, and malicious circulation of the charges, well knowing at the time that they were false and malicious, and calculated to inflict great injury upon him."

The petition contained the usual allegations made in actions of this character.

Plaintiff averred that he was engaged to be married to a near relative of the defendants, with whom they were not on friendly terms, and disliked, and they circulated the said slanderous charges against him in order to ruin his character and reputation, and to place an obstacle in the way of his marriage.

**400** Laurence Martin and her husband answered. They pleaded the general issue. They denied having ever originated, propagated, or repeated the alleged slanderous words, rumors, or utterances set forth in plaintiff's petition, or even any in the least injurious to or prejudicial to his person or character. They averred that some similar rumors or statements were made and uttered to respondents by others, not publicly nor maliciously, but rather in a private manner; that they at no time repeated, spread, or even gave credence to same, but simply made inquiry from persons whom they honestly believed were interested as to whether or not such rumors or statements were in fact being uttered or circulated by others, but not in the least asserting any such matters or rumors to be true, nor even insinuating a willingness to believe anything of the sort. Angel Ledoux and her husband made a similar defense. Edmund and Joseph Pellerin are brothers. They are brothers of the half blood of the young lady to whom plaintiff was engaged to be married, and whom defendants say in their brief that he has since married.

The testimony given by Mrs. Edmund Pellerin to the effect that the statements of which plaintiff complains were made to her by another person as a matter of fact has not been disproved. The complaint, therefore, that she originated the charge made against the plaintiff fails. Mrs. Edmund Pellerin communicated what she had heard to Mrs. Paul Broussard, a married sister of the young lady to whom plaintiff was

engaged, for the purpose, as she told her, of having it communicated by her to her mother, Mrs. Adolphe Pellerin, then a widow. The statements made in regard to the plaintiff were of the most serious character. These reports finally reached the young lady herself, but the testimony does not disclose from whom she first heard them. She refers to a conversation at Breaux's Bridge with a person by the name of Bouilliard, in which he spoke of them to her, but she had evidently been told of them before that conversation. The presumption is that she had heard of them from her mother, Mrs. Adolphe Pellerin, or her sister, Mrs. Paul Broussard, while on a visit to Breaux's Bridge, where they lived. Her usual residence was at Crowley, Louisiana, in <sup>401</sup> the family of Auguste Ledoux, who had married one of her sisters. On her return to Crowley she informed her brother in law what she had been told, and he immediately reported the same to the plaintiff. The latter and Auguste Ledoux went immediately to Breaux's Bridge to trace the reports to their origin. They called upon Mrs. Edmund Pellerin, and also upon her sister, Mrs. Joseph Pellerin. The former told them that reports against plaintiff were made to her by a man who occupied the same seat with her in the car as she was going from Lafayette to Jennings on a visit to her mother. She had never met him before, and in the course of the conversation with her on that occasion he asked her name, and whether she was not related to the young lady who was engaged to the plaintiff, and, receiving an affirmative reply, he said he was sorry, and in that connection made to her the statements complained of. Auguste Ledoux, present at the interview, testified that on receiving this account from Mrs. Edmund Pellerin, plaintiff told her, "Mrs. Pellerin, you have done nothing but your duty, because, if I had a sister, and this matter came up, I would have done the same thing."

Mrs. Edmund Pellerin testified that later her codefendant, Mrs. Joseph Pellerin, asked her whether she had not heard this report, and she replied that she had. Mrs. Joseph Pellerin herself had evidently been informed of the report relative to plaintiff by Mrs. Paul Broussard or Mrs. Adolphe Pellerin, and not by Mrs. Edmund Pellerin. The latter seems to have acted very circumspectly and discreetly in not spreading it. The report does not seem to have gone beyond the Pellerin family until Bouilliard, whose wife was herself one of that family, mentioned the matter to the young lady herself in presence of one or more male persons, not members of it. If Mrs.

Edmund Pellerin was blameless in informing Mrs. Paul Broussard of the statement which she had heard on the railroad car, she could not properly be held responsible for the subsequent indiscretion or improper action of some other member of the family.

We are satisfied from the evidence that the act of Mrs. Edmund Pellerin in communicating to Mrs. Paul Broussard what she had heard was not done maliciously, or to injure <sup>402</sup> anyone, but, on the contrary, from a sense of duty to her husband's family and her own. Had the facts been such as had been represented to her, and had she remained silent, she would have unquestionably been bitterly reproached for her course. She did not know the plaintiff, or anything about him. All that she did was to place matters before the family, so that they could be inquired into and investigated by those more nearly and directly concerned than she was.

Plaintiff refers to the decision of this court in *Buisson v. Huard*, 106 La. 777, 31 South. 293, as sustaining his position. but the particular language he relies upon is found in a quotation of authorities from Odgers' work on Libel, and is not that of this court; and, besides that, the language must be read in connection with what precedes and follows it. It is true the author said that, when a person makes an injurious statement in regard to another, in order to bring it under protection as being a "privileged" communication "he must have believed in the truth of the statements at the time he made them," but this is followed immediately by the declaration: "If a man knowingly makes a false charge against his neighbor, he cannot claim privilege. It can never be his duty to circulate lies."

The latter sentence limits and qualifies the too broadly stated proposition that a man repeating statements must, in order to be justified in so doing, have believed in the truth of the same at the time he made them. It can be readily understood that there are many reports received from others as to the truth of which the party hearing them is entirely ignorant, and is in no position to form an opinion, but which, from the very fact of being in existence, call for investigation and inquiry, as the truthfulness or untruthfulness of the same will most closely affect the future of those related to us by ties of relationship and affection. Of the correctness of this, the very case at bar furnishes an illustration. With respect to charges which originate with the party making and circulating them the rule is much stricter.

There is even less ground for complaint against Mrs. Joseph Pellerin than there is against her sister in law. She merely discussed within the family circle—as she naturally would—a report in which the family <sup>403</sup> would be greatly concerned should it turn out to be true: *Ashton v. Grucker*, 48 La. Ann. 1194, 20 South. 738. Neither of the ladies involved in this litigation pretended to know anything as to the truth of the report. We do not understand plaintiff to claim that he has sustained the allegations of the petition as to either Edmund or Joseph Pellerin. This case falls under the rule announced in *Baysset v. Hire*, 49 La. Ann. 904, 62 Am. St. Rep. 675, 22 South. 44, and *Buisson v. Huard*, 106 La. 768, 31 South. 293.

For the reasons assigned, the judgment appealed from is hereby affirmed.

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*For Authorities* bearing upon the decision in the principal case, see *Baysset v. Hire*, 49 La. Ann. 904, 62 Am. St. Rep. 675, 22 South. 44; *Byam v. Collins*, 111 N. Y. 143, 7 Am. St. Rep. 726, 19 N. E. 75; *Rude v. Nass*, 79 Wis. 321, 24 Am. St. Rep. 717, 48 N. W. 555; note to *Shurtleff v. Stevens*, 31 Am. Rep. 714.

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## MUNTZ v. ALGIERS AND GREтна STREET RY. CO.

[111 La. 423, 35 South. 624.]

**RAILROAD—Lessor's Liability for Lessee's Negligence.**—A street railroad corporation is liable for injuries caused by the negligent operation of the road by another corporation to which it has leased it. (pp. 500, 503.)

P. F. and W. J. Hennessey, for the appellant.

Frank Edward Rainold, for the appellees.

<sup>423</sup> NICHOLLS, C. J. The plaintiff brought suit in the parish of Orleans against the Algiers and Gretna Street Railway Company (or the Algiers, McDonoughville and Gretna Street Railway Company) and the Jefferson Street Railway Company, seeking to recover from them in solido the sum of fifteen thousand dollars, with legal interest. The grounds upon which the demand was based are: That the defendants were corporations organized under the laws of Louisiana, and doing business as common carriers of passengers in the parish of Orleans, conjointly and separately operating horsecars between the parish



of Jefferson and the fifth district of the parish of Orleans. That on or about the 27th of December, 1901, about 7 o'clock in the evening, in Goldsborough parish of Jefferson, Idelia May Muntz, the minor child of the plaintiff aged about twelve years, was knocked down and run over by a car owned and operated by the defendants, so that her neck and limbs were broken and skull fractured, besides suffering other severe injuries, from which, after the most intense agony, she died shortly <sup>424</sup> thereafter. That her death was caused by the fault and gross negligence of defendants, and by the fault and negligence of the driver in charge of the car which ran over and killed her, because the defendants failed to provide their car with proper lights, and with proper appliances and means to give signals and warning of the approach of the car. That the track upon which defendants' car was operated was of a narrow gauge, and laid on the public road, and his child was lawfully thereon, and did not know and was not warned of the approach of the car by which she was knocked down and killed, and received no warning either by the car or the driver thereof, and after she was knocked down and run over by the car the driver never stopped it, but continued on his journey to the terminal of the road in Gretna; and the said driver, if he had been attending to his duties could have seen the child and have prevented the act which caused her death, but neglected to do so; and the car was running at an unlawful rate of speed through the town when it ran down, mangled and killed his child. That the space between the tracks of the railway was generally used by the public as a foot passage, and the child's injuries and her resulting death were not caused by any fault on her part, and her injuries and death were caused directly and solely by the fault and gross negligence of defendants and their employés and agents.

The Jefferson Railway excepted that the court was without jurisdiction *ratione personae*, as its domicile was in the parish of Jefferson, where the trespass complained of was alleged to have occurred. The exception was sustained, the suit as to that company was dismissed, and no appeal was taken from the judgment. The Algiers and Gretna Railway Company excepted to the petition:

1. Because the court was without jurisdiction, and, should the exception be overruled that the petition was contradictory, self-destructive, and the allegation in the petition that the Algiers Railway Company and the Jefferson Street Railway Com-

pany were "conjointly and separately operating horsecars" was without sense and meaning; that, as a matter of fact, plaintiff was in possession of full knowledge concerning its relation to the street railway in question; that it leased out <sup>425</sup> said roadbed and tracks to Thomas Pickles on the 7th of March, 1903, and the cars of said road never belonged to it; that Thomas Pickles died, and his heirs sublet said road to Peter Meid on the 27th of August, 1897, by notarial act before Frank E. Rainold, notary; that on the 23d of January, 1899, he leased the same to Anthony Rubrich and Anthony Rubrich, by notarial act of the 29th of April, 1899, sold his rights in and to the lease to the Jefferson Railway Company; that plaintiff knew that the Jefferson Railway Company was alone operating the road; that the petition disclosed no cause of action, because the driver through whose carelessness it was alleged the accident occurred was not and never had been in the employ of the Algiers and Gretna Railway Company.

It was subsequently agreed between plaintiff's attorneys and the attorney of the Algiers and Gretna Railroad Company that "the exception to the jurisdiction and the formal exception of no cause of action were waived," and the attorney for the latter named company "agreed to try the issue whether that company was lessor, and whether, as lessor, it could be held in any manner for the accident, as raised by his second exception."

Evidence was accordingly heard on these issues. The district judge sustained the second ground of exception filed by defendant, and rendered judgment in its favor and against the plaintiff, dismissing his suit. Plaintiff appealed.

The act by which the Algiers and Gretna Railroad Company was incorporated is not in the record. Mr. Rainold, as witness, states it was incorporated on the 11th of February, 1882, by act before Samuel Flower, notary public; that the original franchise to run a street railroad in Algiers was given, he thought, to a syndicate of about fifteen persons, whom he named; and that they transferred their right to the Algiers and Gretna Railroad Company.

There is no direct evidence in the record showing how or from whom and when that company acquired, or claimed to have acquired, otherwise than through its act of incorporation, the right to operate a railway for transporting freight and passengers outside of the limits of the city of New Orleans beyond and into the parish of Jefferson and <sup>426</sup> over its roads; but there is copied into the transcript an ordinance of the police jury

of the parish of Jefferson (but with nothing showing the date of its passage) granting to the same parties, who were named by Mr. Rainold as composing the syndicate to whom the city of New Orleans had made its grant, and to their successors, transferees and assigns, the right of building and operating, from Algiers, in the parish of Orleans, to the parish line of Jefferson, a track of railroad for the transportation of passengers and freight from Harvey's Canal, into the parish of Jefferson, to the lower line of that parish. However this may be, there is no doubt that the Algiers and Gretna Railway Company claimed to have in some way acquired such a right, inasmuch as on the 7th of March, 1893, by act before Frank E. Rainold, it leased for ten years to Thomas Pickles, who was one of the parties named as forming the syndicates referred to, "all the franchises of the Algiers and Gretna Railway Company, including its road-bed, and the right to operate a railway for transporting freight and passengers between the town of Gretna, in the parish of Jefferson, and the fifth district of the city of New Orleans, formerly known as Algiers, and the tracks as laid between said terminals."

On the 27th of August, 1896, by act before Rainold, Mrs. Henrietta Cook Pickles, wife of Alexander M. Halliday, and Mrs. Josephine E. Harvey, widow of Robert S. Harvey, the heirs of Thomas Pickles, leased the same property, under the same description to Peter Meid, and, additionally, "the stables and real estate situated on Bouny street, in the fifth district of New Orleans," together with the cars then used in the operation of said Algiers and Gretna Railway, which numbered five, and the entire equipment of the road, for the term of five years, to begin on the tenth day of September, 1897, and to end on the 9th of September, 1902. The lessors simultaneously sold and transferred to the lessee the horses and mules—seventeen in number—they used in the operation of the Algiers and Gretna Company.

On the 23d of January, 1899, by act before Rainold, notary, Peter Meid leased to Anthony Rubrich until the ninth day of September, 1902, the same property, under the same description, which was leased by the <sup>427</sup> Algiers and Gretna Railroad Company to Thomas Pickles; also the stables and real estate in McDonoughville, in the parish of Jefferson; also all the cars used, at the time of this lease to Rubrich in the operation of the Algiers and Gretna Railway Company, and the entire equipment of the road.

On the 29th of April, 1899, by act before Rainold, notary, Anthony Rubrich sold and transferred to the Jefferson Railway Company "all the rights which he acquired by reason of the notarial contract executed before Rainold, notary, on the 23d of January, 1899, to which contract Peter Meid, Anthony Rubrich, Ella Mills, Mrs Josephine E. Harvey and Mrs. A. M. Halliday were parties."

The Jefferson Railway Company was incorporated by notarial act before Rainold, notary, on the 4th of April, 1899. The purposes for which it was incorporated were declared to be: "To acquire by lease the right to operate and maintain a railway system between Algiers, in the parish of Orleans, and Gretna, in the parish of Jefferson; to operate and maintain between said terminals for the transportation of passengers and freight; and more especially to acquire all the right of Anthony Rubrich under the contract made by him with Peter Meid and Mrs. A. M. Halliday and Mrs. Josephine E. Harvey, which contract was executed before Frank E. Rainold, notary public, on the 23d of January, 1899; and that this corporation shall have the right to acquire such franchises, privileges and property, both movable and immovable, as shall be necessary for its business or incidental thereto."

Gretna and McDonoughville are unincorporated villages, situated in the parish of Jefferson, the latter between Gretna and the upper line of the city of New Orleans. The accident occurred in a street of McDonoughville. At the time of the accident the only property owned by the Algiers and Gretna Railroad Company were its franchise and the road tracks of the road between Algiers and Gretna. The railroad between Algiers and Gretna was being operated at that time by the Jefferson railway over the roadbed and tracks of the Algiers and Gretna Company under its lease, but the car which ran over the child belonged to it, and the driver in charge of the same was one of its employés. 428 The theory upon which the Algiers and Gretna Company claims to have been released from responsibility in the premises is that, under the laws of Louisiana, the franchises and property of a railroad company can be mortgaged and sold, and that the rights granted by the city of New Orleans and by the police jury of the parish of Jefferson to the syndicates mentioned—and which rights that company acquired—were by their express terms assignable in character, and that, being such, the company had the right to make the lease it did; that by so leasing it was released from all obligations resulting



from the negligent operation of the road, the leasing company being alone responsible. They cite in support of their position articles 2317 and 2679 of the Civil Code; Pierce on Railroads, 283, 284; 23 Am. & Eng. Ency. of Law, 2d ed., p. 785; Mahoney v. Atlantic R. R. Co., 63 Me. 68; Ditchett v. Spuyten, 67 N. Y. 425; Norton v. Wiswall, 26 Barb. 618; Virginia Midland Ry. Co. v. Washington, 86 Va. 629, 10 S. E. 927; Hart v. New Orleans etc. R. R., 4 La. Ann. 262; McDonald v. Louisville etc. Ry. Co., 47 La. Ann. 1440, 17 South. 873; McConnell v. Lemley, 48 La. Ann. 1438, 55 Am. St. Rep. 319, 20 South. 887; Thompson v. Dotterer, 105 La. 37, 29 South. 483; Farmer v. Myles, 106 La. 333, 30 South. 858; Goodwin v. Bodcaw Lumber Co., 109 La. 1050, 34 South. 74.

The plaintiffs refer to Morawetz on Corporation Law, 1120; York etc. R. R. Co. v. Winans, 17 How. 30; Railroad v. Brown, 17 Wall. 445, 450; Thomas v. Railroad Co., 101 U. S. 71; Oregon R. R. Co. v. Oregonian Ry. Co., 130 U. S. 1-39, 9 Sup. Ct. Rep. 409; Central Transp. Co. v. Pullman Car Co., 139 U. S. 24, 11 Sup. Ct. Rep. 478; Wyman v. Penobscot etc. R. R. Co., 46 Me. 162; Middlesex R. R. Co. v. Boston etc. R. R. Co., 115 Mass. 347; Braslin v. Sommerville Horse Ry. Co., 145 Mass. 64, 13 N. E. 65; Davis v. Old Colony R. R. Co., 131 Mass. 258, 276, 41 Am. Rep. 221; Commonwealth v. Smith, 10 Allen, 455, 87 Am. Dec. 672; Chicago etc. R. R. Co. v. Whipple, 22 Ill. 105; Abbott v. Johnstown R. R. Co., 80 N. Y. 27, 36 Am. Rep. 572; Freeman v. <sup>429</sup>Minneapolis etc. Ry. Co., 28 Minn. 444, 10 N. W. 594; Macon etc. R. R. Co. v. Mayes, 49 Ga. 355, 15 Am. Rep. 678.

Referring to the authorities cited by the parties in 23 American and English Encyclopedia of Law, second edition, pages 784, 785, under the title "Railroads," we find that different rules have been adopted in different jurisdictions as to the effect upon the legal liability of a railroad company, which had made a lease of its road, for the negligent operation of the same by its lessee. The first rule and the line of decisions supporting it are found on page 784 of that work under the heading, "Negligent Operation by Lessee—(aa) Rule Holding Lessor Liable." The second rule and decisions supporting it, on page 785, under the heading "(bb) Rule Denying Liability of Lessor."

Under the first of these headings it is said: "There is a sharp conflict of authority as to whether a lessor of a railroad is liable for injuries to persons or property caused by the wrongful or

negligent acts or omissions of the lessee in the operation of the road, so distinguished from the nonperformance of a duty which the lessor's charter or the general law imposes primarily upon the lessor. There is one line of decisions holding that the proper operation of the road so as to avoid injury to third persons is one of the duties imposed by the charter of the proprietary company, and that it cannot escape such duty and the corresponding liability by leasing its road to another, but that the lessor is liable to any person who may be injured by the negligence or wrongful act of the lessee in operating the leased road, unless the charter or statute authorizing the lease exempts the lessor from such liability. The theory of these cases is not that the lessee is to be regarded as the agent or servant of the lessor, but that public policy forbids a railroad company thus to divest itself of its legal responsibility without legislative authority."

Under the second heading it is said: "Opposed to the rule just stated is a line of cases holding that legislative authority to lease a railroad implies an exemption of the lessor from liability for the acts of its lessee, and that when a company had leased its road, and the lessee is in exclusive possession and control under the lease, no liability <sup>430</sup> attaches to the lessor for any negligent or wrongful conduct of the lessee or its servants whereby third persons are injured."

We have said that the act of incorporation is not in the record, but the whole course taken in the case justifies us in assuming that it is a street railroad company created legally by notarial act for the purpose of constructing and operating a railroad for the transportation of freight and passengers for the public benefit from Gretna, in the parish of Jefferson, to that portion of the city of New Orleans, parish of Orleans, lying on the right bank of the Mississippi river, known as "Algiers."

When the incorporators of that corporation availed themselves of the general law to create that corporation, they acquired for the corporation so created certain legal rights and privileges. They also bound the corporation to the performance of certain acts, and subjected it and its property to certain duties and obligations in behalf of the general public. The corporation so created became bound to an acquisition of a right of way, and the construction thereon over it of a roadbed and tracks, and the operation of cars upon the same, under such conditions as to properly secure the safety of the general public. It became subjected as a quasi public corporation to just and proper legal

control and regulation. These were primary obligations on its part, resulting directly ipso facto from its incorporation; and from those obligations toward the public it could not free itself purely at its own will by contracts made with third parties. It might be true that, so long as the corporation remained entirely inactive, it could not be forced into the active performance of these duties by way of mandamus, and that the remedy for non-user would be by way of forfeiture through the state authorities; but when it took action under its act of incorporation—acquired a right of way, constructed a roadbed and track upon it, and placed the railroad into active operation—it placed itself in a position where it could no longer deal with matters as it might itself think proper, in disregard of the primary obligations which it had come under at and by its creation and in favor of the general public. The various acts of acquisition of property and secondary franchises by the corporation, in necessary aid of the purposes <sup>431</sup> and objects of its creation, impressed upon the rights and property and secondary franchises so acquired, in favor of the general public, certain rights which it was not free to of itself set aside or disregard. The corporation, through these acquisitions, became owners of the property; but by the very tenure of the character of this ownership the public, as well as itself, acquired an interest therein. Its ownership was not in one sense an absolute ownership, giving the corporation an unrestricted power of use and disposition, but an imperfect ownership, where the power of use and disposition were held in check and controlled by the rights of the general public and the obligations of the corporation.

The right of a corporation to acquire property in aid of the objects of the incorporation is not a criterion of the right of the corporation to use and dispose of it. Where the rights of property are successively acquired in aid of the objects of the corporation, they become fused, consolidated, or merged into an entirety to carry out the public purposes for which they were acquired, and the corporation is not permitted thereafter at its own mere volition to separate them and to divert them from those purposes.

Defendant's argument that, because the law allows the property and franchises of a corporation to be mortgaged, and to be sold in foreclosure of the mortgage, it must be taken to have authorized the leasing of the same by the corporation, as the power to mortgage is much the broader and more extensive power of the two, and the maxim that the less is included in

the greater applies, is not well founded. The two powers are not in the same line, but are distinct from each other, and it is error to reason from that standpoint. Besides, the precise circumstances under which the property and franchises are authorized to be mortgaged are fixed, and there existed no such condition of things in this case as would have authorized a mortgage, still less a lease.

Defendant urges that the rights which it acquired by transfer from the syndicates were by their terms and on their face assignable, and in leasing the road they simply exercised a right granted in their act of purchase of the rights. It is true that, in so far as the city of New Orleans and the <sup>432</sup> police jury of the parish of Jefferson were concerned, they each agreed that the rights and privileges which they consented to in favor of the original grantees could and should pass to their assigns and successors. Possibly the city of New Orleans and the parish of Jefferson might be held to that consent, but we are not dealing now with what both or either of those corporations would have the right to object to in the premises. Again, the consent of the city and the parish of Jefferson that the grant of the right of way for a railroad through the streets of Algiers should inure to the benefit of the assignees or successors of the original grantee contemplated that all of the rights and franchises of the road should pass as an entirety, and in the interests of the public, to those assigns or successors. They agreed to the transmissibility of their consent to them, but not to a divisibility of the franchises. The franchises, rights, and obligations of the Algiers and Gretna Railroad Company as a quasi public railroad were not created by the action of the police jury of the parish of Jefferson. Neither the city of New Orleans nor the police jury of Jefferson could alter rights and obligations which sprang from and were fixed by the law makers. The effect of the doctrine contended for by the defendant would be to permit six persons, created a corporation with special rights and privileges, but subjected to special duties and obligations to the public, after acquiring property and placing itself in position to carry out its functions, itself to free the corporation and its property from all liability to the public, and abandon the performance of any of its duties, while owning its franchises and property, by the simple process of making a lease to third parties by a contract which would confer upon the corporation rights against its lessee which would prime any to be acquired by third parties for torts com-



mitted by the lessee through the faulty and negligent operation of the road. No such result could have been intended by the legislature. Rights transmissible or assignable quoad one of the parties to a contract are not necessarily so as to the other.

It is a general rule that when a person, whether natural or artificial, has come under obligations to a third person, he cannot <sup>433</sup> free himself from the same by contract by delegating to another the performance of these obligations, and changing debtors. The present action is not one by which a party holding contractual relations with a lessee seeks to extend the obligations of his contract beyond the person with whom he has contracted over to the lessor, but one *ex delicto* brought by a third party who, prior to the injuries received complained of, was a stranger to the lessee.

In the case of *McConnell v. Lemley*, 48 La. Ann. 1433, 55 Am. St. Rep. 319, 20 South. 887, cited by defendant, there was no corporation involved. The issue was whether a private individual, owning a building which he had leased, could be held responsible for damages caused by the acts of the lessee. The owner of the building is liable to the public under certain circumstances, and when so liable he is not released from liability by reason simply of the property being (at the time that damage complained of was received) under lease. In that case the court was of opinion that the damages received were not due to a violation of the lessor's primary obligation. Had they been, a different result would have been reached. A private individual's obligation to the public is much more restricted than is that of a public railroad corporation. *Goodwin v. Bodeaw Lumber Co.*, 109 La. 1050, 34 South. 74, presented questions different from those raised here. That company was not a public railroad corporation, but a lumber company owning a logging track road used only in connection with its own business. It did not lease, but sold outright, a part of its property which it did not care any longer to retain the ownership of. Some of the stockholders were inclined to convert the private railroad into a public one by the procuring of public railroad franchises: others were not inclined to do so. The result was that the road in question, being the private property of the corporation, was sold to certain of the stockholders as individuals, who thereupon organized as a public railroad corporation, and were operating it as such when the accident complained of occurred.

We are of the opinion that the judgment appealed from is erroneous, and for the reasons herein assigned it is hereby ordered, adjudged, and decreed that said judgment be, <sup>434</sup> and the same is, hereby annulled, avoided, and reversed, and that the cause be reinstated on the docket of the civil district court for the parish of Orleans, and this cause be remanded to that court for further proceedings according to law.

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*The Liability of a Lessor Railway corporation for the torts or negligence of the lessee is discussed in the monographic notes to Lee v. Southern R. R. Co., 58 Am. St. Rep. 147-156; Ohio etc. R. R. Co. v. Dunbar, 71 Am. Dec. 295-298; and the subsequent case of Harden v. North Carolina R. R. Co., 129 N. C. 354, 85 Am. St. Rep. 747, 40 S. E. 184.*

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## HEBERT v. LAKE CHARLES ICE, LIGHT AND WATER- WORKS COMPANY.

[111 La. 522, 35 South. 731.]

**ELECTRIC COMPANY—Fallen Wire—Burden of Proof.**—If a traveler on a public street, without contributory negligence, comes in contact with a fallen electric wire, the burden of proof is on the electric company to show that the wire was not there by its negligence. (p. 509.)

**ELECTRIC COMPANY—Degree of Care Exacted of.**—The care and caution required of electric companies is not simply the ordinary care of a reasonably prudent man, but it is bound to use the very highest degree of care practicable to avoid injury to everyone who may lawfully be in proximity to its wires, and likely to come, accidentally or otherwise, in contact with them. (p. 512.)

**ELECTRIC COMPANY—Uninsulated Wire.**—If, during a storm, a telephone wire, which was negligently strung, falls upon an electric light wire below at a point where the insulation has been worn off, and burns the latter wire in two because of its want of insulation, so that the severed ends fall to the street, the electric light company is liable for the death of a traveler who comes in contract therewith. (p. 514.)

**ELECTRIC COMPANY—Negligence.**—The Want of Means of an electric corporation cannot be advanced in extenuation of its failure to place and keep its wires in legal condition. (p. 514.)

**DEATH—Excessive Damages for Causing.**—The damages recovered by a widow for the death of her husband, who was twenty-one years of age, in good health, industrious, and sober, and who gained a livelihood partly by farming on a small tract of rented land and partly as a laborer in the field, his earnings not exceeding forty dollars per month, should be reduced to three thousand dollars for the widow individually and three thousand in her capacity as tutrix for her child. (p. 515.)

Pujo & Moss, for the appellant.

McCoy & Moss, for the appellee.

**523** NICHOLLS, C. J. The plaintiff, in her own behalf, as widow of Rosalie Hebert, and as tutrix of their minor child, seeks to obtain judgment against the defendant for twenty-six thousand and thirty-one dollars as damages to herself and to her said child arising from the death of her deceased husband, Rosalie Hebert, occasioned, it is charged, by the fault of the defendant corporation. She charges that her deceased husband, about eight o'clock on the evening of December 1, 1901, was standing near the southeast corner of the intersection of Ryan and Mills streets, two public thoroughfares in the city of Lake Charles, and that a slight wind and rain coming up suddenly caused him to seek shelter under the open shed just north of the building occupied by the Lake Charles Carriage and Implement Company, Limited, at the northwest corner of the intersection of said streets; that the darkness being very great while crossing Ryan street in a northwesterly direction, just as he reached the sidewalk on the west side of said street and in front of said building he came in contact with a wire hanging from an electric light pole and lying along the ground, charged with electricity in a careless and negligent manner, and was instantaneously killed thereby; that said wire was a part of the electric light system owned and operated by the defendant, the Lake Charles Ice, Light and Waterworks Company, and the wire which electrocuted her husband was carrying and charged with a current of electricity generated by said company; that it was at that time in a rotten and decayed condition, and was stripped of insulation to such an extent as to leave it practically bare; that said dangerous and defective condition existed throughout the said electric light system—all of which were facts well known to defendant corporation and its agents, servants, and employes at that time and long prior thereto; that said corporation had been, and was at that time, guilty of the grossest negligence, and was actively violating its charter and contract with the city of Lake Charles and the ordinances of said city, in that it had constructed and was then operating and maintaining its electric light plant in a careless, improper and dangerous manner; that said dangerous and defective condition of **524** said wires and system and the gross negligence of the defendant company as set forth were the direct, proximate and sole causes of the death of her husband, and he was not guilty of any act of contributory negligence. After so charging, plaintiff made allegations usual to such actions, and prayed for trial by jury and judgment.

Defendant answered, pleading, first, the general issue. It admitted that it was the owner of an electric light system in the city of Lake Charles which it maintained and operated, by means of which it supplied both public and private illumination. It averred that its wires were strung by virtue of the terms of its franchise with the city of Lake Charles, granted in 1891, and its poles located at the direction and under the supervision of the city engineer. That long after the stringing of its wires at the place designated in plaintiff's petition the Cumberland Telephone and Telegraph Company, in extending its telephone system in the said city, strung its wires at said point above and over those of defendant. That on the night in question, at the place mentioned in plaintiff's petition, one of the wires was burned in two by coming in contact with a wire of said telephone and telegraph company, which caused the severed ends to fall to the ground. Defendant specially denied that the deceased, Rosalie Hebert, came to his death by electrocution therefrom. That on the night it was alleged Hebert came to his death there was a severe tornado or cyclonic disturbance in the city of Lake Charles, which resulted in the loosening and unfastening of a great portion of the wires of the telephone and telegraph company's system, one of them falling upon and coming in contact with the smaller wire of defendant, thereby cutting it in two; and, if anyone was responsible for the alleged death of said Hebert, it was the Cumberland Telegraph and Telephone Company, and not respondent.

Defendant specially denied that its electric system was in the condition mentioned, but, on the contrary, it averred that its wires were new, properly insulated, and in good condition. It averred that the claim of the plaintiff was inflated and unfounded in law, even <sup>525</sup> should defendant be responsible, as she sought to recover judgment based upon the earning capacity of the deceased on a life expectancy of forty years, making no allowance for the loss of a day, or for costs of subsistence, illness, or any of the ordinary, usual, and fixed charges of a life, and to that extent plaintiff was endeavoring to enrich herself at the expense of the defendant company; that plaintiff's claim was extortionate and extravagant, inasmuch as defendant's plant had been recently valued at thirty thousand dollars by an expert. That defendant's company officers bore no malice against the deceased, and were not even acquainted with him, and his death, if chargeable to defendant, could not be made the basis for exemplary or punitive damages, which.



though not declared upon in plaintiff's petition, apparently constituted the item of damages asked. That the night when Hebert came to his death was stormy, dangerous, and tempestuous, and, if he was electrocuted in the manner and form charged—which was specially denied—his death was due to his own contributory negligence in being out in the streets and moving from place to place under dangerous conditions, which contributory negligence defendant pleaded in bar of the action. The jury returned a verdict in favor of the plaintiff individually for the sum of four thousand dollars and in her capacity as tutrix for four thousand dollars. The court rendered judgment in conformity to the verdict. After an unsuccessful application for a new trial, defendant appealed.

There can be, in view of the evidence adduced, no contention as to the fact that the deceased, Rosalie Hebert, came to his death by coming in contact with one of the copper wires attached to defendant's electric plant in the town of Lake Charles, which at the time of his doing so was lying in one of the streets of the town, and charged with electricity generated at defendant's power-house, which was sufficient in strength to kill, and which in fact did kill, him. Such a wire of an electric company, detached from the poles and lying on the streets of a town, is, <sup>526</sup> of course, out of its proper place, and those having control of it and charged with the legal duty of taking due care of it were bound to account for its being found in that condition and situation: See *Maus v. Broderick*, 51 La. Ann. 1153, 25 South. 977.

The defendant company was not only charged by general law with the duty of seeing that its wires were so placed and so kept as to injure no one, but they were accorded by the town authorities the privilege or right of stringing its wires on its streets upon the express condition that it should use the utmost precautions in this respect. An examination of the issue in this case must commence with the recognition of an absolute duty on the part of the corporation of protection to the public from things belonging to it or in its custody by due care. The obligation we here refer to is especially emphasized in the case of the owners of buildings and in a more general manner referred to in articles 666, 667 and 670 of the Civil Code, and in the legal maxim, "*Sic utere.*"

Plaintiff's counsel contends that, where an individual or a corporation owns and operates an electrical light plant generating a high current of electricity, conveying it by means of

overhead wires along the streets of a town or city, and it is shown that a traveler upon one of the streets came in contact with one of the wires lying upon the sidewalk and was killed thereby, he being without contributory negligence, the burden of proof is upon it to show that the wire was without negligence on its part (*res ipsa loquitur*); and in support of that proposition they refer the court to *Boyd v. Portland Electric Co.*, 44 Or. 126, 66 Pac. 576; 2 *Jaggard on Torts*, 864; *Joyce on Electric Law*, sec. 606; *Keasbey on Electric Wires*, 2d ed., sec. 271; *Western Union Telegraph Co. v. State*, 82 Md. 293, 51 Am. St. Rep. 464, 33 Atl. 763; *Haynes v. Raleigh Gas Co.*, 114 N. C. 203, 41 Am. St. Rep. 786, 19 S. E. 344; *Denver Consol. Electric Co. v. Simpson*, 21 Colo. 371, 41 Pac. 499; *Moran v. Corliss Steam Engine Co.*, 21 R. I. 386, 43 Atl. 874; *Snyder v. Wheeling etc. Co.*, 64 Am. St. Rep. 922, 28 S. E. 733, 43 W. Va. 661, 21 Am. & Eng. Ency. of Law, new ed., 512, 513 and notes; *Bigelow on Torts*, 596; *Wharton on Negligence*, 527 sec. 241; *Cooley on Torts*, 799; *Shearman & Redfield on Negligence*, 5th ed., sec. 60; *Clairain v. Western Union Tel. Co.*, 40 La. Ann. 182, 3 South. 625.

We are of the opinion that this proposition is conservative and correct. The owners of electrical machinery are in a much better position to know and be informed as to its situation, when such a condition of things takes place, than would be an entire stranger to its affairs, who, being lawfully upon the street, should have been injured by its wires.

Defendant insists that it has in this case shown everything in defense which it could be called upon to show. It claims that, if there be legal liability to plaintiff by anyone, it is by the Cumberland Telephone Company; that the latter company, when it erected its own poles and strung its wires, found defendant already in position under legal authority, and upon it was imposed the duty of doing everything that should be necessary for the protection of life and property; that it should have strung its wires below that of the defendant, or, if it strung it above them, it should have availed itself of every instrumentality in its power and under its control to guard against the cause of the injury in this case, which is ascribed to the falling of one of the wires of the telephone company upon one of its own and burning it so as to make it fall.

For the purposes of this case it may be conceded that defendant correctly states the duty of the Cumberland Telephone Company under the circumstances, but it would by no means follow

as a legal consequence that the existence of that duty relieved the defendant company from its own duty in the premises. It should have taken steps itself to relieve the situation from danger, and not have remained inactive simply because some other company had come to have legal obligations to the public imposed upon it. If, after the defendant company placed its poles and strung its wires, new facts or conditions arose, making, in view of them, its first existing status dangerous to the public, it was a mistake on its part to suppose that the changed situation would carry with it no new or increased obligations on its part to the public by way of remedy.

If the situation was such as would have enabled it (defendant) to have forced the <sup>528</sup> Cumberland Telephone Company to perform the duty imposed upon it, it should have made use of its power in that direction, or, failing that, it should have applied some proper remedy itself.

The expert witnesses testify that there was an easy remedy at hand for preventing the wires of the two companies coming in contact with each other at the points of crossing; one of which was to erect an extra pole, known as a "span pole," at the point of intersection, and attaching the wire or wires to it by placing upon either one of the wires a piece of insulating material known as "waterproof wood." Granting that this was exacting on its part more than ought to be called for, the defendant should certainly have placed its own lines in perfect order at the crossing point.

If, as appears from evidence adduced by its own witnesses, the lines of the defendant company below this point had the insulation upon it worn off or taken from it by the dragging by the telephone company of its wires over them in the process of its construction or repairs, the injured lines should have been at once repaired, and not allowed to have remained in that dangerous condition. The wires should have been insulated independently of the case of the defect or the quarter from which it arose. The fact that there were other lines above their own had the effect of increasing their obligations, not of lessening them. One of defendant's witnesses (who did not pretend to be an expert, however) testified that the object of insulation was to prevent the escape of electricity, and that it afforded no protection to life. This is in direct opposition to expert testimony in the record, and to *Potts v. Shreveport Belt R. R. Co.*, 110 La. 1, 98 Am. St. Rep. 452, 34 South. 103, where it was stated by this court that the principal object of its use was for

that very purpose. If, as the defendant urges, there was danger to its own lines from the presence of the telephone company's lines above and the danger of their falling, it was gross carelessness on its part to have allowed its wires to have remained just below without insulation as long as it did.

If the telephone company had a duty to perform, the defendant had one also to perform, and both failed to perform it, and as a consequence of such failure a life was lost. <sup>529</sup> Both corporations were bound in solido, and the fault of one is no excuse for the fault of the other. Defendant seeks to avoid the consequence of its fault by urging that the immediate, direct, and proximate cause of Hebert's death was a most unusually violent storm, which it had no reason to anticipate, which threw down a wire of the telephone company.

Defendant's counsel quote from Keasbey on Electric Wires, second edition, section 236, to the following effect: "When the proximate cause of the injury is an external force for which the company is not responsible, the question of liability will depend on whether the force was one that might have been reasonably anticipated, whether there was not negligence in not having the materials strong enough or sound enough to resist it, and whether the injury was the natural and probable consequence of negligence. An electric light company that has erected its poles and wires in the streets of a municipality with the consent of the proper authorities, is not an absolute insurer against accident therefrom. It is only bound to exercise care and diligence in the erection and maintenance of the system proportionate to the danger, and when it has fulfilled this obligation it has discharged its entire duty, and its liability ceases."

In support of this position they cite Crosswell on Electricity, sec. 236; *Denver Consol. Electric Co. v. Simpson*, 21 Colo. 371, 41 Pac. 499; *Boyd v. Portland Gen. Electric Co.*, 37 Or. 567, 62 Pac. 378. They quote the supreme court of South Carolina as saying in the *Mitchell v. Charleston Light etc. Co. Case*, 45 S. C. 146, 22 S. E. 767, that "a company is charged with so placing its wires as to withstand the ordinary weather—rain, heat, and cold. It is alleged on the part of the company that the wires were broken in consequence of a severe storm. Was it an ordinarily windy day, such as is liable to occur at that time of the year, or was it one that could not be anticipated? The law does not require impossibilities. If a cyclone that could not be anticipated or reasonably be foreseen was the cause of



that wire falling, and the company was not negligent in allowing it to remain there for an unreasonable time, then <sup>530</sup> under those circumstances it would not be liable."

In the case at bar the defendant was in default as to the condition of its wires at the point where the accident took place not only as respects extraordinary storms, but as to events likely to happen at any moment from the simplest causes. It was failing, and had for a long time before failed, to have placed matters in such a condition as was required of it affirmatively to do for the public safety, not only by the general law, but as the condition upon which it had been granted the right or privilege of stringing its wires in the public streets. Had its wires been in fact in such a condition as they were required to be at the time of an extraordinary storm, a different case would have been presented to us. The defendant was not required to take extraordinary precautions to meet possible extraordinary future events, but it was expected, if an extraordinary storm should arise that its wires would protect the public as far as possible, at least against the effect of the storm. The care and true caution required at the hands of the defendant were not simply the ordinary care of a reasonably prudent man. In the case of *Fitzgerald v. Edison Electric Illuminating Co.*, 200 Pa. St. 540, 86 Am. St. Rep. 732, 50 Atl. 161, the supreme court of Pennsylvania laid down as the rule applicable to a company like the defendant making use of such a dangerous agency that it was bound to know not only the extent of the danger, but to use the very highest degree of care practicable to avoid injury to everyone who may be lawfully in proximity to its wires, and liable to come accidentally or otherwise in contact with them. The defendant (the court said), in accord with the common practice of electric companies, recognizes this obligation by insulating its wires; but the duty was not only to make the wires safe by proper insulation, but to keep them so by constant oversight and repairs. The same view was taken in *Mitchell v. Raleigh Elec. Co.*, 129 N. C. 166, 85 Am. St. Rep. 735, 39 S. E. 801, where it was said: "The association [of such a company] was with (apparently) the most inoffensive and harmless piece of mechanism (if wire can be classified as such) in common use. In adhering to the wire, electricity gives no warning or knowledge of its deadly presence. <sup>531</sup> Vision cannot detect it. It is without color, motion, or body. Latent, and without sound, it exists, and, being odorless, the only means of its discovery lies in the sense of feeling

communicated through the touch, which, as soon as done, becomes its victim. In behalf of human life and the safety of mankind generally, it behooves those who would profit by the use of this subtle and violent element of nature to exercise the greatest degree of care and constant vigilance in inspecting and maintaining the wires in perfect condition." To the same effect are the expressions of this court in *Potts v. Shreveport Belt Ry. Co.*, 110 La. 1, 98 Am. St. Rep. 452, 34 South. 103, and also *Joyce on Electricity Law*, sec. 445.

Plaintiff maintains that, if damages is caused by the defendant's negligence and some other cause for which he is not responsible, including "the act of God," or superior human force directly intervening, the defendant is nevertheless responsible if his negligence is one of the proximate causes of the damage. Also, where the negligence of a defendant contributes so directly to the plaintiff's damage that it is reasonably certain that the other cause alone would not have been sufficient to produce it, the defendant is liable, notwithstanding he may not have anticipated or been bound to anticipate the interference of the superior force, which, concurring with his own negligence, produced the damage; that negligence of a defendant resulting in damage to the plaintiff having been shown to exist prior to the existence of a storm, the burden is upon it to show that the damage would have occurred even had there been no negligence on its part; that, to escape liability under a plea of *vis major*, the defendant must show that it is free from contributory fault. In support of this position the court is referred to *Shearman & Redfield on Negligence*, 5th ed., sec. 39, and cases there cited; *Woodward v. Aborn*, 35 Me. 271, 58 Am. Dec. 699; *Baltimore etc. R. Co. v. Sulphur Spring*, 96 Pa. St. 65, 42 Am. Rep. 529; *Delisle v. Bourriague*, 105 La. 77, 29 South. 731.

Granting, in the case at bar, that the storm which occurred on December 1, 1902, at Lake Charles, was of such unusual severity as to have caused most unexpectedly the falling of one of the wires of the telephone <sup>532</sup> company, what would have been the effect of the storm, and the result of such falling, under existing circumstances, had defendant's wires been insulated? The testimony adduced goes to show that the telephone wire would have laid in contact with defendant's wire perfectly harmless, and the plaintiff's intestate would have been alive to-day, but that the telephone wire falling upon de-

ant's uninsulated wire burned it almost immediately in two, and instantly killed plaintiff's husband.

We cannot give, under the existing conditions, to the storm referred to the defensive force which defendant attaches to it. We think that notwithstanding the storm, and notwithstanding the falling of the telephone wire, Hebert would not have been killed had not at the moment of his death the telephone wire come in contact with a live wire of the defendant company which had been negligently left by it for some time before without proper insulation, and therefore the defendant company must bear the consequence of not only its negligence, but of its fault. The case was tried by a jury of the vicinage. Their verdict was sustained by the district judge. The jury, the judge, and the attorneys all viewed the place at which the accident occurred, and were in position to apply the evidence to the situation much better than this court could. We would not be justified in setting the verdict aside unless we were satisfied it was clearly wrong; and that we are not.

Defendant urges upon us that the amount of the verdict is too large, and it presents to us for our consideration the fact that the corporation has paid no dividend, and is heavily in debt. The extent of its indebtedness is not disclosed, but the value of its property is shown to exceed one hundred and twenty-five thousand dollars.

The plaintiffs are entitled to be paid from that property, to the extent that they have a legal claim, as fully as any other creditor, and they should not be postponed on account of others. So far as the want of means may have been advanced in extenuation of the failure of the defendant to have placed and kept its wires in legal condition, the position is not well founded. A corporation undertaking to carry on a business as dangerous as that in which the defendant is engaged must be prepared to meet the legal requirements <sup>533</sup> of the situation from the beginning. It cannot be permitted to work its way forward to a safe condition, and in the meantime subject the public to danger to life and limb. The state does not guarantee the stockholders of a corporation that their investment shall be a paying one, nor does it protect a corporation from being forced either by direct authority of the state or indirectly through the execution of judgments of courts to place the property in the condition which safety and the rights of the public demand, even though the effect of so doing will be to cause loss to the parties in interest.

It is entitled to exact justice, with discrimination neither for nor against it.

The deceased was about twenty-one years of age. He had been married about eighteen months. He left a widow, who, so far as the record shows, is without means of support. She has one child, issue of the marriage, born after father's death. The deceased was a man of small means, gaining his livelihood partly by farming upon a small tract of rented land, partly as a laborer in the field. His earnings are shown not to have exceeded forty dollars per month. He was a man in good health, sober and industrious. His expectancy of life under the mortality tables was forty years. In addition to want of actual support for the future for herself and child, she has lost the companionship and affection of her husband. The elements which go to fix the quantum of damages in such a case are difficult of ascertainment, but it is none the less the duty of the court to fix the amount as best it may in the exercise of sound discretion. The mortality tables are simply an assistance to the court by way of estimate or approximation. They have no absolute probative force. They may properly be referred to by insurance companies in making their contracts, but judgments of court cannot be based absolutely upon them. The earning power of the deceased would have had to be exercised throughout a long number of years, and under numberless contingencies. We think, in consideration of all the facts of this case, that the verdict of the jury was for too large an amount. It should be reduced to the sum of three thousand dollars in favor of the plaintiff individually and three thousand dollars in her capacity as tutrix.

For the reasons herein assigned the amount <sup>534</sup> of damages awarded by the jury is hereby reduced to six thousand dollars. The judgment of the court rendered on the verdict is correspondingly reduced to six thousand dollars as above stated. As so reduced and amended, the judgment appealed from is affirmed, at the costs of the plaintiffs and appellees.

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## DUTIES AND LIABILITIES OF ELECTRIC CORPORATIONS.

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- XIII. Duty and Liability to Trespassers and Licensees.

I. Degree of Care and Skill Exacted of Electric Companies.

a. The General Rule.—The terms “due care” and “ordinary diligence,” as used in the law of negligence, are relative terms, and mean a degree of care commensurate with the danger involved. In the control and management of an exceedingly dangerous agency, such as electricity, the law exacts a corresponding degree of skill and diligence: *Neal v. Wilmington etc. Ry. Co.*, 3 Penne. (Del.) 467, 53 Atl. 338; *Economy Light etc. Co. v. Stephen*, 87 Ill. App. 220, affirmed in 187 Ill. 137, 58 N. E. 359; *Economy Light etc. Co. v. Hiller*, 203 Ill. 518, 68 N. E. 72; *Harroun v. Brush Elec. etc. Co.*, 42 N. Y. Supp. 716, 12 App. Div. 126; *Ahern v. Oregon Tel. Co.*, 24 Or. 276, 33 Pac. 403, 35 Pac. 549. And care in this respect means more than mere mechanical skill; it includes circumspection and foresight with regard to reasonably probable contingencies: *Anderson v. Jersey City Elec. etc. Co.*, 63 N. J. L. 387, 43 Atl. 654. The duty of an electric company in respect to its wires will, of course, vary according to their location, the strength of the current passing through them, and the like; but when the wires are carrying a highly dangerous current, the law imposes upon the company the utmost degree of care in their constructions, inspection, and repair, so as to keep them harmless at places where persons are likely to come in contact with them. Or-

dinary care is not enough. The law exacts the very highest degree of care practicable to avoid injury to everyone who may lawfully be in proximity to the wires, and likely to come, accidentally or otherwise, in contact therewith. This is the doctrine of the principal case (*ante*, p. 505), and also of *Giraudi v. Electric Imp. Co.*, 107 Cal. 120, 48 Am. St. Rep. 114, 40 Pac. 108; *Denver Tramway Co. v. Reid*, 4 Colo. App. 53, 35 Pac. 269; *Denver etc. Elec. Co. v. Simpson*, 21 Colo. 371, 41 Pac. 499; *Macon v. Paducah St. Ry. Co.*, 23 Ky. Law Rep. 46, 62 S. W. 496; *Perham v. Portland Elec. Co.*, 33 Or. 451, 72 Am. St. Rep. 730, 53 Pac. 14, 24; *Crowe v. Nanticoke Light Co.*, 206 Pa. St. 374, 55 Atl. 1038.

“Wires charged with an electric current may be harmless, or they may be in the highest degree dangerous. The difference in this respect is not apparent to ordinary observation, and the public, therefore, while presumed to know that danger may be present, are not bound to know its degree in any particular case. The company, however, which uses such a dangerous agent is bound not only to know the extent of the danger, but to use the very highest degree of care practicable to avoid injury to everyone who may be lawfully in proximity to its wires and liable to come, accidentally or otherwise, in contact with them. . . . The duty is not only to make the wire safe by proper insulation, but to keep it so by constant oversight and repair”: *Fitzgerald v. Edison Elec. etc. Co.*, 200 Pa. St. 540, 86 Am. St. Rep. 732, 50 Atl. 161.

In a recent Tennessee case (*Memphis St. Ry. Co. v. Kartright*, 110 Tenn. 277, *post*, p. 807, 75 S. W. 719), the court charged the jury that a street-car company was obligated to use the best material, the most approved methods of construction, and the highest degree of care and skill in maintaining and keeping the same in repair, considering the dangerous nature of the appliances, and the peril to life and limb involved in their use. It was insisted that this was requiring too great a degree of care, and the court was requested to charge that the company was required to exercise only a high degree of care in those respects, and not the highest. “But,” said the supreme court, “we are of the opinion that in view of the danger attendant upon the breaking and falling of overhead electric wires in the streets, and the results to be apprehended to persons in the streets, the company should be held to the highest or utmost degree of care in the construction, maintenance and operation of its lines; and the court was not in error in so charging.” Compare *Herzog v. Municipal Elec. etc. Co.*, 85 N. Y. Supp. 712, 89 App. Div. 569.

However, an electric company is not absolutely liable for injuries done by its lines; it is not an insurer against accidents therefrom. But it is bound to exercise only such care and skill as is commensurate with the danger. The degree of such care and skill, as has already been seen, is very great, and varies with the danger which is incurred by a want of diligence. The question of negligence is

for the jury to decide from the facts of each particular case, save where reasonable minds can hardly differ in their conclusions upon the facts; and in determining the question, it is proper for the jury to take into consideration the location of the lines, whether in thickly or sparsely settled communities, the use to which they are to be put, the harmless or dangerous character of the current to be transmitted, their remoteness or proximity to travelers on the highway, and any other circumstances affecting the case: *Knowlton v. Des Moines etc. Light Co.*, 117 Iowa, 451, 90 N. W. 818; *Boyd v. Portland Elec. Co.*, 37 Or. 567, 62 Pac. 378; *Citizens' Ry. Co. v. Gifford*, 19 Tex. Civ. App. 631, 47 S. W. 1041.

An electric company in erecting and maintaining its wires, is bound only to anticipate such combinations of circumstances and accidents and injuries therefrom as it may reasonably forecast as likely to happen, taking into account its own experience and practice of others in similar situations, together with what is inherently probable in the condition of the wires as they relate to the conduct of its business: *Snyder v. Wheeling Elec. Co.*, 43 W. Va. 661, 64 Am. St. Rep. 922, 21 S. E. 733.

**b. As to Persons in Public Streets.**—It has already been noted that the degree of care and diligence which the law imposes upon electric companies varies with the location of its wires in respect to the likelihood of their coming in contact with persons and animals. If wires charged with powerful currents of electricity are placed in public streets and highway, or suspended above them, the danger is great, and the care exercised must be proportionate thereto. In the use of electricity in such public places, reasonable care is great care. Electric companies permitted to use public streets for their own purposes are required to exercise the utmost degree of care in the construction, inspection, and repair of their wires and poles, to the end that travelers along the highway may not be injured by their appliances: *City Elec. St. Ry. Co. v. Conery*, 61 Ark. 381, 54 Am. St. Rep. 262, 33 S. W. 426; *Gannon v. Laeledge Gaslight Co.*, 145 Mo. 502, 46 S. W. 968, 47 S. W. 907; *New York etc. Tel. Co. v. Bennett*, 62 N. J. L. 742, 42 Atl. 759; *Caglione v. Mt. Morris Elec. etc. Co.*, 67 N. Y. Supp. 660, 56 App. Div. 191; *Haynes v. Raleigh Gas Co.*, 114 N. C. 203, 41 Am. St. Rep. 786, 19 S. E. 344; *Memphis St. Ry. Co. v. Kartright*, 110 Tex. 277, 75 S. W. 719.

**c. As to Patrons and Customers.**

**1. In General.**—Thus far the duty and liability of electric companies have been considered in relation to the public generally; and, as has been seen, they are held to a very high degree of care and responsibility to all people without regard to contractual relations. When they undertake, for hire, to deliver so dangerous an agency as electricity into the houses of people for every-day use, great care and caution should be observed—such a degree thereof as is commensurate with the danger—which danger is enhanced by the lack

of knowledge, by the consumer, of the safety of the means and appliances employed to effect the delivery: *Alton Illuminating Co. v. Foulds*, 190 Ill. 367, 60 N. E. 537. In *Denver Consol. Elec. Co. v. Lawrence*, 31 Colo. 301, 73 Pac. 39, an electric light company was held liable to one of its patrons who received a shock of electricity while turning on a light. The court said: "The company insists that it is not an insurer, and that its obligation is that of using ordinary care. We are not prepared to say that it is an insurer, but the patrons of the company have the right to presume that they will not be injured in attempting to use that which the company sells, and that it will do all that human care, vigilance, and foresight can reasonably do, consistent with the practical operation of its plant, to protect those who use its electric light. With reference to the liability of persons or corporations supplying electricity, Thompson, in his *Commentaries on the Law of Negligence*, at section 796, has this to say: 'It may be doubted whether persons or corporations employing, for their own private advantage, so dangerous an agency as electricity, ought not to be regarded as quasi insurers, as toward third persons, against any injurious consequences which may flow from it. It may be doubted whether one who collects, or rather creates, so dangerous an agency on his own land, ought not to be held to the obligation of restraining it, that is, of insulating it, at his peril; which was the obligation put upon land owners in respect of water, which from its nature is pressing outward in all directions and continually struggling to break through any artificial barriers by which it may be restrained.' "

2. **Stipulations Against Liability.**—Electric companies in common with other corporations, have attempted to evade their duty by stipulating in their contracts with customers against liability for negligence. Public policy, however, forbids this. Thus, in *Denver Consol. Elec. Co. v. Lawrence*, 31 Colo. 301, 73 Pac. 39, it is decided that a company furnishing electricity for lighting purposes cannot escape responsibility for negligence by stipulating in its contracts with customers for exemption from all liability for damages resulting from the use of the light.

## II. Insulation of Wires.

a. **General Duty and Liability as to.**—Corporations which maintain wires carrying dangerous currents of electricity must exercise the care and prudence necessary to prevent injury at those places where people have the right to go, either for work, pleasure, or business. It is their duty to use the highest and utmost care, consistent with the practicable operation of their plants, properly and safely to insulate or guard their wires at such places, and by constant oversight, inspection, and repair to keep them in such condition; and if they fail to discharge this duty, they are answerable for the consequences. It is their duty to furnish perfect protection at such



points as people are likely to come in contact with the wires. The exercise of ordinary care is not enough to relieve them from responsibility: *McLaughlin v. Louisville Elec. etc. Co.*, 100 Ky. 173, 37 S. W. 851; *O'Donnell v. Louisville Elec. etc. Co.*, 21 Ky. Law Rep. 1362, 55 S. W. 202; *Overall v. Louisville Elec. etc. Co.*, 20 Ky. Law Rep. 759, 47 S. W. 442; *Lewis v. Louisville Elec. etc. Co.*, 21 Ky. Law Rep. 34, 50 S. W. 992; *Schweitzer v. Citizens' etc. Elec. Co.*, 21 Ky. Law Rep. 608, 52 S. W. 830; *Baries v. Louisville Elec. etc. Co.*, 25 Ky. Law Rep. 2303, 80 S. W. 814; *Potts v. Shreveport Belt Ry. Co.*, 110 La. 1, 98 Am. St. Rep. 452, 34 South. 103; *Geismann v. Missouri-Edison Elec. Co.*, 173 Mo. 654, 73 S. W. 654; *Fitzgerald v. Edison Elec. etc. Co.*, 200 Pa. St. 540, 86 Am. St. Rep. 732, 50 Atl. 161; *Thomas v. Wheeling Elec. Co. (W. Va.)*, 46 S. E. 217. See, too, *Griffin v. United Elec. etc. Co.*, 164 Mass. 492, 49 Am. St. Rep. 477, 41 N. E. 675; *Schultz v. Faribault etc. Elec. Co.*, 82 Minn. 100, 84 N. W. 631; *Ennis v. Gray*, 34 N. Y. Supp. 379, 87 Hun, 355. And a person has a right, under ordinary circumstances, to assume, without being open to the charge of contributory negligence, that this duty has been discharged, if he does not know otherwise: *Mitchell v. Raleigh Elec. Co.*, 129 N. C. 166, 85 Am. St. Rep. 735, 39 S. E. 801; *Perham v. Portland Elec. Co.*, 33 Or. 451, 72 Am. St. Rep. 730, 53 Pac. 14, 24; *Fitzgerald v. Edison Elec. etc. Co.*, 200 Pa. St. 540, 86 Am. St. Rep. 732, 50 Atl. 161; *Thomas v. Wheeling Elec. Co. (W. Va.)*, 46 S. E. 217. But this right to assume that wires are properly insulated does not relieve a lineman from the obligation of exercising active diligence for his own safety: *Jackson etc. St. R. R. v. Simmons*, 107 Tenn. 372, 64 S. W. 705. And this duty as to perfect insulation does not extend to places where no one can reasonably be expected to go: *Calumet Elec. St. Ry. Co. v. Grosse*, 70 Ill. App. 381; *Hector v. Boston Elec. etc. Co.*, 174 Mass. 212, 75 Am. St. Rep. 300, 54 N. E. 539.

**b. At Particular Points and Places.**—Accordingly, the case of uninsulated wires in a cellar out of reach until some one climbs up on a box and gets his hand involved in them, is not comparable to that of leaving uninsulated wires dangling or lying in the street, and the owner is not ordinarily responsible for the resulting injuries: *McMullen v. Edison Elec. etc. Co.*, 34 N. Y. Supp. 248, 13 Misc. Rep. 392. And it is not evidence of negligence, so it is held in *Brush Elec. etc. Co. v. Lefebvre*, 93 Tex. 604, 77 Am. St. Rep. 898, 57 S. W. 640, to suspend uninsulated wires over an awning, which serves merely as a shade and protection for the front of the building and is not used as a place of resort either for pleasure or for business. It is otherwise, however, if the awning is a place where men are likely to go to work and make repairs: *Rucker v. Sherman Oil etc. Co.*, 29 Tex. Civ. App. 418, 68 S. W. 818. See, too, *Caglione v. Mount Morris Elec. etc. Co.*, 67 N. Y. Supp. 660, 56 App. Div. Rep. 191, where in removing an arc lamp from in front of a store an electric

company left the wires in such shape that in their motion against the store awning they wore off their insulation, so that the electricity escaped to the framework and iron front of the building. This condition existed for months, until the electricity ignited the awning, and a person attempting to extinguish the fire was killed by coming in contact with the store front. It was held that the jury was justified in finding the company negligent.

One who goes upon a roof over which electric wires are stretched cannot be regarded as going into the presence of known danger and assuming the hazards thereof, and as forfeiting his right to recover for injuries suffered from the negligence of the corporation maintaining such wires in not keeping them properly insulated: *Clements v. Louisiana Elec. Light Co.*, 44 La. Ann. 692, 32 Am. St. Rep. 348, 11 South. 51. See, also, *Giraudi v. Electric Imp. Co.*, 107 Cal. 120, 48 Am. St. Rep. 114, 40 Pac. 108; *Steindorff v. St. Paul Gaslight Co.* (Minn.), 100 N. W. 221. Where a painter, who goes upon a roof to work, props up with a board a defectively insulated wire which is in his way, and the board slips while he is under the wire and he is killed, the question of the negligence of the electric company and of the contributory negligence of the painter is for the jury: *Fitzgerald v. Edison Elec. etc. Co.*, 207 Pa. St. 118, 56 Atl. 350.

A company transmitting a current of electricity through wires to a converter on the side of a dwelling-house near a balcony on the roof of a part of the first story thereof, having a gutter and leaders therefrom to the ground, owes a duty to one using the balcony to take care to prevent the escape of the current in case of contact with the wires. The duty required in such a case includes making provision as to the probability and possibility of persons using the balcony coming in contact with the wires: *Brooks v. Consolidated Gas Co.* (N. J. L.), 57 Atl. 396. See, too, *Consolidated Gas Co. v. Brooks* (N. J. L.), 53 Atl. 296.

If an electric company runs a wire into a store, but leaves it defectively insulated at points less than one foot from the front of the building, and a boy is injured by coming in contact therewith while cleaning the roof over a projecting window, there is strong prima facie evidence of negligence on the part of the company which should be submitted to the jury: *Brown v. Edison Elec. etc. Co.*, 90 Md. 400, 78 Am. St. Rep. 442, 45 Atl. 182. And the fact that one is injured by a naked wire strung on the side of a house just below a window and within easy reach of a person sitting at the window, raises a presumption of negligence against the company: *Walters v. Denver Consol. Elec. etc. Co.* (Colo. App.), 68 Pac. 117. See the same case in 12 Colo. App. 145, 54 Pac. 960.

An electric company placing a live wire in such close proximity to a stairway as to menace the safety of one who inadvertently throws his arm over the rail of the stairway, is chargeable with active, and not merely passive, negligence. Such a condition con-

stitutes a nuisance: *Wittleder v. Citizens' Elec. etc. Co.*, 64 N. Y. Supp. 114, 50 App. Div. 478.

Negligence in placing wires for lighting in a jail, in consequence of which the building is burned and a prisoner therein killed, may render the electric corporation answerable in damages for his death: *Miller v. Ouray Elec. etc. Co.* (Colo. App.), 70 Pac. 447.

In using a highway bridge for its own purposes an electric company must exercise a very high degree of care; and in determining what precautions are necessary, it must consider all the uses to which the bridge is customarily put. If boys are accustomed to use it for a bathing place and diving stage, with the knowledge and without the objection of the municipal authorities, the wires must be strung over or across it with reasonable regard for their safety: *Nelson v. Branford Light. etc. Co.*, 75 Conn. 548, 54 Atl. 303. A *prima facie* case of negligence is made out against an electric company where it appears that, knowing that a railroad bridge over which it has placed its wires must, from time to time, require repairs, and that, owing to the high voltage of electricity carried, the wires could not be so insulated as to render them safe to persons coming in contact with them, it nevertheless so placed them that persons could not make such repairs without coming in deadly contact therewith: *Perham v. Portland Elec. Co.*, 33 Or. 451, 72 Am. St. Rep. 730, 53 Pac. 14, 24.

**c. Against Atmospheric Electricity—Lightning.**—It has been said that an electric company in placing its wires in a building is not required to so insulate them as to protect against lightning strokes, or electricity having its origin in the clouds or atmosphere: *Phoenix Light etc. Co. v. Bennett* (Ariz.), 74 Pac. 48. Yet, if there are reasonable grounds to apprehend that lightning may be conducted over telephone wires to and into a house in which the company has placed its instruments, and there do injury, and there are known and approved devices for preventing such consequences, it is the duty of the company to make use of such devices and thereby guard against accidents from lightning: *Griffith v. New England Tel. etc. Co.*, 72 Vt. 441, 48 Atl. 643. And where a telephone company, in removing a telephone from a store, instead of removing the wires, merely cuts them from the instrument and twists their ends together, and leaves them hanging in the building so that atmospheric electricity striking the wires along their course on the outside is conducted into the building and discharged to the peril of people and property therein, the company is liable for the damages caused. And its liability is not confined to the owner of the store, but extends to his customers: *Southern Bell Tel. etc. Co. v. McTyler*, 137 Ala. 601, 97 Am. St. Rep. 62, 34 South. 1020. Where a telephone company permits a wire to remain for several weeks across a highway, suspended a few feet from the ground, it is answerable to a traveler coming in contact with it during an electrical storm, and injured by a discharge

of electricity attracted from the atmosphere: *Southwestern Tel. etc. Co. v. Robinson*, 50 Fed. 810.

**d. Ordinance Requiring Insulation.**—Where there is an ordinance requiring electric wires to be insulated, workmen whose duty takes them in proximity to them have a right to assume that the law has been complied with: *Knowlton v. Des Moines etc. Light Co.*, 117 Iowa, 451, 90 N. W. 818; *Mitchell v. Raleigh Elec. Co.*, 129 N. C. 166, 85 Am. St. Rep. 735, 39 S. E. 801. The failure of an electric company to keep its wires insulated, as required by municipal ordinance, is *prima facie* evidence of negligence: *Mitchell v. Raleigh Elec. Co.*, 129 N. C. 166, 85 Am. St. Rep. 735, 39 S. E. 801. The right to recover for an injury received from an improperly insulated wire maintained in violation of a city ordinance is not precluded by the fact that the original position of the wire may have been changed by some extrinsic cause: *Wales v. Pacific Elec. etc. Co.*, 130 Cal. 521, 62 Pac. 932, 1120. An electric corporation does not relieve itself from the imputation of negligence, where an ordinance prescribes a certain kind of insulation to be used, by using another but less efficient insulation: *Knowlton v. Des Moines etc. Light Co.*, 117 Iowa, 451, 90 N. W. 818.

### III. Notice and Repair of Defective Wires.

**a. Notice of Defects.**—If an electric corporation is conducting its business with due care and diligence, it is not liable for the dangerous condition of a wire, as where it is defectively insulated, of which it has no notice: *Smith v. East End Elec. Light Co.*, 193 Pa. St. 19, 47 Atl. 1123. But an electric company must use due diligence to receive information of the condition of its wires, and a failure to do so constitutes negligence: *Mitchell v. Charleston Light etc. Co.*, 45 S. C. 146, 22 S. E. 767. Notice of a defect, in order to charge a company with liability therefor, need not be direct and express; it is enough that the defect has existed for such a length of time that it should have been known: *Fitzgerald v. Edison Elec. etc. Co.*, 200 Pa. St. 540, 86 Am. St. Rep. 732, 50 Atl. 161. Where there has been an abrasion in an insulated wire for a considerable period of time, the company will be presumed to know its condition: *Griffin v. United Elec. etc. Co.*, 164 Mass. 492, 49 Am. St. Rep. 477, 41 N. E. 675; *Mitchell v. Raleigh Elec. Co.*, 129 N. C. 166, 85 Am. St. Rep. 735, 39 S. E. 801.

Evidence that an electric light company knew at night that its wires were grounded, that it nevertheless kept its power up, and that next day a pedestrian was killed by coming in contact with a live wire in the street, is sufficient to establish gross negligence, and justify a verdict and judgment for punitive as well as actual damages: *Taxarkana etc. Elec. Co. v. Orr*, 59 Ark. 215, 43 Am. St. Rep. 30, 27 S. W. 66.

**b. Repair of Defects.**—An electric company must promptly remedy any defects or breaks in its wires occasioned by defects or accidents:



Cook v. Wilmington etc. Elec. Co., 9 Houst. (Del.) 306, 32 Atl. 643; Boyd v. Portland Elec. Co., 40 Or. 126, 66 Pac. 576. However, by acting with promptness and diligence it may exonerate itself. Where a street railway company discovers with reasonable promptness the sagging of a trolley wire caused by the falling of a wire belonging to another, and immediately takes proper steps to prevent its wire from injuring travelers in the street, the company meets the legal requirements as to diligence under such circumstances: Read v. City etc. Ry. Co., 115 Ga. 366, 41 S. E. 629.

#### IV. Evidence of Negligence.

**a. Admissibility and Sufficiency.**—If a person is injured by his hand coming in contact with a defective insulated wire, and it is shown that the position of the wire has not been materially changed, the testimony of a witness as to the height of the wire where the injury occurred, five or ten minutes after the accident, is competent as showing the position of the wire at time of the injury in respect to exposing people unreasonably and negligently to danger: Gloucester Elec. Co. v. Kankas, 120 Fed. 490. The clothing worn by a person at the time of coming in contact with a wire is admissible as tending to illustrate the manner in which the injury was caused: Quincy Gas etc. Co. v. Baumann, 203 Ill. 295, 67 N. E. 807.

In an action for injuries alleged to have been caused by the falling of a live wire on a bicycle rider, it is error to grant a nonsuit because the facts testified to are incredible and impossible, when it is not shown by science and common knowledge that the testimony—the case involving electrical phenomena—is false: Walters v. Syracuse etc. Ry. Co., 178 N. Y. 50, 70 N. E. 98.

**b. Presumption of Negligence.**—Proof that a live electric wire is broken and lying or hanging in the public streets, and that injury results from contact therewith, makes out a prima facie case of negligence against the electric company: Gannon v. Laeledge Gaslight Co., 145 Mo. 502, 46 S. W. 968, 47 S. W. 907; Newark Elec. etc. Co. v. Ruddy, 62 N. J. L. 505, 41 Atl. 712, affirmed in 63 N. J. L. 357, 46 Atl. 1100; Snyder v. Wheeling Elec. Co., 43 W. Va. 661, 64 Am. St. Rep. 922, 28 S. E. 733. “Since the wire which caused the injury would not, presumably, have parted and fallen down, in the ordinary course of events, unless it was either defective or improperly stretched or fastened, it is reasonable to presume that its position in the street is owing to one or all of these causes. It must be assumed that a suitable wire, properly put up, would not be a menace to travelers on the highway; otherwise, the operation of a light plant by wires supported by poles in the streets of a city would be ipso facto a nuisance, and an unauthorized interference with the rights of the public. If, therefore, the wires break and fall down, that fact in itself affords reasonable evidence of negligence either in the use of defective wires or in the manner of putting them up, and calls upon the defendant to

show that it was without fault": *Boyd v. Portland Elec. Co.*, 40 Or. 126, 66 Pac. 576. See, too, the principal case, ante, p. 505.

A later utterance of the Oregon court on this question will be found in *Chaperon v. Portland Gen. Elec. Co.*, 41 Or. 39, 67 Pac. 928, to this effect: "The other question involves the doctrine of *res ipsa loquitur*—the thing speaks for itself. The only evidence adduced touching the negligence of the defendant in allowing and permitting its wire to become broken and remain suspended upon a public street is of the simple fact that it was found so broken and suspended, and that injury to the horse ensued, no attempt being made to show the cause of the fracture, or to show any act of commission or omission, carelessly or negligently suffered on the part of the defendant, conducing thereto. Was this sufficient? The defendant was engaged in the transmission and utilization of a subtle and dangerous energy over and along a public street by means of machinery and appliances presumably under its exclusive management and control, because the erection and maintenance of the system by the defendant has been admitted by its pleadings. The dangerous character of the business imposed upon the defendant a very high degree of care in the maintenance of its apparatus and appliances in a secure and safe condition, and thus to guard against the danger of accident to those in the lawful use and enjoyment of the street. Under these conditions, when the plaintiff had shown the fracture and the unsafe condition in which the wire was found (being suspended upon a public street), and that injury actually ensued therefrom, he was relieved from the necessity of going further and showing such facts as would exclude all other hypotheses or possibility (as that it was not due to the carelessness or unlawful acts of any third person, or other cause), because the most natural and reasonable inference therefrom is that the wire would not have parted or been out of repair, and the accident would not have happened, but for the neglect of duty enjoined upon the defendant; thus taking the case out of the general rule of law that the mere proof of an accident raises no presumption of negligence. The defendant's primary responsibility, because of the high degree of care with which it was charged; the likelihood that the condition would not have existed, in the ordinary course, if due care had been observed; and its exclusive control and management of the system, so that the plaintiff had not adequate or equal facilities with the defendant for ascertaining or showing from whence the real and actual cause of the parting of the wires arose—conjunctively operated to relieve the plaintiff from the necessity of showing more in the first instance. Such a showing made for him a *prima facie* case, and imposed upon the defendant the burden of making it appear that the unsafe and insecure condition of the wire was not due to any negligence upon its part; and this it could do by showing due observance of that degree of care enjoined upon it, and, if it had succeeded in that respect, it should have been exonerated. This is within the doctrine of *res ipsa loquitur*—the defendant being required

to give such evidence as would exonerate it—and the plaintiff was relieved from the burden of proving the nonexistence of an adequate explanation or excuse.” For limitations on this doctrine, see *Boyd v. Portland Elec. Co.*, 41 Or. 336, 68 Pac. 810.

The falling of a trolley wire, attended with injurious consequences, is held to raise a presumption of negligence on the part of the street railway company in *O’Flaherty v. Nassau Elec. R. R. Co.*, 54 N. Y. Supp. 96, 34 App. Div. 74, affirmed in 165 N. Y. 624, 59 N. E. 1128; *Smith v. Brooklyn Heights R. R. Co.*, 81 N. Y. Supp. 838, 82 App. Div. 531; *Memphis St. Ry. Co. v. Kartright*, 110 Tenn. 227, post, p. 807, 75 S. W. 719. And evidence that the breaking of trolley wires at a street intersection was caused by the trolley pole slipping from the trolley wire and striking against the cross-wires, and that such slipping is a matter of hourly occurrence in the operation of the railway, does not relieve the company of the imputation of negligence, but rather brings it out more clearly: *Clancy v. New York etc. R. R. Co.*, 81 N. Y. Supp. 875, 82 App. Div. 563. Where a guy wire of an electric railway breaks and falls to the ground in a public street, though the fall is caused by the stroke of a trolley, there arises against the company a presumption of negligence, which, unless rebutted, entitles one who is injured thereby to recover damages: *Chattanooga Elec. Ry. Co. v. Mingle*, 103 Tenn. 667, 76 Am. St. Rep. 703, 56 S. W. 23.

The above doctrine is applied in *Clarke v. Nassau Elec. R. R. Co.*, 41 N. Y. Supp. 78, 9 App. Div. 51, to the following state of facts: A horse being driven along the street stepped upon one of the rails of an electric railway, sprang into the air, and fell down and died in a few minutes. The driver, on rushing to the horse’s head and seizing the hames of the harness, received a powerful shock of electricity. Said the court: “The fact that the defendant brought electricity into the street for use as a motive power, and the fact that electricity so employed was capable of escaping in such a way as to produce the casualty which actually took place, were sufficient, taken together, to justify the inference that the accident was due to the agency of the defendant, in the absence of proof that it was otherwise caused. The maxim *res ipsa loquitur* is directly applicable. . . . The doctrine of *res ipsa loquitur* simply calls upon the defendant after proof of the accident to give such evidence as will exonerate him, if any there be, and relieves the plaintiff from the burden of proving the nonexistence of an adequate explanation or excuse.” This case is approved in *Dyer v. Buffalo Gen. Elec. Co.*, 46 N. Y. Supp. 874, 20 App. Div. 124.

## V. Proximate and Remote Cause of Injury.

The question of what is the proximate cause of an injury occasionally arises where a wire of one electric corporation falls across the wire of another corporation, with disastrous consequences. The principal case, ante, page 505, affords an illustration of this, where it is held that if, during a storm, a telephone wire, which was negligently

strung, falls upon an electric light wire below at a point where the insulation has been worn off, and burns the latter wire in two because of its want of insulation, so that the severed ends fall to the street, the electric light company is liable for the death of a traveler who comes in contact therewith; for the falling of the telephone wire upon the wire below would have been attended with no disaster but for the uninsulated condition of the latter and that condition is to be ascribed as the proximate cause of the death. The respective liability of the two negligent companies in cases of this nature will receive further consideration under the head of "Parallel and Intersecting Wires," post. See, also, *Consolidated Elec. etc. Co. v. Koepf*, 64 Kan. 735, 68 Pac. 608. In *Elliott v. Allegheny etc. Light Co.*, 204 Pa. St. 568, 54 Atl. 278, it is held that where a painter, in falling from a ladder clutches a wire left without insulation, the fall is the proximate cause of the accident.

#### VI. Contributory and Imputed Negligence.

A cause of action for injuries suffered through the negligence of an electric corporation, in the matter of its wires, may be barred by the contributory negligence of the person injured. Whether or not there is, in a given case, such contributory negligence is usually a question for the jury: *Texarkana Gas etc. Co. v. Orr*, 59 Ark. 215, 43 Am. St. Rep. 30, 27 S. W. 66; *Bergin v. Southern New Eng. Tel. Co.*, 70 Conn. 54, 38 Atl. 888; *Cosgrove v. Kennebec Light etc. Co.*, 98 Me. 473, 57 Atl. 841; *Regan v. Boston Elec. etc. Co.*, 167 Mass. 406, 45 N. E. 743; *Proctor v. San Antonio St. Ry. Co.*, 26 Tex. Civ. App. 148, 62 S. W. 938, 939. Thus, if one touches a wire to demonstrate the correctness of his judgment that it is not dangerous, he cannot recover for injuries sustained: *Anderson v. Jersey City Elec. etc. Co.*, 64 N. J. L. 664, 46 Atl. 593; *Wood v. Diamond Elec. Co.*, 185 Pa. St. 529, 39 Atl. 1111. Though, of course, one touching a wire where the insulation is worn off cannot be adjudged guilty of contributory negligence as a matter of law, where it appears that he did not know that the wire was damaged nor that it was an electric wire: *Griffin v. United Elec. etc. Co.*, 164 Mass. 492, 49 Am. St. Rep. 477, 41 N. E. 675. A person who comes in contact with an electric wire in the necessary and lawful discharge of his duties will not on that account be regarded as guilty of contributory negligence, if it is the duty of the owner of the wire to keep it insulated, and this duty has been neglected, and there is nothing in the appearance of the wire to indicate such neglect to the person injured, although he has been warned to be careful of the wires and keep away from them: *Clements v. Louisiana Elec. etc. Co.*, 44 La. Ann. 692, 32 Am. St. Rep. 348, 11 South. 51.

A person traveling in a public street or highway has a right to assume that it is free from dangerous obstacles, and the fact that he comes in contact with an electric wire suspended or lying therein, the presence of which he does not observe, does not, of itself, estab-



lish contributory negligence on his part: *Brush Elec. etc. Co. v. Kelley*, 126 Ind. 220, 25 N. E. 812; *Suburban Elec. Co. v. Nugent*, 58 N. J. L. 658, 34 Atl. 1069; *Hovey v. Michigan Tel. etc. Co.*, 124 Mich. 607, 83 N. W. 600; *Devlin v. Beacon Light Co.*, 192 Pa. St. 188, 43 Atl. 962. Ordinarily, the question of contributory negligence, in such a case is for the jury, and not for the court: *Lloyd v. City etc. Ry. Co.*, 110 Ga. 165, 35 S. E. 170.

A person injured while attempting to remove a fallen wire from his premises in order to protect them is held not guilty of contributory negligence in *Leavenworth Coal Co. v. Ratchford*, 5 Kan. App. 150, 48 Pac. 927. And in *Dillon v. Allegheny etc. Light Co.*, 179 Pa. St. 482, 36 Atl. 164, where a telephone company left a broken wire in the street, and a policeman, in trying to remove it with his mace, was killed, the company was held liable. But where a wire breaks and falls in the street, and a storekeeper approaches with pliers to cut it, and a young man follows him and knows the danger of contact with the wire, but nevertheless winds a handkerchief about his hand and reaches over the storekeeper's shoulder and takes hold of the wire, he is chargeable with contributory negligence as a matter of law: *Frauenthal v. Laeledge Gaslight Co.*, 67 Mo. App. 1.

If an experienced employé of an electric company neglects to use rubber gloves, and brings his hands in contact with wires obviously not insulated, the company cannot be held answerable for the consequences: *Junior v. Missouri Elec. etc. Co.*, 127 Mo. 79, 29 S. W. 988. So, where an experienced lineman of a telephone company comes in contact with the wire of an electric light company, which has been strung on the telephone poles and from which the insulation has been worn off near the pole which he climbs and for several feet on each side, he knowing, or being able to know by ordinary diligence, that the wire was exposed, no recovery can be had for his resulting death: *Columbus R. R. Co. v. Dorsey (Ga.)*, 46 S. E. 635. Where one about to take down wires is warned and cautioned by his employer, but disregards the same, he cannot be considered, in the event of his injury, as exercising due care for his own safety: *Tri-City Ry. Co. v. Killeen*, 92 Ill. App. 57.

A railroad brakeman who, well knowing the presence of electric wire hanging so low over the track as to interfere with a person standing on the tops of cars, attempts to pass from the top of one car to the top of another, when there is no urgent or imperative necessity to justify such a risk, is chargeable with such contributory negligence as will bar a recovery for injuries sustained, in an action against the owner of the wires: *Dansville St. Car Co. v. Watkins*, 97 Va. 713, 34 S. E. 884.

If a mother takes her boy upon a roof in the evening to look into an adjoining theater, and she warns other persons there present

from touching an electric wire, but the boy touches it at an exposed point when it is brought near him, his contributory negligence bars his right to recover for injuries sustained, if he is old enough to know better, and if he is too young to realize the danger of his course, his mother's negligence in taking him to a place of danger may be imputed to him: *Mayor etc. of Cumberland v. Lottig*, 95 Md. 42, 51 Atl. 841. But a child of ten years of age is not chargeable with contributory negligence because he takes hold of a wire in a street charged with a deadly current of electricity, if there is nothing from which an adult could have inferred that the wire was carrying any current at all: *Haynes v. Raleigh Gas Co.*, 114 N. C. 203, 41 Am. St. Rep. 786, 19 S. E. 344.

Of one ignorant of the danger that may result from contact with electric wires, a less degree of care is demanded to avoid injury than is required if he had been informed of the danger. One is required to use no more care for his own safety than is usual under similar circumstances among careful and prudent persons of the class to which he belongs. The same degree of care is not exacted of an ignorant person as is demanded of one better educated: *Giraudi v. Electric Imp. Co.*, 107 Cal. 120, 48 Am. St. Rep. 114, 40 Pac. 108.

#### VII. Fallen and Hanging Wires.

a. **In General.**—Evidence that an electric wire has fallen in a public street, and that injuries have resulted therefrom, makes a *prima facie* case of negligence against the electric company and casts the burden on it to show that the condition of the wire is not due to its fault: See "Presumption of Negligence, ante, 524. However, if a person breaks down the wires of an electric company, it will not be answerable for an injury received by him while handling the wires so broken, because it maintained or renewed the current through them: *Newark Elec. etc. Co. v. McGilvery*, 62 N. J. L. 451, 41 Atl. 955. The liability for fallen wires will be discussed further under the head of "Parallel and Intersecting Wires," post.

b. **Pulley Wire from Arc Lamp.**—An electric corporation which maintains a pulley wire for hoisting and lowering an arc lamp without proper insulation, and allows it to come in contact with the feed wires, thereby becoming charged with a deadly current, is guilty of negligence in respect to a boy who passes along the sidewalk and takes hold of the wire where it passes around the reel on the pole at a point some four or five feet from the ground: *Lexington Ry. Co. v. Fain*, 24 Ky. Law Rep. 1443, 71 S. W. 628. "We think it a self-evident proposition," remarked the court, "that it was the duty of the appellant, in using the streets of the city of Lexington, by permission of the municipal authorities, for purposes of private gain, to so conduct its business as not to injure persons passing along such streets, and to keep the highways occupied by

their apparatus in substantially the same condition as to convenience and safety as they were in before such occupancy."

**c. Guy Wire.**—If a guy wire supporting a trolley wire falls and becomes charged with electricity, the owner, after notice, is liable for not protecting the public against it: *Neal v. Wilmington etc. Ry. Co.*, 3 Penne. (Del.) 467, 53 Atl. 338. Indeed, where the guy wire of a railway company breaks and falls to the ground in a public street, though the fall is caused by the stroke of the trolley, a presumption of negligence arises against the company, which, if not rebutted, entitles one who is injured thereby to recover: *Chattanooga Elec. Ry. Co. v. Mingle*, 103 Tenn. 667, 76 Am. St. Rep. 703, 56 S. W. 23. An electric company is under the duty to exercise all reasonable precaution against passing a dangerous current through a guy wire attached to a pole on a vacant, uninclosed lot in a densely populated portion of the city: *New Omaha etc. Light Co. v. Johnson* (Neb.), 93 N. W. 778. Evidence that a boy seventeen years old knew that the guy wire of an electric light post carried a current of electricity, and that he placed his hand on it after being warned by a younger companion, does not conclusively establish contributory negligence, where it appears that the wire had been charged with electricity for several days, with notice to the owner, and that it had been handled frequently by various persons during that time, and a few minutes before by the boy, without harm: *South Omaha Waterworks Co. v. Vocasek*, 62 Neb. 710, 87 N. W. 536.

### VIII. Parallel and Intersecting Wires.

**a. Liability When They Come in Contact.**—A corporation, in stringing wires of a dangerous voltage, must be regardful of the presence of other wires and of the possibility of its own wires charging or coming in contact with them. It must use due care and diligence, not only to prevent such contact or charging, but to discover and prevent its continuance even when caused by the negligence of others. And it must be mindful that the wires of other corporations may from time to time require the attention of linemen and other workmen: *Atlanta Consol. St. Ry. Co. v. Owings*, 97 Ga. 663, 25 S. E. 377; *Paine v. Electric etc. Co.*, 72 N. Y. Supp. 279, 64 App. Div. 477; *International Light etc. Co. v. Maxwell*, 27 Tex. Civ. App. 294, 65 S. W. 78. "That the ownership of the wire," to quote from a recent Pennsylvania decision, "is not controlling as to the liability for an injury caused by coming in contact with it is determined by the class of cases in which it is held that an electric railway company or an electric light company is responsible for an injury where it negligently permits its wire to come in contact with another company's telephone or telegraph wire, which transmits the current and thereby causes an accident. This is a sound rule and is recognized in many jurisdictions: *City Elec. etc. Ry. Co. v. Conery*, 61 Ark. 381, 54 Am. St. Rep. 262, 61 S. W. 381; *Western*

*Union Tel. Co. v. State*, 82 Md. 293, 51 Am. St. Rep. 464, 33 Atl. 763; *Electric Ry. Co. v. Shelton*, 89 Tenn. 423, 24 Am. St. Rep. 614, 14 S. W. 863; *Block v. Milwaukee etc. Ry. Co.*, 89 Wis. 371, 46 Am. St. Rep. 849, 61 N. W. 1101. These cases hold it to be the duty of electric companies to use care not only to keep their own wires in proper condition and repair, but also to prevent their coming in contact with other wires, which, by becoming charged with and transmitting the electric current, may cause an injury. When an injury results under such circumstances, the electric company is responsible by reason of the negligent control of its wires, regardless of the ownership of the wire that transmits the current to the person who is injured. In the case at bar, the electric current was not transmitted by the company's wire coming in contact with another wire which caused the plaintiff's injury, but it was carried on a wire connected by the company with its own feed wire for the very purpose of transmitting the current which, by reason of the non-insulation of the wire, injured the boy. With much greater reason, therefore, should the defendant company in this case, under like circumstances, be held liable for the transmission of its current through another's wire, than where the electric company's current is communicated to the wire by negligent contact': *Daltry v. Media Elec. etc. Co.*, 208 Pa. St. 403, 57 Atl. 833.

When one is injured while taking down a dead wire, which does not belong to the defendant, by its breaking and coming in contact with a defectively insulated wire of the defendant, the latter is liable, although the accident would not have happened but for a defect in the wire which broke: *San Antonio Gas etc. Co. v. Speegle* (Tex. Civ. App.), 60 S. W. 884. And if, during a storm, a telephone wire, which was strung negligently, falls upon an electric light wire below at a point where the insulation has been worn off, and burns the latter wire in two because of its want of insulation, so that the severed ends fall to the street, the electric light company is liable for the death of a traveler who comes in contact therewith: See the principal case, ante, page 505.

It is the duty of a corporation maintaining an uninsulated telegraph wire to use reasonable care that it does not come in contact with a highly charged electric light wire, and there remain till it wears off the insulation of the latter wire and diverts the current from it to the danger of those who may touch the telegraph wire or another wire with which it may come in contact: *Hamilton v. Bordertown Elec. etc. Co.*, 68 N. J. L. 85, 52 Atl. 290. Telegraph and telephone companies are answerable in damages to a person injured by a wire suspended from one of their poles by their permission, and which, becoming broken, falls across the feed wire of an electric railway company, and, becoming charged with electricity, is thrown against such person while in the street: *Western Union Tel. Co. v. State*, 82 Md. 293, 51 Am. St. Rep. 464, 33 Atl. 763. See, also,



*Ahern v. Oregon Tel. Co.*, 24 Or. 276, 33 Pac. 403, 35 Pac. 549. See, too, *Western Union Tel. Co. v. Thorn*, 64 Fed. 287.

Where the electric wires of different companies come in contact, as in the case of telephone or telegraph and electric light companies, they may be held jointly liable for injuries resulting to third persons from their concurring acts of negligence: *Economy Light etc. Co. v. Hiller*, 203 Ill. 518, 68 N. E. 72; *Cumberland Tel. etc. Co. v. Ware*, 24 Ky. Law Rep. 2519, 74 S. W. 289. Both corporations, it is said by the Louisiana court in the principal case, are bound in solido, and the fault of one is no excuse for the fault of the other.

It is negligence on the part of an electric light company to so string its wires that those of one circuit cross those of another, so that a slight sagging of one wire will bring it in contact with another, and to maintain one as a live circuit while employes are set at work handling with bare hands the wires of the dead one so crossing those of the live circuit: *Kraatz v. Brush Elec. etc. Co.*, 82 Mich. 457, 46 N. W. 787. Where a broken wire hangs to a pole of an electric light corporation, and a small wire extends from such wire to a point on an electric wire where the insulation is worn off, and transmits a dangerous current of electricity to the hanging wire, the company is liable to one coming in contact therewith, after the condition has existed some two weeks, while on the sidewalk: *Wehner v. Lagerfelt*, 27 Tex. Civ. App. 520, 66 S. W. 221.

**b. In the Case of Trolley Wires.**—It is the duty of a corporation maintaining comparatively harmless electric wires, such as telephone wires, to use reasonable care to prevent them from coming in contact with naked wires carrying powerful electric currents; and it is the duty of a corporation maintaining an uninsulated powerfully charged wire, such as a trolley wire, to protect its wire from such contact by using a degree of care commensurate with the probable consequences of a want of such protection: *New York etc. Tel. Co. v. Bennett*, 62 N. J. L. 742, 42 Atl. 759. If an electric street railway company and a telephone company concurrently maintain two wires so related to each other and so erected that one is likely to fall across the other and occasion damage to life or property, it is the common duty of both companies to abate the dangerous condition, where the danger is within the concurrent, common knowledge of both, and they are jointly liable for injuries caused by a contact of the wires, especially when they allow them to remain in that condition: *McKay v. Southern Bell Tel. Co.*, 111 Ala. 337, 56 Am. St. Rep. 59, 19 South. 695.

A street railway company may be held liable where a telephone wire stretched above its trolley wire falls upon the trolley and conducts electricity therefrom to the injury of one coming in contact with the telephone wire: *City Elec. St. Ry. Co. v. Conery*, 61 Ark. 381, 54 Am. St. Rep. 262, 33 S. W. 426. Speaking of the duty and liability of electric companies, the court said: "This duty is not limited to keeping their own wires out of the streets, or other public

highways, but extends to the prevention of the escape of the dangerous force in their service through any wires brought in contact with their own, and of its transmission thereby to anyone using the streets. Only in this way can the public receive that protection due it while exercising its rights in the highways in or over which electric wires are suspended." Where an uninsulated span wire is maintained in such a manner that it is likely to come in contact with a trolley wire, the railway company may be held answerable for the consequences: *McAdam v. Central Ry. etc. Co.*, 67 Conn. 445, 35 Atl. 341. In *Kankakee Elec. Ry. Co. v. Whittemore*, 45 Ill. App. 484, where a telephone wire fell on a trolley wire and completed a circuit, and a trolley pole of the railway company's car knocked the wire on a horse, the railway company was held responsible.

If persons negligently cause a telephone wire to fall and remain across a trolley wire, where it could come in contact with passing animals, charged with electricity from the trolley, their negligence is the proximate cause of an injury to an animal coming in contact with the wire, and it is of no consequence that the negligence of the owner of the trolley, in not providing fenders against the telephone wires, was a conjunctive cause of the accident: *Jones v. Finch*, 128 Ala. 217, 29 South. 182.

**c. Duty to Place Guards Over Wires.**—If an electric corporation places wires, designed to carry powerful currents of electricity, in a street where there are telephone wires above, thus making the telephone wires, which before were harmless, dangerous, it would seem clear that the duty of the electric company requires it to guard its wires so that a falling telephone wire will not come in contact with them. The obligation of the telephone company in the premises is not so palpable, but probably it also exists: *Rowe v. New York etc. Tel. Co.*, 66 N. J. L. 19, 48 Atl. 523; *Electric Ry. Co. v. Shelton*, 89 Tenn. 423, 24 Am. St. Rep. 614, 14 S. W. 863; *Richmond etc. Ry. Co. v. Rubin (Va.)*, 47 S. E. 834. There are decisions, however, to the effect that it cannot be said, as a matter of law, that it is the duty of an electric railway to place guards over its trolley wires in such a way as to prevent telephone wires, in the event of their falling, from coming in contact with the trolley wire: *Albany v. Watervliet etc. R. R. Co.*, 27 N. Y. Supp. 848, 76 Hun, 136; *Block v. Milwaukee St. Ry. Co.*, 89 Wis. 371, 46 Am. St. Rep. 849, 61 N. W. 1101. But although a railway company erects and maintains its trolley wire in the manner that other trolley wires are erected and maintained by many prudent and well-managed corporations conducting a similar business in other cities, it is negligent where it knowingly suffers a wire of a telephone company to be suspended above its own in a condition likely to fall across its own, involving danger to persons and property in the

street, without providing proper safeguards: *McKay v. Southern Bell Tel. Co.*, 111 Ala. 337, 56 Am. St. Rep. 59, 19 South. 695.

Where a wire passes under a heavy limb of a tree in a highway, and it is charged with a powerful electric current, the duty of the electric company requires it to guard the wire so as to prevent its being broken by the possible falling of the limb: *Spires v. Middlesex etc. Power Co.* (N. J. L.), 57 Atl. 424.

### IX. What Corporations are Liable for Negligence.

**a. Company Furnishing Power.**—It has been held the duty of an electric company to see that a street railway company to which it furnishes power has its wires insulated: *Thomas v. Marysville Gas Co.*, 108 Ky. 224, 56 S. W. 153. On the other hand, it has been held that if one engages contractors to wire his property, and subsequently engages a lighting company to light the premises, the latter company is not answerable for injury by fire occasioned by negligent wiring: *National Fire Ins. Co. v. Denver etc. Elec. Co.* (Colo. App.), 63 Pac. 949. The Kentucky decision is questioned, and the Colorado decision approved, in *Memphis Consol. etc. Elec. Co. v. Speers* (Tenn.), 81 S. W. 595, where it is decided that if an electric company contracts to furnish electricity to illuminate a sign, but has no interest in nor control of the wires and appliances conducting the electricity to the sign, it is not accountable for the escape of the electricity from the wires, in consequence of which a horse is killed by reason of some defect in construction or insulation.

**b. Vendor and Vendee of Plant.**—In the case of *Gordon v. Ashley*, 79 N. Y. Supp. 274, 77 App. Div. 525, reversing 70 N. Y. Supp. 1038, 34 Misc. Rep. 743, it appears that Ashley contracted to furnish a village with electricity for lights, and built a plant for that purpose. He then sold the plant to a corporation of which he became the president and the holder of a majority of the stock. After this transaction a man was killed by a negligently maintained wire. The sole relation between Ashley and the corporation seems to have been that of vendor and vendee, and after the transfer the corporation operated the plant and performed the lighting contract with the consent of the village. It was held that Ashley was not answerable for the casualty on the ground that he controlled the plant, notwithstanding that, according to his contract with the village, he had no right to assign such contract without the consent, by resolution, of the board of trustees, which was not passed until after the accident.

A complaint against a telephone company alleging that the plaintiff was injured by lightning conducted into his building on account of the defective condition of the company's wires, is insufficient, if it is also alleged that the defect was occasioned by the removal of a telephone belonging to another corporation of which the de-

fendant is the successor, and it is not shown that the defendant created the dangerous condition or had an opportunity to put the wires in proper condition before the accident: *Scheiber v. United Tel. Co.*, 153 Ind. 609, 55 N. E. 742. But when one electric light corporation purchases the plant of another company and continues its business, it impliedly contracts with its customers and the public that it will use such appliances and care as are known to the business to protect them from injury; and it is answerable to anyone who, without fault on his own part, sustains damage for its failure to do so: *Waller v. Leavenworth Light etc. Co.*, 9 Kan. App. 301, 61 Pac. 327.

### **X. Duty and Liability of Municipal Corporations.**

**a. As to Its Own Wires.**—Municipal corporations in using highly dangerous agencies, such as electricity, must exercise care commensurate with the danger to prevent injuries to persons and property. The degree of care, prudence, and foresight exacted of them is perhaps not less than that exacted of private corporations: *Owensboro v. Knox*, 25 Ky. Law Rep. 680, 76 S. W. 191; *Emery v. Philadelphia*, 208 Pa. St. 492, 57 Atl. 977. And the fact that such an agency is used or supervised under the police power does not excuse negligence in its use: *Herron v. Pittsburg*, 204 Pa. St. 509, 93 Am. St. Rep. 798, 54 Atl. 311, where a city is held liable for injuries sustained by a traveler in the street coming in contact with a broken police-call wire. See, also, *Twist v. Rochester*, 55 N. Y. Supp. 850, 37 App. Div. 307, affirmed in 165 N. Y. 619, 59 N. E. 1131, where a city is held responsible for injuries sustained by a wire called a "patrol line," broken and dangling in the street. If the disturbed condition of a city telephone and fire alarm system indicates to the city authorities that the fire alarm wire may be broken and down in the street, it is their duty to investigate the cause of the disturbance to ascertain if the wire is dangerous in obstructing the street; and notice of a disturbance of the system occasioned by the fire alarm wire being broken and down is notice of the obstruction of the street: *Emporia v. Burns*, 67 Kan. 523, 73 Pac. 94.

**b. As to the Wires of Private Corporations.**—It is the duty of municipal corporations to exercise a careful supervision over the adjustment and maintenance in and over its streets of the electric wires and apparatus of private corporations; and if they neglect this duty and fail to remedy defects or abate dangerous conditions, after notice, in such electric systems, they may be held answerable for the consequences: *Decatur v. Hamilton*, 89 Ill. App. 561; *Mooney v. Luzerne Borough*, 186 Pa. St. 161, 40 Atl. 311. In these two cases injuries were sustained from broken wires. But it is held in *Denver v. Sherret*, 88 Fed. 226, Justice Thayer dissenting, that a city is not chargeable with the duty of inspecting the structures of an electric light company and maintaining them in a safe condition, to the same extent as though they were erected by the city; but that its duty



embraces no more than a general supervision of the corporation, and it is answerable for dangerous conditions only when it has been negligent after notice, actual or constructive, of such conditions.

A city and a lighting company may be joined in one action where a wire breaks, falls down, and remains in the street for three weeks, there causing injury to a passer-by. Both are presumed, from the lapse of time, to have notice: *Kansas City v. File*, 60 Kan. 157, 55 Pac. 877.

A city is negligent in permitting an arc lamp, though not owned or operated by it, to be suspended four or five feet above the sidewalk of a public street, and some fourteen inches outside a railing of two iron pipes three or four feet high, without any protection in the way of netting or other covering, and improperly insulated: *Schmidt v. Chicago*, 107 Ill. App. 64.

### XI. Duty and Liability of Railway Companies.

When an electric railway company is given authority to use the public streets and highways for its line, the law implies a duty of using a very high degree of care in the construction, operation, and maintenance of its appliances, requiring it to employ every reasonable precaution known to those possessed of the skill and knowledge requisite to the safe conduct and control of such an agency, for providing against all dangers incident to its use, and holds it accountable for the injury of any person due to the neglect of that duty, whether or not he is one of its employés: *McAdam v. Central Ry. etc. Co.*, 67 Conn. 445, 35 Atl. 341; *Chattanooga Elec. Ry. Co. v. Mingle*, 103 Tenn. 667, 76 Am. St. Rep. 703, 56 S. W. 23. An electric railway company is bound to exercise the highest or utmost care to conserve the safety of the public: *Memphis St. Ry. Co. v. Kartright*, 110 Tenn. 277, post, p. 807, 75 S. W. 719. This is a valuable case, reviewing earlier decisions.

The duty and liability of electric railway companies in respect to their trolley and other wires has already been discussed under "Presumption of Negligence," and "Parallel and Intersecting Wires," ante. A prima facie case of negligence against an electric railway corporation is made out where a passenger testifies that while riding in an electric-car she became alarmed at flames shooting out of the controller box, and, in leaving the car, received an electric shock in stepping on or over the metal doorsill at the rear of the car: *Buckbee v. Third Ave. R. R. Co.*, 72 N. Y. Supp. 217, 64 App. Div. 360. If a man or horse, in stepping upon a rail of an electric street railway company, receives a shock of electricity, negligence on the part of the company is presumed to such a degree as to call for explanation and put it to its proof. The doctrine of *res ipsa loquitur* applies to such cases: *Trenton etc. Ry. Co. v. Cooper*, 60 N. J. L. 219, 64 Am. St. Rep. 592, 37 Atl. 730; *Ludwig v. Metropolitan St. Ry. Co.*, 75 N. Y. Supp. 667, 71 App. Div. 210; *Braham v. Nassau Elec. R. R. Co.*, 76 N. Y. Supp. 578, 72 App. Div. 456.

## XII. Duty and Liability of Employers.

a. **In General.**—An employer making use of so subtle and dangerous an energy as electricity owes to his employés the duty of exercising a very high degree of care for their protection against injury from such use. He must take precautions to protect them against injuries from the accidental crossing or contact of wires, occasioned by the breaking or sagging, and the consequent charging of the wire carrying the current used in his business with a dangerous current from a more powerfully charged wire: *Moran v. Corliss Steam Engine Co.*, 21 R. I. 386, 43 Atl. 874. See, too, *Myhan v. Louisiana Elec. etc. Co.*, 41 La. Ann. 964, 17 Am. St. Rep. 436, 6 South. 799; *General Elec. Co. v. Murray* (Tex. Civ. App.), 74 S. W. 50. Moreover, an electric corporation in stringing wires in close proximity to the wires of another corporation, must be regardful for the safety of the employés of such other corporation. Each company owes to the employés of the other the duty to string its wires and place its apparatus so that they will not be a menace to the safety of such employés when they are about their duties as linemen or otherwise, and by inspection and repair to maintain its wire and appliances in this condition. For a failure to do so, resulting in an injury to such employés, the company is accountable: *Atlanta Consol. etc. St. Ry. Co. v. Owings*, 97 Ga. 663, 25 S. E. 377; *Illingsworth v. Boston Elec. etc. Co.*, 161 Mass. 583, 37 N. E. 778; *Barker v. Boston Elec. etc. Co.*, 178 Mass. 503, 60 N. E. 2; *Wagner v. Brooklyn Heights R. R. Co.*, 74 N. Y. Supp. 809, 69 App. Div. 349, affirmed in 174 N. Y. 520, 66 N. E. 1117; *Standard Light etc. Co. v. Munsey* (Tex. Civ. App.), 76 S. W. 931; *Dallas Elec. Co. v. Mitchell* (Tex. Civ. App.), 76 S. W. 935; *Huber v. La Crosse City Ry. Co.*, 92 Wis. 636, 53 Am. St. Rep. 940, 66 N. W. 708; *Newark Elec. etc. Co. v. Garden*, 78 Fed. 74.

But where an electric street railway company grants to a telephone company permission to use its poles for the support of telephone wires, it is not responsible for negligence to an employé of the telephone company injured by a shock received while tightening a slack span wire of the railway company. While he is thus engaged, the highest duty which the railway company owes him is that of not willfully or wantonly injuring him: *Sias v. Lowell etc. Ry. Co.*, 179 Mass. 343, 60 N. E. 974.

b. **Assumption of Risks and Contributory Negligence.**—An electric corporation may escape responsibility for negligence to its employés through their assuming the risks of the service or through their being guilty of contributory negligence: *Epperson v. Postal Tel. etc. Co.*, 155 Mo. 346, 50 S. W. 795; *New Omaha etc. Light Co. v. Rombald* (Neb.), 93 N. W. 966; *Car v. Manchester Elec. Co.*, 70 N. H. 308, 48 Atl. 286. However, it is not contributory negligence for an employé to engage in a dangerous occupation, and he as-

sumes only the ordinary risks incident to the employment: *Myhan v. Louisiana Elec. etc. Co.*, 41 La. Ann. 964, 17 Am. St. Rep. 436, 6 South. 799.

### XIII. Duty and Liability to Trespassers and Licensees.

As to mere trespassers or licensees, an electric corporation is ordinarily under no legal obligation other than to do them no willful or wanton harm: *McCaughna v. Owasso etc. Elec. Co.*, 129 Mich. 407, 95 Am. St. Rep. 441, 89 N. W. 73; *Keefe v. Narragansett Elec. Co.*, 21 R. I. 575, 43 Atl. 542. A boy going upon a roof belonging to a corporation where there are naked electric wires used in its business is held to be a licensee, within this rule, in *Sullivan v. Boston etc. R. R. Co.*, 156 Mass. 378, 31 N. E. 128. So, a trespasser climbing poles takes the risks incident to the trespass in coming in contact with electric wires thereon: *Augusta Ry. Co. v. Andrews*, 89 Ga. 653, 16 S. E. 203. In *Cumberland Tel. etc. Co. v. Martin* (Ky.), 76 S. W. 394, a person, in taking refuge from a storm, went under a porch of a store. As he placed his back against an iron grating, he was killed by lightning which struck a telephone pole, and was conducted to the porch by a negligently maintained wire over the metal roof of the porch, and from there to the grating. It was held that he was a mere licensee, to whom the telephone company owed no duty properly to maintain the wire. One who has an implied license to go upon a roof is not entitled, when acting without the scope of his license, to recover for injuries suffered from naked wires: *Hector v. Boston Elec. etc. Co.*, 161 Mass. 558, 37 N. E. 773.

Where dangerous premises are attractive to children, a different rule exists as to the liability of the owner to trespassers. Thus, where an electric company lays its wires on the viaduct of a public street, outside but close to the traveled way, between which wires and way is a railing or balustrade over which small boys are accustomed to climb and get close to the wires, and the wires are defectively insulated, the company is answerable for the death of a boy by his coming in contact with the wires while in the act of climbing, where the company is advised of the habit of the boys and of the defective insulation: *Consolidated Elec. etc. Co. v. Healey*, 65 Kan. 798, 70 Pac. 884. The doctrine of traps and attractive nuisances is held not applicable to the case of a boy who is injured by a dangerous electric wire strung under a sidewalk, there being a considerable space under the walk and access thereto from the abutting lot: *Commonwealth Elec. Co. v. Melville*, 210 Ill. 70, 70 N. E. 1052.

Where an electric company places a wire under a sidewalk which is several feet above the ground, the space thereunder being ac-

cessible from the abutting lot, the rear of which opens into an alley, and boys are in the habit of playing in the lot and going under the sidewalk, without objection from the municipality or lot owner, and a fire breaks out under the sidewalk, a boy who goes under the walk and is injured by coming in contact with the defectively insulated wire, does not sustain to the company the relation of a trespasser or licensee: Commonwealth Elec. Co. *v.* Melville, 210 Ill. 70, 70 N. E. 1052.



CASES  
IN THE  
SUPREME JUDICIAL COURT  
OF  
MASSACHUSETTS.

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GARCELON v. COMMERCIAL TRAVELERS' EASTERN  
ACCIDENT ASSOCIATION.

[184 Mass. 8, 67 N. E. 868.]

**INSURANCE—Accident—Liability of Benefit Association.**—A member of a benefit association entitled to a definite sum under the terms of his certificate payable out of a disability assessment levied upon the members of such association may recover the amount in an action of contract against the association for breach of its implied agreement to levy such assessment. (p. 541.)

**PLEADING—Declaration When in Contract.**—A declaration against a benefit association by a member thereof, alleging a breach by such association of its implied contract to levy a disability assessment with which to pay indemnity to such member, is a declaration in contract, and allegations therein as to bad faith, fraudulent purpose, and unlawful action on the part of such association, make it neither a declaration in tort, nor a declaration having one count in contract and one in tort. (p. 542.)

**INSURANCE—Accident—Loss of Arm.**—The amputation of an arm a little below the elbow is the "loss of an arm" within the meaning of that term as used in a certificate of a benefit association agreeing to indemnify the holder for the loss of an arm without specifying what part thereof shall be lost. (p. 542.)

Action against a fraternal benefit association to recover indemnity for the loss of an arm, amputated about four inches below the elbow, which amputation was made necessary by a railroad accident. The declaration among other things alleged, "that the defendant was organized for the purpose of providing indemnity for its members in case of accident, the membership being limited to commercial travelers, that the plaintiff was a commercial traveler and a member in good standing, that by the certificate of membership the defendant agreed with

the plaintiff that if he 'shall suffer disability caused by external, violent and accidental means, which shall leave upon the body of said member an external and visible mark, the said association, in accordance with the provisions of its by-laws, within sixty days from the receipt by its board of directors of proof satisfactory to said board of the particular disability suffered by said member, will, from the amount realized from one disability assessment of two dollars levied upon each member of said association, pay to said member whose name is above written, indemnity as follows, that is to say: . . . . For the loss of one leg, or one arm, or for an injury which alone, in the judgment of a competent surgeon selected by the board of directors, has caused total disability, rendering said member unable to perform any duties or follow any occupation for a period of not less than two years, and who shall have been, by said board, adjudged to be permanently totally disabled, one-half the amount realized from said assessment, not to exceed the sum of two thousand five hundred dollars.' . . . . That the defendant and its board of directors, acting in bad faith and for the purpose of cheating and defrauding the plaintiff, unlawfully and without right refused and failed to have a competent surgeon pass judgment upon the disability of the plaintiff or to adjudge the plaintiff to be permanently totally disabled, or to levy any disability assessment for the purpose of paying the plaintiff, or for any purpose whatever, or to pay the plaintiff, for or on account of the accident, loss of arm and disability, any money whatsoever." The declaration was demurred to and the demurrer sustained. Plaintiff appealed.

F. P. Cabot, for the plaintiff.

W. F. Merritt, for the defendant.

<sup>11</sup> BARKER, J. 1. Both before and since the statement in *Burdon v. Massachusetts Safety Fund Assn.*, 147 Mass. 360, 17 N. E. 874, that under a policy like that now in suit, "it may be that an action at law would lie; but the more appropriate remedy would be a proceeding in equity to compel the association to lay the assessment," actions at law have been entertained in our courts upon similar policies. The fact that a plaintiff at law has another remedy in equity to which he might resort is not, commonly at least, a defense to his action at law. We think the policy sued on contains an implied contract on the part of the defendant that under the circumstances alleged it will levy an assessment, and that sufficient facts are alleged

in the declaration to show a breach of that contract and that upon the admission as true of the allegations the plaintiff is entitled to judgment for the sum of two thousand five hundred dollars.

2. The declaration is in contract, and the allegations as to bad faith, fraudulent purpose and unlawful action on the part of the defendant make it neither a declaration in tort nor a declaration having one count in contract and one in tort.

3. We consider the amputation of an arm a little below the elbow to be the loss of an arm in the common acceptance of those words and within their meaning as used in the policy, which specifies merely the "loss of an arm" without mentioning whether the loss is by amputation below or above the elbow joint.

In our opinion the demurrer should have been overruled, and the case is remanded to the superior court with directions to reverse the order sustaining the demurrer and to enter an order overruling it.

So ordered.

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*If One is Insured* against an injury which causes the "amputation of a limb [whole hand or foot]," the injury insured against is not the amputation or loss of a hand or foot, but the amputation of a limb, not necessarily a whole arm or leg, but any amputation including a whole hand or foot: *Fuller v. Locomotive Engineers' etc. Ins. Assn.*, 122 Mich. 548, 80 Am. St. Rep. 598, 81 N. W. 326. See, in this connection, *Sheanon v. Pacific Mut. Life Ins. Co.*, 77 Wis. 618, 20 Am. St. Rep. 151, 46 N. W. 799; *Lord v. American Mut. Acc. Assn.*, 89 Wis. 19, 46 Am. St. Rep. 815, 61 N. W. 293; *Maynard v. Locomotive Engineers' etc. Ins. Assn.*, 16 Utah, 145, 67 Am. St. Rep. 602, 51 Pac. 259; *Turner v. Fidelity and Casualty Co.*, 112 Mich. 425, 67 Am. St. Rep. 428, 70 N. W. 898.

GARFIELD AND PROCTOR COAL COMPANY v. ROCK-  
LAND-ROCKPORT LINE COMPANY.

[184 Mass. 60, 67 N. E. 865.]

**SHIPPING—Liability of Dock Owner.**—The owner or occupant of a dock is liable in damages to a person who, by his invitation, express or implied, makes use of it, for an injury caused by any defect or unsafe condition of the dock which the occupant negligently causes or permits to exist, if such person was himself in the exercise of due care. (p. 545.)

**SHIPPING — Dock Owners — Duties of — Negligence.**—An owner or occupant of a dock is not an insurer of the safety thereof, but he is required to use reasonable care to keep it in such shape as to be reasonably safe for the use of vessels which he invites to enter it, or for which he holds it out as fit and ready, and if he fails in this and there is a defect in his dock, known to him, or which by the use of ordinary care and diligence should be known to him, he is guilty of negligence and liable to the person who, using due care, is injured thereby. (p. 546.)

**SHIPPING—Negligence of Dock Owner—Assumption of Risk.**—If the master of a vessel uses reasonable care in entering a dock under invitation, he does not assume the risk of injury to his vessel from a sunken ledge of rock, the existence of which is unknown to him, merely because he has to go through some mud of the presence of which he has knowledge. (p. 546.)

**SHIPPING—Liability of Dock Owner—Representations of Agent.**—The master of a vessel about to take her into a dock is justified in relying upon the statement of the agent of the dock that the berth is a proper one, that there is plenty of water, and that the bottom is good, and is not under any obligation to take soundings. (p. 547.)

**AGENCY—Limitation on Authority.**—If a person is in charge of a wharf or dock, ostensibly as the agent of the owner, the latter cannot show that the agent has only limited authority in giving directions to vessels coming there. (p. 547.)

**NEGLIGENCE—Dock Owners—Evidence.**—If a vessel is injured from grounding on a concealed ledge of rock in the mud at the bottom of a dock, it is not necessary in order to recover, to show that the dock owner knew of such ledge, if its existence could have been discovered by him in the exercise of reasonable diligence and the plaintiff was in the exercise of reasonable care. (p. 547.)

The following rulings were requested by the plaintiff and refused by the court:

“1. The master of the ‘Western Belle’ was justified in relying upon the statement of Norton that the berth was a proper one and was under no obligation to take soundings.

“2. If the defendant is liable the plaintiff is entitled to recover the fair value of the vessel to the plaintiff during the time needed to repair her.



"3. If Norton, the defendant's wharfinger, stated that the berth was proper for her, the defendant is liable for an injury caused by the vessel's resting on the ledge, although Norton and the defendant were ignorant of the existence of the ledge, if sounding the mud would have disclosed it.

"4. It is not necessary for the plaintiff to show that the defendant knew of the ledge; it is sufficient if its existence could have been discovered by reasonable diligence."

H. Wheeler, for the plaintiff.

R. M. Saltonstall, for the defendant.

**61** LATHROP, J. The judge of the superior court, who tried this case without a jury, found for the defendant, and stated the reasons for his finding. Some of these reasons do not appear to be in accordance with the evidence, nor to be warranted by it; and the judge concludes his subsidiary findings by the statement that the master of the vessel "knew that in order to reach the berth designated, his keel must plow the mud a depth of two feet and that the bottom would be searched by his barge as it had not been searched by a vessel before." And he ends by saying: "I am of opinion that the loss would rest where it has fallen." There is no finding that the master of the vessel was not in the exercise of due care, and the theory on which the decision apparently rests is that the master took the risk.

We will now point out wherein it seems to us that the judge was not warranted by the evidence in some of his subsidiary findings. In the first place the judge states: "It does not appear that any vessel had ever been in the dock before drawing more than twenty feet of water." Crockett, a witness for the defendant, who was interested in the defendant company, and had charge of its local business at Rockland, testified that prior to June, 1900, when the accident occurred, "the wharf had been used for loading and unloading vessels of all sizes, from small schooners to large ships drawing more than twenty feet." Norton, an employé of the defendant, testified in its behalf that he **62** had seen a vessel in this dock drawing more than the plaintiff's vessel, "a vessel that drew twenty-three feet, at least." The judge further says: "The captain of the harbor tugboat employed by the barge told her master that he thought it doubtful whether there was enough water." Holmes, the master of the tugboat, testified "that he told the master of the barge that he thought it was doubtful if there was water enough to go into

that berth, and that the master asked him if the bottom was all right there, and Holmes said that it was as far as he knew." This puts a somewhat different light upon what the judge evidently considered a warning. We are also of opinion that the judge was not warranted in finding that "the master knew that his keel must plow the mud a depth of two feet." There was evidence that the vessel drew "twenty-one feet forward and twenty-two feet aft, and there were figures on her bow and stern indicating the draught." The principal damage to the vessel was just forward of amidships, where the draught would be less than twenty-one feet six inches.

The judge found that other vessels "had lain there before without injury." There was evidence to warrant a finding that vessels had lain at the dock before without injury, but it does not appear that these vessels had rested on the ledge. While such evidence is often admitted in this class of cases, its admissibility is very questionable. It would seem to come within the rule that the fact that other persons have not suffered by an alleged defect, is immaterial: *Aldrich v. Pelham*, 1 Gray, 510. But if such evidence is admissible, to entitle it to any weight, it should appear that the other vessels were of the same length, breadth and flatness, as was the plaintiff's vessel and were as heavily loaded as she was. The defendant made no attempt to prove any of these things. The value of such evidence is to show the existence of no defect, but, as was said by Judge Wallace in *Smith v. Havemeyer*, 36 Fed. 927, 928, it becomes quite unimportant when it appears beyond doubt that there are defects capable of producing mischief which could have been readily discovered by proper examination.

The general rules of law which are applicable in cases of this character are the same in England and in this country, and are the same at common law and in admiralty. They are as well <sup>63</sup> stated in the case of *Nickerson v. Tirrell*, 127 Mass. 236, 239, as perhaps in any case: "The owner or occupant of a dock is liable in damages to a person who, by his invitation, express or implied, makes use of it, for an injury caused by any defect or unsafe condition of the dock which the occupant negligently causes or permits to exist, if such person was himself in the exercise of due care. Such occupant is not an insurer of the safety of his dock, but he is required to use reasonable care to keep his dock in such a state as to be reasonably safe for use by vessels which he invites to enter it, or for which he holds it out as fit and ready. If he fails to use such due care, if there

is a defect which is known to him, or which by the use of ordinary care and diligence should be known to him, he is guilty of negligence and liable to the person who, using due care, is injured thereby: *Wendell v. Baxter*, 12 Gray, 494; *Carleton v. Franconia etc. Steel Co.*, 99 Mass. 216; *Thompson v. North-eastern Ry.*, 2 Best & S. 106; *Mersey Docks v. Gibbs*, L. R. 1 H. L. 93." Other cases bearing upon this point are: *Smith v. Burnett*, 173 U. S. 430, 19 Sup. Ct. Rep. 442; *Barber v. Abendroth*, 102 N. Y. 406, 55 Am. Rep. 821, 7 N. E. 417; *Barrett v. Black*, 56 Me. 498, 96 Am. Dec. 497; *Sawyer v. Oakman*, 1 Low. 134, Fed. Cas. No. 12,404, 7 Blatchf. 290, Fed. Cas. No. 12,402; *The John A. Berkman*, 6 Fed. 535; *Pennsylvania R. R. Co. v. Atha*, 22 Fed. 920; *Smith v. Havemeyer*, 36 Fed. 927; *Manhattan Transp. Co. v. Mayor*, 37 Fed. 160; *Union Ice Co. v. Crowell*, 55 Fed. 87. The rule is the same in England: *Gibbs v. Liverpool Docks*, 3 Hurl. & N. 164; *Mersey Docks v. Gibbs*, 11 H. L. Cas. 686, L. R. 1 H. L. 93; *The Moorecock*, 13 P. D. 157, 14 P. D. 64.

We have examined all the cases cited by the counsel on each side, and also other cases, but we have found none in which the doctrine of the assumption of the risk has been applied. It may, however, be true that where a master of a vessel knows of a hidden obstruction in a dock and takes his vessel in he acts so carelessly that he may be said to assume the risk. The case of *Christian v. Van Tassel*, 12 Fed. 884, was decided upon the general principles we have stated, but Judge Brown, in giving the opinion, apparently in answer to an argument of counsel, said: "The libellant, in voluntarily moving the boat forward upon what was known to be shoal water, took the risk <sup>64</sup> of whatever might result from grounding upon the usual mud bottom, . . . but he did not take the additional risk resulting from the stones, of which he was not apprised and for which the respondent must be held responsible."

It is clear that the vessel was in the defendant's dock on business, and was, therefore, there by invitation. The judge has found, and the evidence shows, that the injury was caused by a ledge of rocks embedded in the mud at the bottom of the dock. The questions of fact which he did not pass upon are whether the master was in the exercise of due care, and whether the defendant knew of the defect or could by the exercise of reasonable care and diligence have ascertained its existence.

If the master exercised reasonable care and the defendant was negligent, it cannot be said that the master took the risk of the ledge merely because he had to go through some mud.

We are of opinion, therefore, that the case was not decided upon the application of proper principles of law, and that there must be a new trial.

The first request we are of opinion should have been given. We are not aware of any case in which it has been held that the master of a vessel which is to lie in a regular berth at a wharf is obliged to take soundings, though such an obligation may be held to exist where a vessel is to take ground at a place where vessels do not usually lie. As to the authority of Norton, it is plain from the evidence that he was the agent of the defendant on the wharf, and gave all the directions to the master that were given in respect to the berth the vessel was to lie at. The master reported to him before the vessel was hauled in, inquired the depth of the water and the character of the bottom. He was assured that there was plenty of water, and the bottom was good. This bears directly upon the question of the due care of the master. There was some attempt to show that Norton was only the general superintendent of certain branches of business, such as loading cars and vessels with lime, "discharging vessels with coal, taking account of cooperage, etc." There is nothing in the evidence to show that the defendant had anyone else on the wharf with authority to give directions to vessels coming there, and to answer questions in regard to the depth of water and the nature of the bottom. Indeed, there is no evidence <sup>65</sup> that the defendant directly denied Norton's authority to do all that he did in this case. Norton was ostensibly the person in charge of the wharf, and by a familiar principle of agency, the defendant cannot show that he had only limited authority: *Pennsylvania R. R. Co. v. Atha*, 22 Fed. 920. The request, therefore, should have been given.

The second request states a correct principle of law, but it is rendered immaterial by the judge's finding. The third request is perhaps stated too broadly. The fourth request should have been given: See cases cited above.

Exceptions sustained.

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*The Owner or Occupant of a Dock or wharf, while not an insurer of its safety, must keep it reasonably safe for use by vessels which he invites to enter it, or for which he holds it out as fit and ready: The John A. Berkman*, 6 Fed. 535. See, also, *Chapman v. State*, 104 Cal. 690, 43 Am. St. Rep. 158, 38 Pac. 457; *Barrett v. Black*, 56 Me. 498, 96 Am. Dec. 497; *Fennimore v. New Orleans*, 20 La. Ann. 124; *Nickerson v. Tirrell*, 127 Mass. 236; *Vroman v. Rogers*, 132 N. Y. 167, 30 N. E. 388; *Pennsylvania R. R. Co. v. Atha*, 22 Fed. 920; *Heissenbuttle v. New York*, 30 Fed. 456. He must use at least ordinary care and diligence to keep the water adjacent thereto free



from obstructions: *Petersburg v. Applegarth*, 28 Gratt. 321, 26 Am. Rep. 357; *The Calvin P. Harris*, 33 Fed. 295. In *Barber v. Abendroth*, 102 N. Y. 406, 55 Am. Rep. 821, 7 N. E. 417, it is held that the owner of a wharf is liable for an injury to a vessel lawfully using it, by an obstruction in the river bottom adjoining it, known to him but not to the master of the vessel.

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## McDERMOTT v. BOSTON ELEVATED RAILWAY CO.

[184 Mass. 126, 68 N. E. 34.]

**NEGLIGENCE—Children.**—A child six and one-half years of age passing over a cross-walk leading from one side of the street to the other, through which runs the track of a street railway, is not, as a matter of law, necessarily negligent in failing to look and see whether a car is coming or in failing to listen for the ringing of a car gong before attempting to cross. The question of the negligence of such child is for the jury to determine. (p. 549.)

**NEGLIGENCE.—Children of Tender Age**, while travelers upon public ways, are held to the exercise of that degree of care which may reasonably be expected of children of their age, or which children of that age ordinarily exercise. (p. 549.)

F. P. Curran, for the plaintiff.

E. P. Saltonstall and W. Flaherty, for the defendant.

**126** **BRALEY, J.** At the time of the accident, the plaintiff, a child six and a half years of age, was on the cross-walk at the intersection of Highland avenue with Cherry street in the city of Somerville, and as she was passing over the track of the defendant, one of its cars struck her. The defendant offered no evidence at the trial, but at the close of the plaintiff's case asked the judge to rule that she was not in the exercise of due care and could not recover. The judge so ruled, and the case is here on her exception to the ruling.

The plaintiff did not testify, but from the evidence set out in the exceptions it appears that she was on her way to school with **127** other children. The schoolhouse, known as the Burns School, was on Cherry street, which ran westerly from the westerly side of Highland avenue, and to reach it the plaintiff and other children from the same section of the city attending that school would be obliged to pass over Highland avenue at the cross-walk that ran from the east side of the avenue to Cherry street. While walking with the other children, some of whom preceded her, as she came up to the cross-walk through which

ran the track of the defendant, and when within six or seven feet of the rail, the car that struck her was about one hundred and forty feet distant, and in full view from the crossing. At that time the conductor in charge of the car, which was running at "a pretty good rate of speed," first saw her, and while it would be obvious to anyone in the motorman's place that children were in the street and passing over the crossing, the gong was not sounded until the car was within ten or fifteen feet of the plaintiff, who does not appear to have either seen it coming or heard the gong. The children in front of her kept on walking over the track; she followed, and as she stepped on the rail the accident happened.

It cannot be held as matter of law that for a child six and one-half years of age to pass over a cross-walk that leads from one side of a street to the other, while on her way to school, and through which runs the track of a street railway, is of itself negligence. The question is narrowed to the inquiry, ought the plaintiff, when she could have seen the car, to have looked to see if one was coming, and also to have listened for the sound of the gong before attempting to cross the street, and whether, having failed to do so, she must therefore be held to have been guilty of such contributory negligence as bars her recovery.

In the cases that from time to time have been before this court in which the due care of children of tender years, while travelers upon the public ways, has been discussed, it has been said that the child "is to be held to the exercise of that degree of care which may reasonably be expected of children of his age, or which children of his age ordinarily exercise": *Collins v. South Boston R. R. Co.*, 142 Mass. 301, 314, 56 Am. Rep. 675, 7 N. E. 856, and cases cited. The principle is clearly defined, but the difficulty arises in its application to the facts of different cases, and it often becomes a <sup>128</sup> matter of great perplexity and doubt to determine if the child is of such tender years that the rule cannot be held to govern, and the doctrine of imputed negligence as applied to the conduct of parents or those intrusted with his care must be invoked. A child may be so young in years that if allowed by his parents, or those having custody of his person, to go unattended on the highways, such conduct on their part would unhesitatingly be condemned by the average judgment of men as careless, and to be imputed to the child if he should thereby be injured. It was accordingly held that to allow a child two and one-half years old unattended to pass across a public street in a city, and which was

traversed by a horse railroad, was *prima facie* evidence of want of due care of those having him in charge: *Wright v. Malden etc. R. R. Co.*, 4 Allen, 283, 289. See *Butler v. New York etc. R. R. Co.*, 177 Mass. 191, 58 N. E. 592; also *Cotter v. Lynn etc. R. R. Co.*, 180 Mass. 145, 91 Am. St. Rep. 267, 61 N. E. 818.

But in *Lynch v. Smith*, 104 Mass. 52, 6 Am. Rep. 188, and in *Hayes v. Norcross*, 162 Mass. 546, 39 N. E. 282, the plaintiffs being respectively four years and seven months and five years and six months of age, on the facts disclosed it was said that the issues involved were, did the plaintiff possess such a degree of intelligence and knowledge that he could properly be allowed to go alone through the street, and if it was found that he did, then did he use such care as an ordinarily prudent and careful boy of his age is accustomed to use under like circumstances. "School children who are properly sent to school unattended must use such reasonable care as school children can. It must be reasonable care adapted to the circumstances, or, in other words, the ordinary care of school children." The case at bar falls within the law of these cases, and whether a child of the age of the plaintiff is sufficiently intelligent to be allowed to attend the public schools in the ordinary way unaccompanied, as well as the degree of foresight required of, and used by the plaintiff under the circumstances, as shown by the evidence, are to be determined as questions of fact: *Lynch v. Smith*, 104 Mass. 52, 62 Am. Rep. 188; *O'Brien v. Hudner*, 182 Mass. 381, 65 N. E. 788.

The evident willingness to take chances and the accompanying spirit of recklessness on the part of the plaintiff that appears in cases like *Messenger v. Dennie*, 137 Mass. 197, 50 Am. Rep. 295, *Mullen v. Springfield* <sup>129</sup> *Street Ry. Co.*, 164 Mass. 450, 41 N. E. 664, *Morey v. Gloucester Street Ry. Co.*, 171 Mass. 164, 50 N. E. 530, and *Sewell v. New York etc. R. R. Co.*, 171 Mass. 302, 50 N. E. 541, are wanting in this case.

The relative rights of the parties in the use of the street are clear. The plaintiff had a right to the use of the street as a traveler for the purpose of going to school, equal to that of the defendant to run its cars therein as a common carrier of passengers. It is difficult to distinguish in principle this case from *O'Shaughnessy v. Suffolk Brewing Co.*, 145 Mass. 569, 14 N. E. 779. In that case a girl eight years and one month old, while on her way to school, sat down on the edgestone of the sidewalk for the purpose of sharpening a slate pencil. She knew that there was much driving on the street and did not at any time

look to see if a wagon was coming. As she sat with one leg under her and the other leg projecting into the street, she was struck by a wagon belonging to the defendant and run over, and the question if at the time she was in the exercise of due care was held to have been properly submitted to a jury. Here the plaintiff was properly on the cross-walk, where foot travelers crossing Highland avenue at that point would be, and had a right to rely on the presumption that the servants of the defendant, knowing the use of the walk by children going to the Burns school, would pay that regard to those lawfully in the street at that place which reasonable care and diligence required. It might be found that it would be childlike and natural for her to follow her companions and to pay no close attention to surrounding conditions. For these reasons it cannot be said as matter of law that the plaintiff's failure either to look and ascertain if a car was coming, or to listen for the ringing of the gong, or to fully appreciate the possibility that cars passing the crossing would run at such speed that she might be struck before she passed over the track was contributory negligence: *Plumley v. Birge*, 124 Mass. 57, 26 Am. Rep. 645; *Moynihah v. Whidden*, 143 Mass. 287, 292, 9 N. E. 645; *McNeil v. Boston Ice Co.*, 173 Mass. 570, 54 N. E. 257; *Aiken v. Holyoke Street Ry. Co.*, 180 Mass. 8, 61 N. E. 557.

Upon the evidence a jury could find that the plaintiff was in the exercise of such care as might be expected of the ordinarily prudent child of her age, and there must be a new trial.

Exceptions sustained.

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*It is the Duty of One About to Cross a Railroad or street railway track to look and listen for the approach of cars or trains:* *Passman v. West Jersey etc. R. R. Co.*, 68 N. J. L. 719, 54 Atl. 809, 96 Am. St. Rep. 573, and cases cited in the cross-reference note thereto. A failure so to do may amount to negligence per se: *Day v. Boston etc. R. R. Co.*, 96 Me. 207, 90 Am. St. Rep. 335, 52 Atl. 771. As to the application of these rules in the case of children, see *Spillane v. Missouri Pac. Ry. Co.*, 135 Mo. 414, 58 Am. St. Rep. 580, 37 S. W. 198; *Studer v. Southern Pac. Co.*, 121 Cal. 400, 66 Am. St. Rep. 39, 53 Pac. 942; *Kreuzer v. Pittsburgh etc. Ry. Co.*, 151 Ind. 587, 68 Am. St. Rep. 252, 43 N. E. 649, 52 N. E. 220; *Schmidt v. St. Louis R. R. Co.*, 149 Mo. 269, 73 Am. St. Rep. 380, 50 S. W. 921; monographic note to *Barnes v. Shreveport City R. R. Co.*, 49 Am. St. Rep. 421-423. The mere fact that a young child is on the track where it has no right to be does not relieve a street railway company from liability for its own negligence in injuring the child: *Johnson v. Reading City etc. Ry. Co.*, 160 Pa. St. 647, 40 Am. St. Rep. 752, 28 Atl. 1001. See, also, *Harrington v. Los Angeles Ry. Co.*, 140 Cal. 514, 98 Am. St. Rep. 85, 74 Pac. 15. The contributory negligence of the child in such cases is generally a question for the jury:



Holdridge v. Mendenhall, 108 Wis. 1, 81 Am. St. Rep. 871, 83 N. W. 1109. As to whether the negligence of parents may be imputed to the child, see Cotter v. Lynn etc. R. R. Co., 180 Mass. 145, 61 N. E. 818, 91 Am. St. Rep. 267, and cases cited in the cross-reference note thereto.

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## BASSETT v. FIDELITY AND DEPOSIT COMPANY.

[184 Mass. 210, 68 N. E. 205.]

**EXECUTORS AND ADMINISTRATORS—Insolvency—Liabilities of Sureties.**—The surety on an executor's bond is liable for the full amount of a debt due the testator from an insolvent partnership of which the executor was a member, although such insolvency existed at the time of the testator's death. (p. 553.)

**EXECUTORS AND ADMINISTRATORS—Debt Due from Executor to Testator—Demand.**—If a debt from an executor to his testator is due on demand, the former cannot set up that no such demand was made, or that he could not make a demand on himself. (p. 556.)

**EXECUTORS AND ADMINISTRATORS—Liability of Sureties—Interest.**—If an executor is chargeable with funds in his hands for which he has negligently failed to account, to an amount in excess of the penal sum named in his bond, he and his sureties are liable for the penal sum named in the bond with interest from the date of the issue of execution on the judgment rendered for the recovery of such sum. (p. 556.)

J. C. Hammond and H. P. Field, for the plaintiff.

E. K. Arnold, for the defendant.

**211** LORING, J. The principal exception of the defendant corporation is to the refusal of the judge to recommit the case to the assessor to take evidence as to the insolvency of the executor, **212** and of the firm of which he was a member at the date of the testatrix's decease.

The contention which has been made in support of this exception is that the obligation of a surety on an executor's bond goes no farther than to guarantee that the executor will lawfully administer the assets of the testatrix which had an existence in fact and which came to his hands or knowledge, and that it is beyond the scope of such a bond to create assets which the testatrix never had by making the surety guarantee debts due from insolvent debtors; and for that reason it cannot be made liable for the full amount of the notes held by the testatrix made by the executor's insolvent firm.

But there is another side to the case. An executor or administrator is appointed for the sole purpose of enforcing in behalf of those interested in the estate the rights of the estate against others. When the estate has a claim against the executor or administrator himself, he is incapacitated from performing that duty and taking to himself that office. For that reason, on broad principles of policy it was laid down by the common law of England that he must yield all controversy as to the debt due from himself and treat it as an asset of the estate. No one is bound to accept the office, and if he elects to do so he thereby tacitly assents to this condition.

The common law did not allow him to accept the office and keep his rights in a controversy when his duty and his personal interest were in a direct conflict. To allow him to accept the office and then to settle the amount which the creditors and others interested in the estate would have got had he not taken the office but had allowed some disinterested person to be appointed to enforce these rights would not be doing justice to those whose rights the law undertakes to preserve. Take the case at bar as an example. The executor's firm was going on with its business when the testatrix died, and went on in business for some fourteen months after that time. The law could hardly be said to have fully preserved the rights of those interested in the estate if it allowed this creditor of the estate to accept an office where it became his duty to collect the amount due from his own firm by pressing for payment and after fourteen months of inaction on his part to settle the rights of the <sup>213</sup> beneficiaries by a judicial inquiry as to what would have happened had a disinterested person been appointed to perform the duty owed to these beneficiaries.

But it is not necessary to discuss the question further. It is concluded by authority in this commonwealth. The rule was originally laid down in 1814, in *Stevens v. Gaylord*, 11 Mass. 256. The history of the rule and the cases, both in England and in this country are given in *Winship v. Bass*, 12 Mass. 199, and in *Tarbell v. Jewett*, 129 Mass. 457. The rule is one of general application and has been held to be applicable not only in case of executors and administrators, but also in case of assignees in insolvency: *Benchley v. Chapin*, 10 Cush. 173; guardians: *Mattoon v. Cowing*, 13 Gray, 387; and receivers appointed to wind up insolvent corporations: *Commonwealth v. Gould*, 118 Mass. 300. It has been recognized and applied in the following cases in addition to those cited above: *Hobart v.*

Stone, 10 Pick. 215; Kinney v. Ensign, 18 Pick. 232; Ipswich Mfg. Co. v. Story, 5 Met. 310; Sigourney v. Wetherell, 6 Met. 553; Willey v. Thompson, 9 Met. 329; Chenery v. Davis, 16 Gray, 89; Leland v. Felton, 1 Allen, 531; Chapin v. Waters, 110 Mass. 195; Hazelton v. Valentine, 113 Mass. 472; Choate v. Arrington, 116 Mass. 552; Pettie v. Peppard, 120 Mass. 522; Martin v. Smith, 124 Mass. 111; Choate v. Thorndike, 138 Mass. 371; Stetson v. Moulton, 140 Mass. 597, 5 N. E. 809.

And, finally, it was held in *Leland v. Felton*, 1 Allen, 531, that an executor should be charged with the full amount of notes belonging to the testator made by a firm of which he was a partner, although it was insolvent when the testator died, as well as with the full amount due on notes made by himself, who also was insolvent at that time.

The defendant in the case at bar asks us to hold that although an insolvent executor is to be charged with the debt due from him the sureties on his bond are not to be held liable therefor. But that is out of the question. That contention flies directly in the face of the elementary principles governing the effect of a decree allowing a probate account, and the elementary principles as to the obligation of a surety on a probate bond.

In the first place, a decree of a probate court allowing an account of an executor or other official is binding on all interested <sup>214</sup> in the estate including sureties on the bond of the accountant. If there is error, the error must be corrected in the probate court, as it may be if there was fraud or if the party in question had not such notice as to be concluded by the decree: *Jennison v. Hapgood*, 7 Pick. 1, 19 Am. Dec. 258; *Sever v. Russell*, 4 Cush. 513, 50 Am. Dec. 811; *Parcher v. Bussell*, 11 Cush. 107. It is settled that a surety on a probate bond is a party interested in the accounts of the principal, and for that reason has a right of appeal to the supreme judicial court: *Farrar v. Parker*, 3 Allen, 556.

In the second place the obligation of a surety on a probate bond is the obligation of the principal. The bond is a joint bond and the judgment necessarily must be the same against both. This is more than a technical rule of law, it is an instance where the true character of a surety's liability comes to the surface. The ground on which it was held that a surety has a right of appeal in such a case was that the decree settling the account of the principal, "if once properly established, fixes the amount of liability of the sureties on their bond": *Farrar v. Parker*, 3 Allen, 556, 558. And *Endicott, J.*, in *Tarbell v.*

Jewett, 129 Mass. 457, 468, speaking of *Leland v. Felton*, 1 Allen, 531, said that it was held that the executor would be charged for his own notes and for the notes of his firm held by the testator, although both he and the firm were insolvent, "which of course rendered his sureties liable." Again, in *Choate v. Arrington*, 116 Mass. 552, 556, Wells, J. said: "The surety is liable for whatever is properly chargeable to his principal in the official capacity on account of which the bond was given." To the same effect see *Ames, J.*, in *Chapin v. Waters*, 110 Mass. 195, 197.

It is apparent that this was assumed to be the case in *Leland v. Felton*, 1 Allen, 531. In that case the executor had resigned and the plaintiff *Leland* had been appointed administrator with the will annexed *de bonis non*. The main contention of the defendant *Felton* (the executor who had resigned) was that the debt due the testator was suspended, not extinguished, by his being executor, that it was revived by his resignation and that the remedy of the administrator was an action on the notes against him and his partners in which he could recover a personal judgment, but that he could not be charged with the <sup>215</sup> amount by the probate court in his executor's account. If the liability of the surety was different from that of the executor, there was no possible object in this defense. The sole purpose of the defense was to protect the sureties, and from an examination of the court records it appears that after the decision in *Leland v. Felton*, 1 Allen, 531, judgment was recovered in an action brought against the principal and sureties in the supreme judicial court, in the October term, 1863, no defense being interposed by the sureties. It further appears from an inspection of the records of the probate court that several payments were made on account of that judgment by one of the sureties.

The defendant's request, therefore is a request that we overrule the case of *Leland v. Felton*, 1 Allen, 531. But after a careful consideration of *Baucus v. Stover*, 89 N. Y. 1, *Baucus v. Barr*, 45 Hun, 582, affirmed in 107 N. Y. 624, 13 N. E. 939, *Lyon v. Osgood*, 58 Vt. 707, 7 Atl. 5, *Garber v. Commonwealth*, 7 Pa. St. 265, *McCarty v. Frazer*, 62 Mo. 263, *State v. Gregory*, 119 Ind. 503, 509, 22 N. E. 1, *Harker v. Irick*, 10 N. J. Eq. 269, *Spurlock v. Earles*, 8 Baxt. 437, cited and relied on by the defendant, we are of opinion that for the reasons given the true rule was laid down in *Leland v. Felton*, 1 Allen, 531, and that it is now too late to question the practice which was then adopted and has been in force for over forty years.



There is nothing in the other points taken by the defendant in defending its liability. There was evidence which warranted the finding made by the assessor that the sums advanced by the testatrix resulted in a debt due to her, the time for payment of which had arrived. Even if a demand had been necessary, the defendant cannot set up that no demand was made, as he seeks to do. It was his duty as executor to make a demand, and he could not set up that he could not make a demand on himself. See *Stevens v. Gaylord*, 11 Mass. 256, 270, where Jackson, J., says: "In the case of his own debt, which he admits to be due, it is obvious that he can never prove a demand and refusal."

In the case at bar there was a breach of the bond in failing to account, an agreement for judgment in favor of the plaintiff, and the case was sent to an assessor to fix the amount for which execution should issue. He charged the executor with interest on the demand notes of his firm amounting to eighteen thousand four hundred and fifty-three dollars, and with interest on three thousand five hundred dollars, the value of the Glendale stock, with annual <sup>216</sup> rests at six per cent, to the date of his report; and as this sum exceeded the penal sum of the bond he reported that execution should issue for the penal sum of the bond with interest from the date of the writ. The superior court directed that execution should issue for the full amount of judgment and interest from the date of the rendition thereof.

The defendant contends that in contemplation of law these two sums have been in the hands of the executor since the death of the testatrix, and that on the authority of *Wyman v. Hubbard*, 13 Mass. 232, *Stearns v. Brown*, 1 Pick. 530, and *Boynton v. Dyer*, 18 Pick. 1, 7, an executor is not chargeable with interest on funds in his hands. But the rule laid down in the last of those cases is that an executor is not chargeable with interest "except where they actually receive it or make some profitable use of the funds, or are guilty of negligence in accounting for them." This defendant was guilty of negligence in not accounting for these two amounts.

It appears that the parties made an agreement that judgment might be entered for the penal sum of the bond, but it would seem from the record before us that no judgment has in fact been entered. The plaintiff is at least entitled to judgment for interest on the penal sum of the bond from the date of the writ: *Harris v. Clap*, 1 Mass. 308, 2 Am. Dec. 27; *Pitts v. Tilden*, 2 Mass. 118; *Warner v. Thurlo*, 15 Mass. 154; *Bank of Brighton v. Smith*, 12 Allen, 243, 90 Am. Dec. 144, and the amount of

that judgment bears interest. We understand that the superior court's order was intended to be made in conformity with this. On a judgment being entered *nunc pro tunc*, execution may issue as ordered by the superior court.

Exceptions overruled.

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*Liability on the Bonds* of executors and administrators is discussed in the monographic note to *Commonwealth v. Stub*, 51 Am. Dec. 519-534. According to *Estate of Walker*, 125 Cal. 242, 73 Am. St. Rep. 40, 57 Pac. 991, an administrator is to be charged with a personal debt due from him to the decedent as money on hand, but he, as administrator, and his sureties, are not bound for any debt any further than he has had the means to pay. Hence, if he has, at all times since his appointment, been unable to pay anything on the debt, they are not liable at all.

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## WESTLAKE v. DUNN.

[184 Mass. 260, 68 N. E. 212.]

**DEEDS—Acknowledgment in Blank—Estoppel.**—If a person signs and acknowledges a deed, leaving the name of the grantee in blank, and intrusts it to another on his statement of his desire to show it to a friend who is going to advance a part of the purchase money, and that he will return it in a few minutes, and he then fraudulently inserts his own name in the blank and mortgages the property to a mortgagee, who acts in good faith, the original signer of the deed is not estopped to assert his title against the mortgagee, nor from maintaining suit in equity to set aside the deed and cancel the mortgage. (pp. 558, 559.)

H. C. Joyner and H. M. Whiting, for the plaintiff.

C. E. and C. L. Hibbard, for the defendant.

<sup>260</sup> MORTON, J. This is a bill in equity to have a deed from the plaintiff Westlake to the defendant Dunn, alleged to have been obtained by fraud, declared null and void, and to have a mortgage from Dunn to the defendant bank of the same property canceled and discharged. The judge ruled and found in favor <sup>261</sup> of the plaintiffs and the case is here on exceptions by the defendant bank to the refusal of the judge to give certain rulings requested by it. The defendant Dunn did not appear and the bill was taken *pro confesso* against him.

There is no serious dispute as to the facts. The evidence consisted of the testimony of one Bell, the attorney for Westlake, and who is also one of the plaintiffs, and a statement of

facts by the attorneys for the bank, and the deeds and documents referred to in the testimony on one side and the other.

From this evidence it appears that Westlake was the owner of certain real estate in Pittsfield which he wanted to sell, and that there were negotiations between him and Dunn in regard to a sale of the same. In consequence of these negotiations, the plaintiff Bell prepared a deed of the property at the request of Westlake. This deed was signed and acknowledged by Westlake. When he signed and acknowledged it, it was unsealed and the name of the grantee was blank. In this condition the deed was handed to Dunn in order that he might show it as he represented to a possible purchaser. Mrs. Westlake had not signed it, however, and it was returned at Bell's suggestion to have her sign it, which she did. Subsequently, the seals and the revenue stamps were put on but the name of the grantee still remained blank. In this condition Dunn obtained the deed from Bell, to whom Westlake had intrusted its delivery and the receipt of the purchase money, by representing that he wanted to take it to show to a friend who was going to let him have two thousand dollars of the purchase money, and that he would return it in a few minutes. He did not return it, but wrote in his own name as grantee and then took it to the defendant bank to which he had previously applied for a loan on the property of two thousand dollars, which had been approved, and delivered it to the bank and executed a note and mortgage to the bank for two thousand dollars which thereupon paid him that amount, and on the same day caused the deed and mortgage to be duly recorded. The officers of the bank and its attorney acted in good faith, and had no knowledge of the fraud that had been perpetrated by Dunn. Subsequently the plaintiff Westlake discovered the fraud, and upon the commencement of foreclosure proceedings by the bank in June, 1901, brought this bill.

Without going further into detail, it is clear, we think, that **262** the deed was obtained from Bell by Dunn under circumstances that warranted the finding made by the judge that the deed never was delivered with intent to pass the title, and also the further finding made by the judge that there was a fraudulent insertion by Dunn of his name as grantee. The deed never having been delivered with intent to pass the title as a completed deed or with authority to Dunn to insert the name of the grantee, it had no force or validity as a deed, no title vested in Dunn and he could, of course, convey none. The insertion of his name as grantee by himself was an act wholly unau-

thorized even if it did not constitute a forgery. The subsequent acceptance by Westlake of a deed from Dunn to himself, before the discovery of the fraud, and the recording of it did not constitute a ratification of what had been done and a confirmation of Dunn's title, because, in accepting the deed and causing it to be recorded, Westlake acted in ignorance of the fraud that had been committed by Dunn.

The bank contends that Westlake is estopped to set up title in himself and is not entitled to relief in equity. If that is so it must be either on the ground that the conduct of Westlake and his agent Bell was calculated to, and did, induce the bank to lend the money and take the note and mortgage, and that they knew, or ought to have known, that such was likely to be the effect of their conduct (*Stiff v. Ashton*, 155 Mass. 130, 29 N. E. 203), or on the ground of negligence on the part of Westlake and Bell in suffering Dunn to take the deed and thereby enabling him to commit the fraud and procure the loan from the bank, and that as between two innocent parties the one whose negligence has contributed to the wrongdoing complained of should suffer the loss occasioned thereby, and not the other. The effect of such a contention, if sustained on either ground, would be to leave the title in Dunn and the bank. But we think that the contention of the bank cannot be sustained. Neither Westlake nor Bell did or said anything which they knew or ought to have known would or could induce the bank or anyone else to lend money to Dunn and take a mortgage on the land in question as security. They were entirely ignorant of the whole transaction. They had no reason even to suspect that Dunn was going to make the use which he did of the deed. This ground of estoppel therefore fails: *Stiff v. Ashton*, 155 Mass. 130, 29 N. E. 203. So, also, we think, does the other. <sup>263</sup> It was not negligent on Bell's part to intrust the deed with the name of the grantee left blank to Dunn to show, as he represented, to a friend with the promise to return it in a few minutes. Dunn had no authority to fill in the blank either with his own name or that of any other person, though he had said that he was going to take the deed to himself, and there was no objection to his doing so, provided he paid the purchase price. Neither Westlake nor Bell owed any duty to anyone to see that Dunn did not use the deed in the manner in which he did. If there was no such duty on their part then there was no negligence: See *O'Herron v. Gray*, 168 Mass. 573, 60 Am. St. Rep. 411, 47 N. E. 429; *Scollans v. Rollins*, 179 Mass. 346, 88 Am. St. Rep.



386, 60 N. E. 983; *Scholfield v. Londesborough*, [1896] App. Cas. 514. A deed is a different instrument from the instruments referred to and dealt with in *Russell v. American Bell Teleph. Co.*, 180 Mass. 467, 62 N. E. 751, and in *Scollans v. Rollins*, 179 Mass. 346, 88 Am. St. Rep. 386, 60 N. E. 983.

The rulings requested by the defendant were given in part and refused in part. We discover no error on the part of the judge in dealing with them as he did. The result is that the exceptions must be overruled.

So ordered.

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*The Unauthorized Alteration* of an instrument by the holder thereof filling in blanks is discussed in the monographic note to *Burgess v. Blake*, 86 Am. St. Rep. 107-112, on the alteration of written instruments.

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## SIMPSON v. PRUDENTIAL INSURANCE COMPANY.

[184 Mass. 348, 68 N. E. 673.]

**INFANCY—Avoidance of Contract of Insurance.**—A policy of life insurance taken out by an infant is not necessary. He may avoid it, and recover the money paid by him as premiums thereon. (p. 561.)

**INFANCY.—In Order to Avoid His Contract**, an infant is not obliged to put the other party in statu quo. (p. 561.)

**INFANCY—Avoidance of Contract of Insurance—Demand.**—If an action to avoid a contract of insurance and to recover the premiums paid under such contract is brought by an infant, notice of the rescission of the contract and a demand for such premiums through an attorney appointed by the infant are good and sufficient until avoided by the latter. (p. 561.)

N. P. Avery, for the plaintiff.

H. P. Small, for the defendant.

**348** MORTON, J. The plaintiff in this case is a minor and brings this action by her next friend to recover the premiums paid by her on a life insurance policy issued to her by the defendant. The case was heard upon agreed facts, and judgment was ordered for the defendant and the plaintiff appealed. The policy was what is termed a twenty year endowment policy for five hundred dollars, and the agreed facts state that there was no fraud or undue influence practiced upon the plaintiff by the defendant or its agents, and that the contract was a reasonable and prudent one for a person in the plaintiff's situation

and condition in life. Before the action was brought the plaintiff, through her attorney, had notified the defendant that she repudiated the policy and the contract contained in it, and demanded a return of the sums that she had paid as premiums. The premiums paid amounted to fifty-four dollars, and it is agreed that the expense to the <sup>349</sup> defendant of keeping the policy in force was twenty-eight dollars and seventy-two cents. The defendant contends that this should be deducted from or set off against the premiums if the plaintiff is allowed to recover for them.

It is manifest, we think, that however reasonable and prudent it may be for an infant to take out a policy of life insurance, it does not come within the class of necessities, or within the class of contracts which have been held as matter of law to be beneficial to, and therefore binding upon, an infant. It is only when the contract comes within the class of contracts which as matter of law are binding upon an infant that the question of its reasonableness and prudence is material: *Tupper v. Cadwell*, 12 Met. 559, 46 Am. Dec. 704.

The defendant contends that the contract, having been executed in part at least, the plaintiff cannot recover without making the defendant whole for the expense to which it has been subjected. But that would be compelling the plaintiff to carry out to that extent a contract which is not binding on her and which she may avoid: *Morse v. Ely*, 154 Mass. 458, 26 Am. St. Rep. 263, 28 N. E. 577.

It is well settled in this commonwealth, whatever may be the law elsewhere, that in order to avoid a contract an infant is not obliged to put the other party in statu quo: *Gillis v. Goodwin*, 180 Mass. 140, 91 Am. St. Rep. 265, 61 N. E. 813, and cases cited; *White v. New Bedford Cotton Waste Corp.*, 178 Mass. 20, 59 N. E. 642.

The defendant further contends that there has been no rescission because the notice and demand were made by an attorney, and an infant cannot appoint an agent or attorney, and the authority of a *prochein ami* is only commensurate with the writ: *Cassier's Case*, 139 Mass. 458, 1 N. E. 920; *Miles v. Boyden*, 3 Pick. 213; *Burns v. Smith*, 29 Ind. App. 181, 94 Am. St. Rep. 268, 64 N. E. 94; 1 Am. & Eng. Ency. of Law, 2d ed., 940.

If we assume that the bringing of the action did not of itself constitute all the rescission and demand that was necessary, then we are of the opinion that the appointment of an agent for the

purpose of giving notice of rescission and making a demand was not such an act under the circumstances of this case as could be held as matter of law to be prejudicial to the plaintiff and therefore void, but that it was at the most only voidable, and therefore the notice and demand until avoided by the plaintiff would <sup>350</sup> be sufficient: *Whitney v. Dutch*, 14 Mass. 457, 7 Am. Dec. 229; *Towle v. Dresser*, 73 Me. 252.

Judgment reversed and judgment for the plaintiff.

*An Infant's Contract* of insurance is not void, but merely voidable: *Union Cent. Life Ins. Co. v. Hilliard*, 63 Ohio St. 478, 81 Am. St. Rep. 644, 59 N. E. 230; note to *Craig v. Van Bebber*, 18 Am. St. Rep. 615. As to his right to recover what he has paid under such a contract, see *Johnson v. Northwestern Mut. Life Ins. Co.*, 56 Minn. 365, 45 Am. St. Rep. 473, 57 N. W. 934, 59 N. W. 992. And as to the necessity of an infant, upon disaffirming a contract, putting the other party in statu quo, see *Hobbs v. Nashville etc. Ry.*, 122 Ala. 602, 82 Am. St. Rep. 103, 26 South. 139; *Gillis v. Goodwin*, 180 Mass. 140, 91 Am. St. Rep. 265, 61 N. E. 813; *Ridgeway v. Herbert*, 150 Mo. 606, 73 Am. St. Rep. 464, 51 S. W. 1040; *Rice v. Butler*, 160 N. Y. 578, 73 Am. St. Rep. 703, 55 N. E. 275; *Bullock v. Sprowls*, 93 Tex. 188, 77 Am. St. Rep. 849, 54 S. W. 661; *Jenkins v. Jensen*, 24 Utah, 108, 91 Am. St. Rep. 783, 66 Pac. 773; monographic note to *Craig v. Van Bebber*, 18 Am. St. Rep. 687-694.

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## TATMAN v. HUMPHREY.

[184 Mass. 361, 68 N. E. 644.]

**BANKRUPTCY—Preference.**—If the holder of an unrecorded chattel mortgage executed two years before the bankruptcy of the mortgagor and while he was solvent, first takes possession under his mortgage three weeks before the mortgagor files his petition in bankruptcy, he being insolvent at the time, and the mortgagee having reasonable cause to believe him insolvent, the transfer dates from the time that the mortgagee takes possession, and is voidable as an unlawful preference under the United States bankruptcy act of 1898. (p. 565.)

C. T. Tatman, pro se.

W. H. Brown, for the defendant.

<sup>361</sup> **KNOWLTON, C. J.** The question in this case is whether the defendant's title under an unrecorded mortgage of personal property, made to him more than two years before the bankruptcy of the mortgagor, which covered the stock of goods and fixtures then owned by the mortgagor and such future additions as he should make thereto, and which was made to

secure payment of certain notes and of future indebtedness, is good against the trustee in bankruptcy of the mortgagor. Under the Revised Laws, chapter 198, <sup>362</sup> section 1, because of the failure to record the mortgage within fifteen days of the date written therein, and because the property had not been delivered to and retained by the mortgagee, the mortgage was not valid against any person other than the parties thereto: *Haskell v. Merrill*, 179 Mass. 120, 60 N. E. 485. About three weeks before the commencement of the proceedings in bankruptcy, the mortgagor then being insolvent and the defendant having reasonable cause to believe him insolvent, the defendant took possession of the property covered by the mortgage, by removing it from the mortgagor's store, and afterward retained it. After taking possession he served a notice of his intention to foreclose the mortgage under the provisions of the Public Statutes, chapter 192, sections 7, 9.

The defendant's acquisition of possession of the mortgaged property before the commencement of the proceedings in bankruptcy, and before third persons had acquired liens or rights by attachment or otherwise, gave him a title which was good at common law against creditors, and which would have been good against an assignee in insolvency under the statutes of this commonwealth, or against an assignee in bankruptcy under the United States bankruptcy act of 1867: *Folsom v. Clemence*, 111 Mass. 273; *Chase v. Denny*, 130 Mass. 566; *Blanchard v. Cooke*, 144 Mass. 207, 11 N. E. 83; *Bennett v. Bailey*, 150 Mass. 257, 22 N. E. 916; *Bliss v. Crosier*, 159 Mass. 498, 34 N. E. 1075; *Haskell v. Merrill*, 179 Mass. 120, 60 N. E. 485; *Gibson v. Warden*, 14 Wall. 244; *Sawyer v. Turpin*, 91 U. S. 114.

The question of difficulty in the case arises under the United States bankruptcy act of 1898, whose provisions in regard to preferences and acts of bankruptcy differ materially from those of the bankrupt act of 1867. In *Wilson v. Nelson*, 183 U. S. 191, 22 Sup. Ct. Rep. 74, 7 Am. Bank. Rep. 142, the supreme court of the United States, in an elaborate opinion, discussed this difference, and pointed out its effect in cases similar to the present. In that case the bankrupt when solvent, nearly thirteen years before his bankruptcy, gave an irrevocable power of attorney to confess judgment for a debt which he then contracted, and this power was exercised by the creditor shortly before his bankruptcy.

Among the acts of bankruptcy mentioned in section 3a of the act, one is defined as follows: having "suffered or permitted,



while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or <sup>363</sup> final disposition of any property affected by such preference vacated or discharged such preference." In section 67f, it is provided "that all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same," etc. In section 67c, it is declared that "a lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person shall be dissolved by the adjudication of such person to be a bankrupt if it appears that said lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference," etc. In view of these and other provisions of the act, it was decided, in the case just cited, that suffering and permitting the creditor to obtain a preference through legal proceedings was an act of bankruptcy by the express provisions of the statute, irrespective of any active intent of the debtor at that time to hinder, delay or defraud his creditors, or to give a preference, and notwithstanding that the power of attorney to confess judgment was given many years before, and it was said that the preference could be avoided and the property recovered by the trustee. It was held that in determining the time of an alleged act of bankruptcy, it must be deemed to have occurred when something open and notorious was done affecting the debtor's estate. It is also said in the opinion that "the act of 1898 makes the result obtained by the creditor, and not the specific intent of the debtor, the essential fact."

Under another clause of the statute the same distinction is drawn between this and the former act in the case of *In re Klingaman*, 101 Fed. 691, 4 Am. Bank. Rep. 254, where it is said that: "The intent of this section is to declare that, as against creditors of an insolvent, the limitation of time for invoking relief against a preference does not begin to run until in some <sup>364</sup> form they have received actual or constructive notice of the transfer to the preferred creditor; and this in-

tent is reached by the declaration that in such cases the transfer constituting the act of bankruptcy shall be held to date from the time the instrument of transfer is recorded, or the possession is taken, or notice is otherwise brought home to the creditors of the bankrupt." The facts in this case were somewhat analogous in principle to those in the case at bar. Other federal decisions tend in the same direction: *White v. Bradley Timber Co.*, 119 Fed. 989; *In re Metzger Toy & Novelty Co.*, 114 Fed. 957; *In re Wright Lumber Co.*, 114 Fed. 1011; *In re Sheridan*, 3 Am. Bank. Rep. 554.

Even though the proceedings by which the mortgagee obtained his lien, three weeks before the filing of the petition, were not proceedings in court, and not legal proceedings if the term is construed narrowly, they were proceedings to enforce his legal rights. If the present case is not covered by the decision in *Wilson v. Nelson*, 183 U. S. 191, 22 Sup. Ct. Rep. 74, the principles upon which the two cases rest are very similar.

In section 3a, one of the acts of bankruptcy mentioned is having "transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors." In the same section under b, the time for filing a petition founded on such an act of bankruptcy is within four months after "the date of the recording or registering of the transfer or assignment . . . if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property unless the petitioning creditors have received actual notice of such transfer or assignment."

In view of these several provisions, and the language of sections 60a and 60b, and the construction put upon the statute by the supreme court of the United States, we are of opinion that, in the case of a preference by way of an unrecorded chattel mortgage, the transfer dates, under the bankruptcy act of 1898 and the amendatory act of February 5, 1903, from the acquisition of possession under the mortgage.

In *Mathews v. Hardt*, 79 N. Y. App. Div. 570, 80 N. Y. Supp. 462, 9 Am. Bank Rep. 373, the appellate division of the supreme court of New York, <sup>365</sup> in a well-considered opinion, made a decision which entirely covers the present case. The court held that the preference should be deemed to have been obtained at the time when possession was taken, though the taking of possession was merely to effectuate an agreement made

in good faith and many months before the prohibited time for making the transfer. The case at bar certainly falls within the spirit and reason of the statute as interpreted in these decisions. The reason for the enactment as it is interpreted is well illustrated by the fact that the mortgagor in this case, less than four months before the proceedings in bankruptcy, made a statement to certain of his creditors and to commercial agencies, that there was no encumbrance on his stock or fixtures, a statement which was literally true if we look only to the state of the title as against creditors, but wickedly false in its understood meaning if the mortgagee, on the eve of the debtor's bankruptcy, could take all of the debtor's property and leave nothing for the other creditors who had trusted him because of his possessions.

Judgment for the plaintiff.

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*Unrecorded Chattel Mortgages* are considered, in respect to their validity and effect, in *Deseret Nat. Bank v. Kidman*, 25 Utah, 379, 95 Am. St. Rep. 856, 71 Pac. 873; *Blumauer v. Clock*, 24 Wash. 596, 64 Pac. 844, 85 Am. St. Rep. 966, and cases cited in the cross-reference note thereto. For recent decisions under the bankruptcy act, see *Fleming v. Courtenay*, 98 Me. 401, 99 Am. St. Rep. 414, 57 Atl. 592; *McKittrick v. Cahoon*, 89 Minn. 383, 99 Am. St. Rep. 606, 95 N. W. 223; *Colwell v. Tinker*, 169 N. Y. 531, 62 N. E. 668, 98 Am. St. Rep. 587, and cases cited in the cross-reference note thereto.

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## McKENZIE v. GLEASON.

[184 Mass. 452, 69 N. E. 1076.]

**DEEDS.—Boundaries on Ways,** public or private, contained in deeds, include the soil to the center of the way, if owned by the grantor, and the way thus referred to is a monument, which controls courses and distances, unless the deed, by explicit statement or necessary implication, requires a different construction. (p. 569.)

**DEEDS.—Boundaries—Ways.**—A boundary in a deed running from "a stake and stones near an old road," thence by said road "to a stake and a pair of bars," includes the fee to the center of such road and a right of way thereon to the grantee and others, when such road is over the land of the grantor and its use is required for the reasonable enjoyment of the land conveyed. (p. 570.)

**DEEDS.—Boundaries—Ways—Estoppel.**—A boundary in a deed as by the designated side of a private road over the land of the grantor, excludes the road, but the grantor is estopped to deny its existence. (p. 571.)

**DEEDS.—Boundaries—Ways—Estoppel.**—A boundary in a deed of land on a private road over land of the grantor carries the land to the center of such road, estops the grantor from denying the

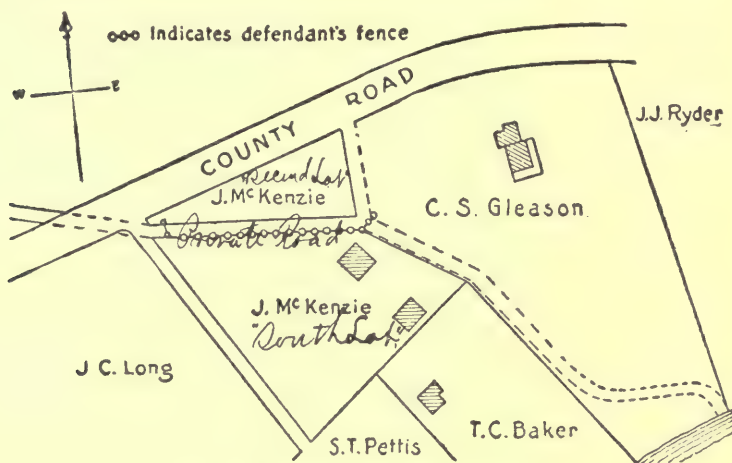
existence of the road, and gives the grantee a right of way through its entire length and width as it existed at the date of his deed. (p. 571.)

**WAYS—Obstruction—Pleading and Evidence—Estoppel.**—If a declaration prays damages for the obstruction of a right of way by a fence, and it is stipulated or agreed by the parties that if plaintiff is entitled to the right of way, the fence constitutes such obstruction as to support the declaration, the defendant is estopped to contend that the evidence shows a fence to exist across the way at a point not included in the description given in the declaration. (p. 572.)

Action to recover for the obstruction of a way and for a trespass. Mrs. E. J. Dana conveyed to plaintiff certain premises, known as his south lot, by deed describing it as follows: "A certain piece or parcel of land situate in that part of Wareham called Long Neck and adjoining a houselot of Thaddeus C. Baker, and bounded as follows: Beginning at the easterly corner of said Baker's lot, and running South  $40^{\circ}$  West, fourteen rods to a cedar post; thence North  $35\frac{1}{4}^{\circ}$  West sixteen rods to a stake and stones near an old road leading to the shore; thence by said road North  $88\frac{3}{4}$  East thirteen rods to a stake by a pair of bars; thence South  $60\frac{1}{2}^{\circ}$  East seven rods to bound first mentioned: containing one hundred and fifty rods more or less." Subsequently one Wixon, who had acquired the adjoining premises through Mrs. Dana, conveyed to the plaintiff, McKenzie, the property known as his second lot, by deed describing it as follows: "A certain lot of land situated in that part of said Wareham called Long Neck and on the southerly side of the state highway, and is bounded as follows: Beginning at a stake at the northeast corner of said lot and the northwest corner of a private road used by Thaddeus C. Baker, and on the southerly side line of the state highway, thence running south  $69^{\circ}$  west by the southerly side line of the state highway two hundred and twenty feet to a stake at the easterly side of a private road, thence South  $11^{\circ} 45'$  East by said private road six feet, thence South  $81^{\circ} 30'$  East by the northerly side of said private road forty-six feet, thence due East also by the northerly side of said private road one hundred and seventy-three and five-tenths feet to the westerly side of the private road first mentioned used by Thaddeus C. Baker aforesaid, thence north  $9^{\circ}$  west by the westerly side of said private road ninety-two and five-tenths feet to the first-mentioned bound." Afterward the premises marked on the plan below attached as the property of "C. S. Gleason," were conveyed to him by said Wixon, who had acquired them through Mrs. Dana. The court ruled that plain-



tiff under his deed to his south lot became entitled to the southerly half of the private road to the shore, as shown by the plan as adjoining his premises, and that the language of the deed to that property carried the northerly line of his land to the center of such road. Defendant excepted.



PLAN OF PREMISES IN DISPUTE.

H. H. Baker and C. F. Chamberlayne, for the plaintiff.

G. W. Stetson and H. Le B. Sampson, for the defendant.

**456** **BRALEY, J.** The question presented for decision is, whether the plaintiff, under the boundaries in his first deed, acquired title to the southerly half of the way, and unless some imperative principle of law requires that the plaintiff cannot have any relief, a construction ought to be given to the deed which will not compel him to use his farm in parts, or exclude him from access to the county road.

The way is either included or excluded by the description in the deed. It cannot reasonably be held, under the language used, to be in part a monument, and in part merely descriptive for the purpose of identifying the line that runs "by the road" from stake to stake. If we exclude the road, the language used runs the line from stake to stake, following the general course of the road as shown on the plan, but in no instance extending beyond the original line so drawn, or in other words, the land of the plaintiff does not reach to or abut on the road: *Motley v. Sargent*, 119 Mass. 231, 235. The word "abuttal" means the same as boundary unless there are words that limit its meaning,

and if the plaintiff abuts on the road, then he is bounded by the road, which is included. "The road is an abuttal, not a monument; and if the deed does not say on what side, it shall be taken to mean the center": Shaw, C. J., in *Smith v. Slocomb*, 9 Gray, 36, 37, 69 Am. Dec. 274. And the words "on the county road" and "by said road" have so been construed by this court: *O'Connell v. Bryant*, 121 Mass. 557; *Dean v. Lowell*, 135 Mass. 55, 60.

A grantee whose land is bounded by a way owned at the time by his grantor may acquire the right to use that way, not only because he gains a fee in half of it, but also, being so bounded, his grantor would be estopped to deny the existence of the way: *Stark v. Coffin*, 105 Mass. 328, 330. In the description in the deed, if it were not for the use of the terms "stake and stones near an old road," and "stake by a pair of bars," no question could arise but that the way was included; and the true test is, What was the intention of the grantor under all the circumstances?

It was said in *Clark v. Parker*, 106 Mass. 554, 556: "In the construction of deeds, where lands are bounded on or by a way, either public or private, the law presumes it to be the intention of the grantor to convey the fee of the land to the center of the way, if his title extends so far. This presumption is, of course, 457 controlled, whenever there are words used in the description showing a different intention. But it has been held that giving measurement, in the deed, of side lines, which reach only to the outer line of the way, are not alone sufficient to overcome it."

The earlier cases were apparently in conflict with this rule of construction. "In some opinions of this court it has indeed been implied or asserted that a boundary upon a road or street passed no title in the land under it. But in the more recent decisions the general rule has been repeatedly declared, and must now be regarded as the settled law of the commonwealth, overruling whatever is irreconcilable in the earlier cases, that a deed bounding land generally by a highway, with no restrictive or controlling words, conveys the grantor's title in the land to the middle of the highway": Gray, J., in *Boston v. Richardson*, 13 Allen, 146, 152; *Phillips v. Bowers*, 7 Gray, 21, 24. Compare *Crocker v. Cotting*, 166 Mass. 183, 187, 44 N. E. 214.

It is now too late to doubt the general rule as to boundaries by, or on, a street or way either public or private, which may be stated in the language used in *Peck v. Denniston*, 121 Mass.

17, 18, as follows: "The general rule is well settled that a boundary on a way, public or private, includes the soil to the center of the way, if owned by the grantor, and that the way, thus referred to and understood, is a monument which controls courses and distances, unless the deed by explicit statement or necessary implication requires a different construction." Any argument that may be advanced by the defendant founded upon the fact that the side lines run in the first instance to a stake and stones near the way, and in the second from a stake near a pair of bars, and therefore the intention of the grantor was to exclude the way, must be considered with the further facts that after leaving the bars the boundary as shown on the plan still continues for an appreciable distance by the road to the starting point, which was a corner of land that bounded on the road. And if it was not the intention of Eliza J. Dana to grant to the plaintiff the use of the way, then she had sold a tract of land to the plaintiff to which he could not obtain access without becoming a trespasser, or else be forced to rely on a way by necessity over her remaining land. "The law presumes that one will not sell land to another without an understanding that the grantee shall have a legal right of <sup>458</sup> access to it, if it is in the power of the grantor to give it, and it equally presumes an understanding of the parties that one selling a portion of his land shall have a legal right of access to the remainder over the part sold if he can reach it in no other way": *New York etc. R. R. Co. v. Railroad Commrs.*, 162 Mass. 81, 83, 38 N. E. 27.

It is true that this language was used in considering a right of way arising from necessity, but it is equally applicable to the facts disclosed by this case. In the light of these circumstances the presumption is strong that the grantor did not intend such a result, and the operation of the rule is not to be controlled by a possible, but not reasonable, construction, that the length of the side lines of the lot might exclude any part of the road. Under somewhat similar conditions a like conclusion was reached in principle, in the following cases: *White v. Godfrey*, 97 Mass. 472, 474; *Motley v. Sargent*, 119 Mass. 231; *O'Connell v. Bryant*, 121 Mass. 557; *Dean v. Lowell*, 135 Mass. 55; *Dodd v. Witt*, 139 Mass. 63, 65, 52 Am. Rep. 700, 29 N. E. 475, and cases cited; *Gould v. Eastern R. R. Co.*, 112 Mass. 85, 89, 7 N. E. 543; *Chadwick v. Davis*, 143 Mass. 7, 9, 8 N. E. 601; *Kelley v. Saltmarsh*, 116 Mass. 585, 16 N. E. 460; *Lemay v. Furtado*, 182 Mass. 280, 65 N. E. 395.

A majority of the court is of opinion that by his deed the plaintiff took in fee to the center of the road, with a right of way over the north half; while the half belonging to him was subject to a like easement on the part of others having a right to enter upon and use the way: *Boland v. St. John's Schools*, 163 Mass. 229, 236, 39 N. E. 1035, and cases cited.

For reasons already stated, the description in the deed of the second lot, which is bounded in part by the county road and on its southerly side by the northerly line of the private road, gives the plaintiff no title to any part of the way, as the boundary is expressly limited to its side line. The road evidently was referred to for the purpose of description only, and the deed cannot fairly be held to impart a grant of anything beyond the boundary named. It was clearly the intention of the grantor that the way was to be excluded. The plaintiff, however, does not rest his case solely upon the ground discussed; but also claims that by the description in each deed, whether bounded by the side of the road or by the way itself he gained an easement in the road as it then was for the purpose of travel, <sup>459</sup> either on foot or by carriage throughout its entire length and width as it existed at the date of his deeds. The instructions of the presiding judge at the trial adopted this view. By the description of the second lot the road was excluded, and the defendant was not estopped to deny its existence.

But as to the first lot this position is well taken on the evidence and is amply supported by our decisions. There was an implied covenant that the road was in existence, and it must be held to have passed as appurtenant to the plaintiff's estate: *Parker v. Smith*, 17 Mass. 413, 9 Am. Dec. 157; *Stark v. Coffin*, 105 Mass. 328; *Tobey v. Taunton*, 119 Mass. 404, 410; *Lemay v. Furtado*, 182 Mass. 280, 65 N. E. 395, and cases cited. If the plaintiff had a right to use the way in connection with this lot, any obstruction of it by the defendant which prevented or obstructed such use was a trespass, and he is not harmed by the error in the instructions.

There remains to be considered the question of pleading. The third and fourth counts described the plaintiff's close as an entire estate without reference to the way, and the alleged acts of trespass by the defendant are its obstruction by the fence, the cutting down of a shade tree, and disturbance of the soil by digging post holes for the setting of the fence, which was all within the south half of the way that passed to the plaintiff under his deed. The third count describes the way as leading from the



county road to the plaintiff's land, and it is now contended by the defendant that under this allegation the plaintiff is limited in his proof of the alleged tortious acts to this description, and that the building of the fence across the way at the point where it first enters upon the defendant's homestead is not within the allegation. But the allegation is to be treated as a description of the way for the purpose of identification and must have been so understood, as it is immediately followed by the words "and the defendant erected a fence at two places on the same, so that the plaintiff could not use the same."

The answer to this contention, however, is that it appears from the bill of exceptions that "it is agreed that if the plaintiff does own the south half of the way, the tree was on his land, and the removal of it constituted a trespass, and that if the <sup>460</sup> plaintiff has a right of way over said road, the fence constituted such an obstruction of it as to support the third count."

The instructions of the presiding judge were undoubtedly predicated upon this agreement, which was broad enough to cover any obstruction of the way caused by the erection of the fence in any part of it; and they are not open to this criticism or exception of the defendant.

Exceptions overruled.

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*If a Deed Bounds the Land* conveyed by a street or highway, the presumption is that the conveyance carries the fee to the center of the street or highway. But a deed does not carry title to the center of the street when it calls specifically for the side of the street; and where a deed bounds a lot by stones "on the side of the road," and answers the call for quantity without the road, it does not convey to the center of the road: *Note to Firmstone v. Spaeter*, 30 Am. St. Rep. 853. See, also, *Thompson v. Maloney*, 199 Ill. 276, 93 Am. St. Rep. 133, 65 N. E. 236; *Firmstone v. Spaeter*, 150 Pa. St. 616, 30 Am. St. Rep. 851, 25 Atl. 41; *Graham v. Stern*, 168 N. Y. 517, 85 Am. St. Rep. 694, 61 N. E. 891.

*When One Conveys Land Bounding it on a way or street*, he and his heirs are estopped to deny that there is such a way or street: *Teasley v. Stanton*, 136 Ala. 641, 96 Am. St. Rep. 88, 33 South. 823. See, also, *Roberts v. Mathews*, 137 Ala. 523, 97 Am. St. Rep. 56, 34 South. 624.

## NASHUA SAVINGS BANK v. SAYLES.

[184 Mass. 520, 69 N. E. 309.]

**NEGOTIABLE INSTRUMENTS—Conflict of Laws—Demand and Notice to Indorser.**—If a bank in one state holding an overdue note made and indorsed in another, asks the maker for a new note with the same indorser to take up the old note, and such maker sends a new note for a smaller amount, payable at such bank and signed in blank upon the back by such indorser, together with a check for the balance, whereupon the bank returns the old note, the new note takes effect, as a contract, when accepted by the bank with the check in payment of the old note, and such contract is governed, as to demand and notice to the indorser, by the law of the state in which such bank is located. (p. 574.)

**NEGOTIABLE INSTRUMENTS—Demand and Notice—Indorser.**—A person who signs a note in blank upon the back is liable, under the law of New Hampshire, as a joint maker, without demand upon the other maker, or a notice of his failure to pay it. (p. 574.)

**NEGOTIABLE INSTRUMENTS—Liability of Indorser of New Note Given for Old One—Consideration.**—The surrender of an overdue note is a good consideration for a new note given in part payment of the old one and signed as a joint maker by the indorser of the old note, when such surrender is made in reliance upon his signature. It is immaterial that he was not liable on the old note for want of notice of nonpayment, and that he received no personal benefit from signing the new one. (pp. 574, 575.)

A. S. Hall, for the plaintiff.

W. A. Abbott, for the defendant.

**521** KNOWLTON, C. J. The plaintiff, a corporation established under the laws of New Hampshire, held an overdue note for two thousand three hundred dollars, signed by one Weeks and indorsed by the defendant, upon which there had been no demand or notice. On May 6, 1891, more than five years after its maturity, the plaintiff's treasurer wrote to the maker in Boston, suggesting that at the time when the next payment of interest should become due, on June 1st, he should send a note indorsed by the defendant to take up the old one. Weeks replied immediately, saying that the defendant was away, and that he would attend to the matter **522** on the defendant's return. On May 15th he wrote again to the plaintiff's treasurer, asking for a blank in the form which the bank used, and a blank was sent to him. On May 31, 1890, he sent the note in suit, for two thousand dollars, bearing date Boston, May 31, 1890, payable at the plaintiff's bank in Nashua, New Hampshire, six months after date, and signed by Weeks, with the signature of

the defendant on the back. In the letter inclosing it he wrote, "I inclose herewith a new note for the Sayles note (two thousand dollars instead of two thousand three hundred dollars) and check for three hundred and sixty dollars which I believe pays the interest up to Dec. 1/90. Please send me the old note." On the receipt of the new note and the check, the plaintiff returned the old note.

Upon these facts there is no doubt that the note in suit first took effect as a binding contract when it was received by the plaintiff bank at Nashua and accepted with the check in payment of the old note. Until then the old note remained in force, and there had been no contract between the parties that took the place of it. The suggestion of the plaintiff was that a new note should be given on June 1st, and this note was mailed at Boston on May 31st. Nothing had been said or written by either party in regard to making the new note for a smaller sum than the old one. When the note arrived the plaintiff was at liberty to decline to accept payment in cash for a part of the old note, with a new note for the balance. It might have said, "You must give a note for the whole amount or cash for the whole." It chose to accept the note in suit, and then first the note was delivered, and then and there the contract was made. It was therefore a New Hampshire contract on which the plaintiff now brings suit, and not a Massachusetts contract: *Lawrence v. Bassett*, 5 Allen, 140; *Milliken v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241; *Hill v. Chase*, 143 Mass. 129, 9 N. E. 30; *Baxter National Bank v. Talbot*, 154 Mass. 213, 28 N. E. 163. It is unnecessary to consider whether under the circumstances of this case, the fact that the note was made payable in New Hampshire would also make the laws of that state applicable to it: See *Andrews v. Pond*, 13 Pet. 65; *Bell v. Bruen*, 1 How. 169; *Tilden v. Blair*, 21 Wall. 241; *Coghlan v. South Carolina R. R. Co.*, 142 U. S. 101, 109, 12 Sup. Ct. Rep. 150; *Staples v. Nott*, 128 N. Y. 403, 26 Am. St. Rep. 480, 28 N. E. 515; *New York Life Ins. Co. v. McKellar*, 68 N. H. 326, 44 Atl. 516.

Under the laws of New Hampshire a person who signs a note **523** in blank upon the back, as this defendant signed, is liable as a joint maker, without a demand upon the other maker or a notice of his failure to pay it.

The defendant's contention that the note was without consideration cannot be sustained. It is immaterial that the defendant was not then liable upon the old note, and that he received

no personal benefit from his signing. It is enough that the plaintiff gave up the old note for this, relying upon his signature. Judgment affirmed.

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*The Place Where a Note is Made* is not the place where it is written, signed, and dated, but the place where it is delivered: *Barrett v. Dodge*, 16 R. I. 740, 27 Am. St. Rep. 777, 19 Atl. 530. And the law of the place where a contract or note is by its terms to be performed or paid usually determines its validity: *Bigelow v. Burnham*, 83 Iowa, 120, 32 Am. St. Rep. 294, 49 N. W. 104. See, too, *Guignon v. Union Trust Co.*, 156 Ill. 135, 47 Am. St. Rep. 186, 40 N. E. 556. The liability of an indorser is determined by the law of the place of indorsement: *Alabama Nat. Bank v. Rivers*, 116 Ala. 1, 67 Am. St. Rep. 95, 22 South. 580. See, also, *Limerick Nat. Bank v. Howard*, 71 N. H. 13, 93 Am. St. Rep. 489, 51 Atl. 641. But the place of indorsement is the place of effectual transfer, not the place of the mere act of writing: *Rose v. Park Bank*, 20 Ind. 94, 83 Am. Dec. 306. A note having been indorsed by the payee at his residence in Michigan, but made payable in Illinois, was held to be governed as to enforcement against the indorser by the law of the latter state: *Wooley v. Lyon*, 117 Ill. 244, 57 Am. Rep. 867. See, also, *Staples v. Nott*, 128 N. Y. 403, 26 Am. St. Rep. 480, 28 N. E. 515.

*The Effect of Writing One's Name on the Back of a Note* before delivery is discussed in the monographic note to *Cadwallader v. Hirshfeld*, 72 Am. St. Rep. 676-684; *Dow Law Bank v. Godfrey*, 126 Mich. 521, 86 Am. St. Rep. 559, 85 N. W. 1075.

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## GARGANO v. POPE.

[184 Mass. 571, 69 N. E. 343.]

**CONTRACTS—Champerty.**—A contract by an attorney to prosecute an action for a percentage of the proceeds without compensation in case of failure, and in case of success a debt for services not being in the contemplation of the parties, is void for champerty. (p. 576.)

**EQUITY—Jurisdiction.**—Although a plaintiff in equity could have set up the facts on which he relies as an equitable defense to an action at law, this does not deprive a court in equity of jurisdiction. (p. 576.)

**EQUITY—Jurisdiction—Champerty.**—A court of equity has jurisdiction to set aside a contract void for champerty, on the ground of constructive fraud. (p. 576.)

**CONTRACTS Void for Champerty—Setting Aside in Equity -- Estoppel.**—A person who has made a contract with an attorney, which is void for champerty, is not estopped, as one in *pari delicto*, from setting it aside in equity. The rule that one must come into equity with clean hands does not apply. (p. 576.)

A. D. Hill and L. E. Wyman, for the plaintiff.

S. H. Tyng, for the defendants.



**573** LORING, J. The only exception to the master's report taken by the defendants Tebbetts and Dowd is that he erred in his finding of law that the agreement in question was void for champerty.

The master's finding is as follows: "Findings of Law. . . . I find that the said agreement is void for champerty. It is a contract by the defendants to prosecute a suit at law for a percentage of the proceeds. There is no indication that there was to be any compensation in case of failure, and in case of success a debt for services was not in the contemplation of the parties. The provision as to lien was inserted to give the defendants a more secure hold on the proceeds."

The parties reduced their agreement to writing, and we agree with the master in the construction to be given to that agreement. The cases are reviewed in *Hadlock v. Brooks*, 178 Mass. 425, 59 N. E. 1009, and nothing need be added here.

**574** Apart from the objection that the defendants waived their demurrer (if the part of the answer relied on be taken to be a demurrer) by going to a hearing on the merits, there is nothing in the objection that the facts relied on as entitling the plaintiff to relief could have been set up as an equitable defense. That does not bar the plaintiff from obtaining relief in a court of equity if the court has jurisdiction: *Cook v. Richardson*, 178 Mass. 125, 59 N. E. 675.

There is a jurisdiction in equity to relieve against a void contract made by a solicitor on the ground of constructive fraud, of which equity has jurisdiction. For an instance of the exercise of a similar jurisdiction, see *Reynell v. Sprye*, 1 De Gex, M. & G. 660. See, also, *O'Brien v. Lewis*, 32 L. J. Eq., N. S., 569.

Since Statutes of 1877, chapter 178, now Revised Laws, chapter 159, section 1, this court has full equity jurisdiction. The cases are collected in *Niles v. Graham*, 181 Mass. 41, 62 N. E. 986.

The allegation in the bill admitted by the answer "that at the time of the execution of said agreement . . . [these defendants] . . . were acting as attorneys for the plaintiff in the matter of her said claim against the [other] defendants" does not prevent this conclusion. The agreement covers the "services rendered and to be rendered."

The plaintiff is not barred of her remedy as one in *pari delicto*, or who has not come into equity with clean hands. The money has not been paid to the attorneys and therefore it is not necessary to go so far as the court went in *Reynell v. Sprye*,

1 De Gex, M. & G. 660; Cox v. Donnelly, 34 Ark. 762; Hale v. Sharp, 4 Cold. 275.

Decree affirmed.

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*Champerty and Maintenance* are discussed in the monographic notes to Thallhimer v. Brinckerhoff, 15 Am. Dec. 316-322; Bowman v. Phillips, 13 Am. St. Rep. 297-300. An attorney's compensation may be made contingent upon his success, and be made payable by percentage or otherwise out of the proceeds of the litigation. Such contracts are common, and while their propriety has vehemently been debated, they are not illegal and are steadily enforced: See the monographic note to Shirk v. Neible, 83 Am. St. Rep. 175, on contracts between attorney and client. Consult, also, Lynde v. Lynde, 64 N. J. Eq. 736, 97 Am. St. Rep. 692, 52 Atl. 694; Davis v. Chase, 159 Ind. 242, 95 Am. St. Rep. 294, 64 N. E. 88, 853.

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## SEARS v. CROCKER.

[184 Mass. 586, 69 N. E. 329.]

**EASEMENTS in Streets—Additional Servitudes.**—The owner of land taken for a public street holds it subject to the right of appropriation of the space above and below the surface for the purpose of public travel without compensation. (p. 579.)

**EASEMENTS in Streets—Additional Servitude—Subway.** The construction of a subway for public travel below the surface of a public street imposes no additional servitude on land owned by abutters to the center of the street, for which they are entitled to compensation. (p. 579.)

**MUNICIPAL CORPORATIONS—Property in Subways.**—A statute providing that a city "shall have, hold and enjoy in its private or proprietary capacity, for its own property" the several subways and a tunnel built and to be built under existing statutes, gives title to such subways and tunnel merely as structures, but does not transfer to the city the title to the land occupied by such structures. (p. 580.)

J. C. Gray, E. W. Hutchins, L. S. Dabney and E. G. Loomis,  
for the plaintiffs.

T. M. Babson, for the defendants.

**587** KNOWLTON, C. J. These three cases present the same questions, and they may be considered together in one opinion. They are bills in equity to obtain an injunction against the defendants as members of the Boston transit commission, to prevent the construction of a subway and tunnel from Scollay Square to East Boston through public streets in front of the

premises of the several plaintiffs, without a formal taking of land in the streets. The plaintiffs contend that the construction of the tunnel or subway, without a formal taking of land in the streets, is unauthorized and illegal, because it would impose an additional servitude upon lands previously taken for streets and in that way would deprive the plaintiffs of property as owners of the fee in parts of these streets, and because the Statutes of 1894, chapter 548, section 31, provides for the taking of property "held under or by title derived under eminent domain, or otherwise." They also say that their position is established and their contention confirmed by the provisions of the Statutes of 1902, chapter 534, section 19, that "The city shall have, hold and enjoy in its private or proprietary capacity, for its own property, the existing subway, the East Boston tunnel, the Cambridge street subway and the tunnel and subway built under this act," etc.

The question whether the construction of the tunnel will create an additional servitude upon the plaintiffs' lands in the public streets lies at the foundation of these cases, and should be answered at the outset. The rules and principles applicable to such questions have often been considered by this court: *Attorney General v. Metropolitan Railroad*, 125 Mass. 515, 28 Am. Rep. 264; *Pierce v. Drew*, 136 Mass. 75, 49 Am. Rep. 7; *Lincoln v. Commonwealth*, 164 Mass. 1, 41 N. E. 112; *Howe v. West End St. Ry.*, 167 Mass. 46, 44 N. E. 386; *White v. Blanchard Brothers Granite Co.*, 178 Mass. 363, 59 N. E. 1025; *New England Tel. etc. Co. v. Boston Terminal Co.*, 182 Mass. 397, 65 N. E. 835; *Eustis v. Milton Street Ry. Co.*, 183 Mass. 586, 67 N. E. 663. In the last two cases the doctrine was stated broadly, in accordance with previous decisions, that this public easement includes "every kind of travel and communication for the movement or transportation of persons or property which is reasonable and <sup>588</sup> proper in the use of a public street." In the early settlement of the country and in the location of streets in later times, these ways were appropriated to the use of the public for the movement of persons and property from place to place, just as the adjacent lands were appropriated to the use of private owners. The original proprietors of lands in Boston and the original proprietors of lands in New York did not foresee the growth of population and business which has induced land owners in the largest cities to erect buildings fifteen or twenty stories high, or more, and to excavate under them basements and cellars and subcellars to be ventilated by the

use of engines to be lighted by electricity, and filled with merchandise. They did not think that the surface of the streets would be insufficient for the use of the people with convenience and comfort in moving to and fro and passing in and out in the transaction of business or the pursuit of pleasure. It is now a fact of common knowledge that the streets of those parts of Boston which are most crowded are entirely inadequate to accommodate the public travel in a reasonably satisfactory way if the surface alone is used. Our system, which leaves to the land owner the use of a street above or below or on the surface, so far as he can use it without interference with the rights of the public, is just and right, but the public rights in these lands are plainly paramount, and they include, as they ought to include, the power to appropriate the streets above or below the surface as well as upon it, in any way that is not unreasonable, in reference either to the acts of all who have occasion to travel or to the effect upon the property of abutters. The increase of requirements for the public within the streets of our large cities has probably equalled, if it has not surpassed, the increase of requirements for business along the streets.

The legislature, the guardian of public interests and of private rights, has determined that the space below the surface of certain streets in Boston is needed for travel. The question is whether action under the statutes involves an acquisition of a new right as against the land owner, or only an appropriation and regulation of existing rights. It hardly can be contended that this is an unreasonable mode of using the streets in reference either to travelers or abutters. If it is not an unreasonable mode of <sup>589</sup> using them, the mere fact that it deprives abutters of the use of vaults and other similar underground structures in the streets, which they have heretofore maintained, is of little consequence. Abutters are bound to withdraw from occupation of streets above or below the surface whenever the public needs the occupied space for travel. The necessary requirements of the public for travel were all paid for when the land was taken, whatever they may be, and whether the particulars of them were foreseen or not. The only limitation upon them is that they shall be of a kind which is not unreasonable.

In the present case the travel which is being provided for is from place to place within the city. There are stopping-places on the subway at convenient points. In that respect it is different from a tunnel designed only or chiefly for travel for long distances. The new method is a substitution in part of



a subterranean use of the streets for a use of their surface for the same general purpose. It is impracticable to have direct communication between the premises of abutters and the cars in the tunnel, but by going a short distance access to them may be had from any place. We are of opinion that this use of the streets is within the purposes for which the lands were taken and that no additional servitude is created by it.

The cases bearing upon this subject which have been decided in other courts differ so much from this in their facts and in the legislation to which they relate that they are not very important: See *Ramsden v. Manchester etc. Ry.*, 1 Ex. 723; *In re New York Dist. Ry.*, 107 N. Y. 42, 52, 14 N. E. 187; *Hodgkinson v. Long Island R. R. Co.*, 4 Edw. Ch. 411; *Adams v. Saratoga etc. R. R. Co.*, 11 Barb. 414; *Chicago v. Rumsey*, 87 Ill. 348; *Summerfield v. Chicago*, 197 Ill. 270, 282, 64 N. E. 490, 494; *Baltimore etc. R. R. Co. v. Reaney*, 42 Md. 117.

The authority to take lands, conferred upon the defendants by the Statutes of 1894, chapter 548, section 31, although it includes land taken and held under the right of eminent domain, does not imply that there is no right to use the public ways without such taking. Indeed, the first part of the section gives the right to use these ways before it refers to the subject of taking. It then goes on to authorize the taking of private property, and closes by giving a broad general authority.

590 Nor is the Statutes of 1902, chapter 534, section 19, so significant in their favor as the plaintiffs contend. It declares that "the city shall have, hold and enjoy in its private or proprietary capacity, for its own property," the several subways and the tunnel built and to be built under the statutes that have been passed. This is in accordance with the previous intimations of this court as to ownership of the subway first constructed: *Mahoney v. Boston*, 171 Mass. 427, 429, 50 N. E. 939; *Browne v. Turner*, 176 Mass. 9, 13, 56 N. E. 969. But it does not purport to give a private proprietary right to anything more than the subways and tunnels as structures. It does not deal with the rights of the public to use the streets, or with any right of private property in the streets themselves. It leaves the subways lawfully resting in the public streets by virtue of the rights of the public therein, and it gives the city the same kind of ownership of the structures that gas companies and electric lighting companies have in their pipes and conduits, except that the city is charged with certain special trusts in the ownership of these subways. This provision of the statute does

not purport to take from land owners on the streets any part of their property.

The statute gives damages to all persons injured in their property by the acts of the commission, but the question whether these plaintiffs are entitled to damages under this provision is not before us.

Bills dismissed.

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*The Operation of Street Railways* does not impose an additional servitude upon a public street: San Antonio etc. Ry. Co. v. Limberger, 88 Tex. 79, 30 S. W. 533, 53 Am. St. Rep. 730, and cases cited in the cross-reference note thereto; Doane v. Lake St. etc. Ry. Co., 165 Ill. 510, 56 Am. St. Rep. 265, 46 N. E. 520; Baker v. Selma etc. Ry. Co., 135 Ala. 552, 93 Am. St. Rep. 42, 33 South. 685. It has been held otherwise, however, where the railway is for the transportation of merchandise as well as passengers: Chicago etc. Ry. Co. v. Milwaukee etc. Ry. Co., 95 Wis. 561, 60 Am. St. Rep. 136, 70 N. W. 678. As to whether the erection of telephone poles constitutes a new servitude, see Donovan v. Allert, 11 N. Dak. 289, 95 Am. St. Rep. 720, 91 N. W. 441.

CASES  
IN THE  
SUPREME COURT  
OF  
MICHIGAN.

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HAMMOND v. EDISON ILLUMINATING COMPANY.

[131 Mich. 79, 90 N. W. 1040.]

**CORPORATIONS—Increase in Stock—Rights of Subsisting Stockholders.**—If a corporation increases its capital stock, an existing stockholder is entitled to subscribe for his pro rata share of the increased stock at par, and the majority of the stockholders cannot put a premium on the new stock in the absence of express authority. (p. 584.)

The statute referred to in the opinion reads as follows: "The amount of capital stock in every corporation formed under this act shall not be less than ten thousand dollars and shall be fixed and limited by the stockholders in their articles of association, and shall be divided into shares of twenty-five dollars each; but every such corporation may increase its capital stock and the number of shares therein at any meeting of the stockholders called for that purpose, or at any annual meeting, by a vote of two-thirds in interest of the stockholders. The amount of capital stock shall not exceed five million dollars."

T. A. E. Weadock, for the relator.

J. H. Bissell, for the respondent.

80 MOORE, J. This statement of facts and the claims of the parties is taken from the brief of counsel for respondent:

The petition asked for a writ of mandamus requiring the Edison Illuminating Company of Detroit to issue to the relator twenty-seven shares of the common capital stock at par, for which he has subscribed and tendered to the company the par

value, twenty-five dollars for each share. The shares so claimed are a part of an increase of the common capital stock of said company voted at a recent stockholders' meeting, and the amount to which the relator would be entitled as his proportionate share, he being a stockholder of the company. The meeting at which the increase of stock was voted was the regular annual stockholders' meeting of the Edison Illuminating Company of Detroit, held on the twenty-seventh day of January, 1902, in the city of Detroit. The notice of said meeting was in accordance with the by-laws of the corporation, and contained an express statement that a proposal to increase the capital stock of said company from \$900,000 par value to \$1,000,000 would be submitted to said stockholders for action. Of the 36,000 shares of said company's stock outstanding, 28,349 shares were represented at the meeting and the affirmative vote on the resolution to make the increase of stock was 27,849 shares, which is more than two-thirds. The relator's 140 shares were voted in the negative, and 360 shares did not vote, as the proxy was limited to election of directors.

81 The action taken at the stockholders' meeting to which the relator objects was: "That said new stock be offered to the present stockholders for subscription at the price of \$31.25 per share (which is a premium of twenty-five per cent), to be paid for on or before March 1, 1902, and that such of said stock as is not subscribed by the present stockholders on or before the 15th day of February, 1902, be sold by the officers to new stockholders, for the best interests of the company."

It is conceded relator was entitled to twenty-seven shares of the increase, that he made a lawful tender of the par value of the shares to the company within the time prescribed by the action of the stockholders, and that the tender was refused because it did not comply with the requirements of the stockholders' action.

The other facts set up by the answer are that on the 27th of January, 1902, the Edison Illuminating Company of Detroit owed the sum of \$138,537.78 upon bills payable. This indebtedness represented money borrowed from time to time to pay for new machinery purchased and installed in its plants, in improvements of various kinds upon said plants, and in the extension of the company's lines, both underground and overhead, in the city of Detroit. Such indebtedness was necessarily incurred to increase the company's manufacturing facilities, and the extension of its lines, to provide for the natural increase of its busi-



ness. Such increase of plants and facilities is a part of the capital investment of said company, and required the proposed increase in the company's capital stock to provide substantially for the indebtedness so incurred. The company has no issue of bonds or other outstanding obligations except such temporary loans, but has always provided for extensions of its plant and lines by increasing its capital stock as the growth of its business required.

The sole question in the case is whether a stockholder, under such circumstances, has a right to subscribe for his proportionate part of the increase of the company's capital stock at par; or, in other words, whether two-thirds, the <sup>82</sup> statutory majority, of the capital stock legally represented at a meeting duly called for that purpose, can, under the fourth subdivision of section 2 (section 7038) of chapter 188, 2 Compiled Laws, provide and require that the shares of stock representing the increased capital may only be subscribed for by the present stockholders at a premium above par, not exceeding the market value of the stock. The relator claims the right to subscribe for his proportionate part at par, and that the action of the stockholders fixing the price of purchase at a premium is an invasion of his rights, and that he is entitled to a writ of mandamus requiring the company to accept his tender, and issue to him twenty-seven shares on his paying par therefor. The respondent's position is that, under the Michigan statute cited above, the body of stockholders have abundant authority, in voting the increase of the capital stock, to fix a reasonable time and manner in which the stockholders shall exercise their right of subscribing for their proportionate shares, and that so long as all stockholders are treated alike, so that no one secures an advantage over another, they can fix (within reasonable limits—say, under market value) the price at which the stockholders' right of subscription shall be exercised. Respondent also claims that a corporation has rights distinct from the rights of the individual stockholders, which should be protected in taking action for increase of capital. When the proper action has been taken under the statute, and the increase of capital is ready for subscription and allotment, it is the property of the corporation which is to be sold for the purpose of raising money to discharge the indebtedness of the corporation, or to purchase property to be used by the corporation in the conduct of its business and the exercise of its legal functions. The payment of such debt or the purchase of such property is for the common good of the company and all

the shareholders, and it is to the advantage of all interested that the stock shall be sold for as near its market value as it may be.

The question involved has not been passed upon by the <sup>83</sup> courts in this state. In Taylor on Private Corporations, section 569, it is said: "If the capital stock is increased by the proper authorities, the right to take the additional shares vests in the shareholders pro rata. This right may be waived; but the directors cannot deprive a shareholder of it, nor burden it with conditions unauthorized by the charter or enabling act—as, for instance, the payment of so much per share for the privilege of subscribing. Accordingly, when a corporation is issuing new stock generally, and refuses to issue to a shareholder his due proportion, he can compel it to do so by a suit in equity; at least so long as there remains stock undisposed of."

In 2 Thompson on Corporations, section 2094, it is said: "Where the corporation increases its capital stock, or declares and issues what is sometimes called a stock dividend, the new stock must be distributed ratably among the subscribers to the old stock, or else sold to create a fund which inures to the common benefit. Each stockholder, it has been held, has a right to the opportunity to subscribe for and take the new or increased stock in proportion to the old stock held by him; so that a vote at a stockholders' meeting directing the new stock to be sold, without giving to each stockholder such an opportunity, is void as to any dissenting stockholder. Some observations of the court in support of this conclusion deserve to be quoted. Gillfillan, C. J., said: 'When the proposition that a corporation is trustee of the corporate property for the benefit of the stockholders, in proportion to the stock held by them is admitted (and we find no well-considered case which denies it), it covers as well the power to issue new stock as any other franchise or property which may be of value, held by the corporation. The value of that power, where it has an actual value, is given to it by the property acquired and the business built up with the money paid in by the subsisting stockholders. It happens not infrequently that corporations, instead of distributing their profits in the way of dividends to stockholders, accumulate them till a large surplus is on hand. No one would deny that in such case each stockholder has an interest in the surplus, which the courts will protect. No one would claim that the officers, directors, or majority of the stockholders, without the consent of all, could give away the surplus, or devote it to any other than the general purposes of the corporation. But when new stock

is issued, each share <sup>84</sup> of it has an interest in the surplus equal to that pertaining to each share of the original stock; and if the corporation, either through the officers, directors, or a majority of stockholders, may dispose of the new stock to whomsoever it will at whatever price it may fix, then it has the power to diminish the value of each share of old stock by letting in other parties to an equal interest in the surplus, and in the good will or value of the established business': *Jones v. Morrison*, 31 Minn. 140, 152, 16 N. W. 854."

Section 2097 reads: "An early case in Massachusetts (*Gray v. Portland Bank*, 3 Mass. 364, 3 Am. Dec. 156) hold that a stockholder in a bank that is authorized to commence business with one amount of stock, and to increase the amount afterward, is entitled to subscribe for and hold the additional stock in proportion to his original shares; and the bank is liable to him if its officers, or the corporation, refuse to allow him thus to subscribe therefor; and the measure of damages will be the excess of the market value above the par value of the number of shares to which he was entitled, with interest on such excess."

Section 2098 is as follows: "From this principle it also follows that, where there is a statute permitting corporations to increase their capital stock by increasing the number of their shares, which shares are to be allotted pro rata to the stockholders according to their respective interests, it is not competent for the corporation to charge a bonus to the shareholders who receive the new shares in distribution, and that equity should enjoin the company from refusing to allowing a stockholder to receive his allotment at par without paying a bonus." See, also, 2 Beach on Private Corporations, sec. 473; 2 Clark & Marshall on Private Corporations, sec. 408; 1 Cook on Corporations, sec. 286; 1 Morawetz on Private Corporations, sec. 454; *Jones v. Morrison*, 31 Minn. 140, 16 N. W. 854; *Gray v. Portland Bank*, 3 Mass. 364, 3 Am. Dec. 156; *Cunningham's Appeal*, 108 Pa. St. 546; *Dousman v. Wisconsin etc. Smelting Co.*, 40 Wis. 418; *Jones v. Concord etc. R. R. Co.*, 67 N. H. 234, 68 Am. St. Rep. 650, 30 Atl. 614; *Eidman v. Bowman*, 58 Ill. 444, 11 Am. Rep. 90; *Dawson v. Insurance Co.*, 5 Ry. & Corp. L. J. 154; *State v. Smith*, 48 Vt. 266. It is also said: "Any stockholder may sell his <sup>85</sup> right to subscribe for his proportion of the new stock": 1 Cook on Corporations, 4th ed., 558; *Jones v. Concord etc. R. R. Co.*, 67 N. H. 234, 68 Am. St. Rep. 650, 30 Atl. 614; *Electric Co. of America v. Edison Electric Illuminating Co.*, 200 Pa. St. 516, 50 Atl. 164.

It would seem from these authorities that the right to subscribe for any increase of stock at par if he desires to do so, or to sell that right if he does not desire to exercise it himself, is one of the rights acquired by the stockholder when he becomes a subscriber to the stock. If the business is profitable, the stock may be worth much more than par. If it is, it becomes so because of the investment and use of the money put into the business by the original stockholders, and we can see no hardship done to anyone when this fact is recognized. Of course, if the original stockholder does not avail himself of his right, either by exercising it within a reasonable time or giving to some one else the right to do so, the corporation may reap the advantage of his failure to do so. Notwithstanding the zeal of the very able counsel engaged in the case, our attention is not called to an authority which holds that an original stockholder is not entitled to his pro rata share of stock upon tendering its par value. We have been unable to find such an authority.

The judgment of the court below in issuing the writ of mandamus is affirmed.

Hooker, C. J., Grant and Montgomery, JJ., concurred.

Long, J., did not sit.

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*When the Capital Stock* of a corporation is increased, the original stockholders ordinarily have a right to subscribe for and hold the new stock: *Humboldt Driving Park Assn. v. Stevens*, 34 Neb. 528, 33 Am. St. Rep. 654, 52 N. W. 568; *Gray v. Portland Bank*, 3 Mass. 364, 3 Am. Dec. 156; *Luther v. Luther Co.*, 118 Wis. 112, 99 Am. St. Rep. 977, 94 N. W. 69. The general custom is to compel the stockholders to buy the new stock at par, or to sell the right to buy it at that price, in order to save the corporate interests: *Jones v. Concord etc. R. R. Co.*, 67 N. H. 234, 68 Am. St. Rep. 650, 30 Atl. 614.



## PEOPLE v. HULBERT.

[131 Mich. 156, 91 N. W. 211.]

**RIPARIAN OWNERS—Relative Rights.**—Each riparian owner on a stream or inland lake has an equal right to the use of the water for ordinary purposes, even though such use may in some degree lessen the volume of the water or affect its purity. It makes no difference that the lower proprietor is a municipality instead of an individual. (p. 603.)

**RIPARIAN RIGHTS—Bathing.**—An upper riparian owner on an inland lake has a right to bathe therein as against a city having lower riparian rights and drawing its water supply from such lake. (p. 604.)

**RIPARIAN RIGHTS—Police Power to Regulate or Restrain.** A municipality cannot invoke the exercise of the police power of the state, for the purpose of obtaining a water supply, to prevent the reasonable use of the waters of an inland lake or stream by an upper riparian proprietor for bathing or other ordinary purposes, without the exercise of the right of eminent domain or without compensation. (p. 604.)

S. S. Hulbert and G. W. Mechem, in propria persona.

H. M. Oren, attorney general, J. M. Hatch, prosecuting attorney, and O. S. Clark, for the people.

**156** MOORE, J. Goguac Lake is a natural body of private water wholly within the township of Battle Creek, which township adjoins the city of Battle Creek. It has an area of about three hundred and sixty acres, and varies in depth from nothing at the shore line, to eighty feet. The shore line of the lake is **157** about five miles in all, and at the time of the alleged offense was owned as follows: About two hundred feet by the city, upon which is its pumping station, and the rest of the five miles is owned and occupied by farmers, pleasure resort proprietors, and summer cottagers, the latter holding, some by fee, and others by lease from the farmer owners. At the north end of the lake is a pleasure resort, and scattered around the lake shore are between forty and fifty cottages, occupied during the summer season by the respective owners, or persons to whom they rent. The lake is accessible from the city by a good highway, a fine bicycle path, and an electric road. It is the only nearby pleasure resort for the citizens of Battle Creek. There are a large number of rowboats, sailboats, and several steamers upon the lake. The riparian use to which the various owners have put the water are all the uses which farmers and summer cottagers would naturally exercise, viz., fishing, wading, bathing, swimming,

washing sheep, watering cattle, pigs and horses, washing vehicles and clothing, cutting ice, boating, sailing, etc. In the summer of 1884 the respondent first occupied premises at the lake. In 1884, 1885, and 1886 he occupied tents within a few feet of where he erected a cottage in 1887, since which time he has continuously occupied said cottage. Beginning with 1884, he has occupied the premises for the camping season each year, continuously, except two, and every season has entered the water to swim. His investment in cottage and appurtenances is several hundred dollars.

In 1886 the city proposed a system of waterworks, and at some time thereafter determined to take the city water supply from Goguac Lake. For that purpose the city bought a piece of land fronting on the lake at its northerly end, having a shore frontage of about two hundred feet, and erected thereon a pumping station. The system is to take the water from the lake by means of an inlet pipe sixteen inches in diameter, which runs into the lake. The water is pumped to a standpipe, which is upon a rise of ground a short distance from the lake, and thence is distributed <sup>158</sup> through pipes of four to sixteen inches within the city limits, the piping now amounting to between thirty and forty miles. The water is used by the city, and sold to the people, and is the only water system. The lake is about one and one-half miles long, and is fed by subterranean springs. There is no outlet except the intake pipe. From the cottage of the respondent, by water, to the intake pipe, is about three-quarters of a mile. Quite early in the use of the lake for municipal purposes, the city pumped out so much water as to lower the lake. Litigation resulted, and the city then for certain months in the year turned into the lake the water from Minges brook, so that the water is not now lowered by the city, but the effect of turning in the water from the brook is to make the water harder than it was before.

The city, although given ample power by the charter to condemn lands and easements for a water supply upon paying due compensation for the rights taken did not exercise that right, but, because it was a riparian proprietor, claimed the right to use the water of the lake, and that the other riparian proprietors must do nothing having a tendency to pollute the waters of the lake. The respondent, having first notified the board of public works of his intention to do so, made an entry into the waters of the lake on July 25, 1897, by wading on his own leased land under water, and swimming in the water flowing over said land.

This he did without malice, and to afford a test case. He maintained that the difference between the exercise of the ancient common-law riparian right of bathing and swimming, and those of washing sheep, watering cattle and horses, running a water-wheel for a mill, etc., was a difference only in kind and degree, and that all were common-law rights incident and appurtenant to the ownership or lawful occupation of land upon an inland lake in this state. It was the claim of the people that this act of swimming polluted the source of the water supply, and was criminal. The respondent was informed against, a trial was had, and the charge of the court was such that <sup>159</sup> a conviction followed. The case is brought here by appeal.

Upon the trial several expert witnesses were sworn, who testified that germs might have been thrown off the body of the respondent while swimming, which would produce disease, and that some of those germs might reach the intake pipe, and through it the consumers of the water, and be a source of ill-health. It is not shown any such germs ever did reach the intake pipe, or that any illness in Battle Creek could be traced to the use of the water taken from this lake.

A great many interesting questions are raised by the record and presented in the briefs of counsel, but, in our view of the law, it will be unnecessary to discuss many of them. The first question calling for consideration is, Was the act of respondent unlawful? It is a matter of common knowledge that in this state the riparian owners whose lands border upon lakes, and through whose lands streams run, are in the habit of using the streams and lakes by allowing their domestic animals to drink therein, and by drawing therefrom what water may be needed for domestic purposes; and themselves and their families resort to the water of the streams and lakes for the purpose of bathing at suitable seasons of the year. It is also known that, as a rule, the supply of drinking and cooking water is obtained from springs or wells. Will the fact that a lower riparian proprietor decides to use the water of the stream or lake for drinking and cooking purposes make a reasonable use of the water by the upper riparian owners for the purposes of watering cattle and bathing purposes unlawful because to do so has a tendency to make the water less desirable for drinking and cooking purposes? Can the upper riparian proprietors be deprived of such reasonable and ordinary use when the lower proprietor is a city having a large population, by invoking the police power, and without compensation? It will readily be seen these are very im-

portant questions. The diligence of able counsel has failed to call our attention to a case on all-fours with the one at bar, but the principles involved are not new.

**160** In *Wood v. Waud*, 3 Ex. 748, Pollock, C. B., speaking for the court, said: "We agree with the learned counsel for the plaintiffs in his exposition of the principles which regulate the law as to natural streams, which are fully considered and placed on their right footing, in the case of *Mason v. Hill*, 3 Barn. & Adol. 306, 5 Barn. & Adol. 1, and the authorities there cited. Flowing water, as well as light and air, are in one sense 'publici juris.' They are a boon from Providence to all, and differ only in their mode of enjoyment. Light and air are diffused in all directions, flowing water in some. When property was established, each one had the right to enjoy the light and air diffused over, and the water flowing through, the portion of soil belonging to him. The property in the water itself was not in the proprietor of the land through which it passes, but only the use of it, as it passes along, for the enjoyment of his property, and as incidental to it. The law is laid down by Chancellor Kent, in 3 Kent's Commentaries, 439, thus: 'Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water. . . . He has no property in the water itself, but a simple usufruct as it passes along.' 'Aqua currit et debet currere,' is the language of the law; and Mr. Justice Story, in *Tyler v. Wilkinson*, 4 Mason, 397, Fed. Cas. No. 14,312, cited in Gale on Easements, Willes' edition, page 131, lays down the same law. In the judgment of Lord Chief Justice Tindal in the case of *Acton v. Blundell*, 12 Mees. & W. 324, he treats the right to waters flowing on the surface as arising from the acquiescence of neighboring owners; though he also quotes the judgment of Mr. Justice Story, above referred to, which treats the right as an incident to property; for Mr. Justice Story says: 'The natural stream, existing by the bounty of Providence for the benefit of the land through which it flows, is an incident annexed by operation of the law to the land itself.' Mr. Justice Whitlock, also, in *Sury v. Pigot*, Poph. 169, and Crew. C. J., in *Sury v. Pigot*, Poph. 172, and Lee, C. J., in *Brown v. Best*, 1 Wils. 174, treat the right as arising ex jure naturae and consequently it is not extinguished, as an easement in alieno solo would be, by unity. . . .

"In considering this question, it is to be assumed that the plaintiffs' right is established to the use of the water. It is



said that the true rule on this subject is laid down by Chancellor Kent (3 Kent's Commentaries, 439, 440) that streams are <sup>161</sup> meant for the use of men, and that it would be unreasonable, and contrary to the universal consent of mankind, to debar each riparian proprietor from the application of the water to domestic, agricultural, or manufacturing purposes, provided the use of it be made so as to work no material injury or annoyance to his neighbor; and though there will, no doubt, be, in the exercise of a proper use of water, some evaporation and decrease of it, some variation in the weight and velocity of the current, but the maxim '*De minimis non curat lex*' applies, and a right of action by the proprietor below would not necessarily flow from such use; it would depend on the nature and extent of the injury, and the manner of using the water."

In *Embrey v. Owen*, 6 Ex. 352, Baron Parke, speaking for the court, said: "The law as to flowing water is now put on its right footing by a series of cases beginning with that of *Wright v. Howard*, 1 Sim. & S. 190, followed by *Mason v. Hill*, 3 Barn. & Adol. 304, 5 Barn. & Adol. 1, and ending with that of *Wood v. Waud*, 3 Ex. 748; and is fully settled in the American courts: See 3 Kent's Commentaries, 6th ed., lect. 52, pp. 439, 445. The right to have the stream to flow in its natural state, without diminution or alteration, is an incident to the property in the land through which it passes. But flowing water is *publici juris*; not in the sense that it is a *bonum vacans*, to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only: that all may reasonably use it who have a right of access to it; that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only: See *Mason v. Hill*, 5 Barn. & Adol. 24. But each proprietor of the adjacent land has the right to the usufruct of the stream which flows through it.

"This right to the benefit and advantage of the water flowing past his land is not an absolute and exclusive right to the flow of all the water in its natural state. If it were, the argument of the learned counsel that every abstraction of it would give a cause of action would be irrefragable. But it is a right only to the flow of the water, and the enjoyment of it, subject to the similar rights of all the proprietors of the banks on each side to the reasonable enjoyment of the same gift of Providence. . . .

**162** “The owner must so use and apply the water as to work no material injury or annoyance to his neighbor below him, who has an equal right to the subsequent use of the same water. Nor can he, by dams or any obstruction, cause the water injuriously to overflow the grounds and springs of his neighbor above him. Streams of water are intended for the use and comfort of man; and it would be unreasonable, and contrary to the universal sense of mankind, to debar every riparian proprietor from the application of the water to domestic, agricultural and manufacturing purposes, provided the use of it be made under the limitations which have been mentioned; and there will, no doubt, inevitably be, in the exercise of a perfect right to the use of the water, some evaporation and decrease of it, and some variations in the weight and velocity of the current. But “*de minimis non curat lex*,” and a right of action by the proprietor below would not necessarily flow from such consequences but would depend upon the nature and extent of the complaint or injury, and the manner of using the water. All that the law requires of the party by or over whose land a stream passes is that he should use the water in a reasonable manner, and so as not to destroy, or render useless or materially diminish or affect, the application of the water by the proprietors above or below on the stream.’

“On the other hand, one’s common sense would be shocked by supposing that a riparian owner could not dip a watering-pot into the stream in order to water his garden, or allow his family or his cattle to drink it. It is entirely a question of degree, and it is very difficult—indeed, impossible—to define precisely the limits which separate the reasonable and permitted the use of the stream from its wrongful application; but there is often no difficulty in deciding whether a particular case falls within the permitted limits or not.”

In *Merrifield v. Lombard*, 13 Allen, 16, 90 Am. Dec. 172, it is said: “Any diversion or obstruction of the water which substantially diminishes the volume of the stream, so that it does not flow *ut currere solebat*, or which defiles and corrupts it to such a degree as essentially to impair its purity, and prevent the use of it for any of the reasonable and proper purposes to which running water is usually applied—such as irrigation, the propulsion of machinery, or consumption for domestic use—is an infringement of the right of other owners of land through which a watercourse runs, and creates a nuisance for which those thereby **163** injured are entitled to a remedy. An injury to

the purity or quality of the water, to the detriment of other riparian owners, constitutes, in legal effect, a wrong and an invasion of private right, in like manner as a permanent obstruction or diversion of the water. It tends directly to impair and destroy the use of the stream by others for reasonable and proper purposes: *Mason v. Hill*, 2 Nev. & M. 747, 5 Barn. & Adol. 1; *Wood v. Waud*, 13 Jur. 472, 3 Ex. 748; 3 Kent's Commentaries, 6th ed., 439; Angell on Watercourses, sec. 136."

In *Sanderson v. Pennsylvania Coal Co.*, 86 Pa. St. 401, 27 Am. Rep. 711, it is said: "In an elaborate and carefully considered opinion in *Mason v. Hill*, 5 Barn. & Adol. 1, Denman, C. J., held that the possessor of land through which a natural stream runs has the right to the advantage of that stream flowing in its natural course, not inconsistent with a similar right in the proprietors of the land above and below; and that neither can any proprietor above diminish the quantity or injure the quality of the water, nor can any proprietor below throw back the water without his license or grant. It was one of the features of that case that the water which the defendant had the right to use, subject to the duty of returning it, was heated when it was returned to the stream, and the jury had assessed damages for that. The chief justice said, in entering judgment: 'As to the right to recover for the injury sustained by the water being returned in a heated state, there can be no question.'

"In *Wood v. Sutcliffe*, 16 Jur. 75, 8 Eng. L. & Eq. 217, an injunction was granted to restrain the defendant, against whom a recovery had been had at law, from pouring dye wares, dye liquors, madder, indigo, or potash into a channel that connected his dye works with a stream called the 'Bowling Beck,' on which, below the works, the cotton-mill of the plaintiffs was situated, and in the use of the water of which they claimed prescriptive rights. 'I am satisfied from the evidence,' the vice-chancellor remarked in the course of his opinion, 'that to some considerable extent the pollution of this stream is inevitable, and that no court of law or court of equity, nor all the courts in the world, except there were a power of removing all that mass of human beings which now congregate about its banks, ever could restore it to the state in which it once was. But still it does not follow, because <sup>164</sup> there be a certain degree of pollution, which cannot be very accurately measured, and which is inevitable, that, therefore, everybody has a right to pollute the stream by pouring in immense quantities of filth and pollution from his own works, to make it ten thousand times worse.'"

In *Greene v. Nunnemacher*, 36 Wis. 50, the following language is used: "If the plaintiff is a riparian proprietor, he has the undoubted right to enjoy the use of the waters of the river for his cattle and for domestic purposes without having their purity affected or their quality destroyed by the upper proprietor. . . . And, if this is really the situation of his premises, it needs no argument to show that, so far as he is concerned, he has the right to insist that the defendants shall not foul and corrupt the waters by discharges and slops from their distillery and hog and cattle yards, so as to render the waters unfit for agricultural and domestic purposes."

In *Dwight Printing Co. v. City of Boston*, 122 Mass. 583, it is said: "The riparian proprietors higher up still retain all their common-law rights in the river, so far as they are not inconsistent with the use defined in the statute. They certainly are not prohibited from drawing water from the river for domestic purposes, or from watering cattle in it, or from cutting ice."

In *Strobel v. Kerr Salt Co.*, 164 N. Y. 303, 79 Am. St. Rep. 643, 58 N. E. 142, it is said: "There is nothing about the case now before us to take it out of the general rules governing the rights of riparian owners. Those rules are well established in this state, and, so far as material to the case before us, are, in the absence of modification by grant or prescription, as follows: A riparian owner is entitled to a reasonable use of the water flowing by his premises in a natural stream, as an incident to his ownership of the soil, and to have it transmitted to him without sensible alteration in quality or unreasonable diminution in quantity. While he does not own the running water, he has the right to a reasonable use of it as it passes by his land. As all other owners upon the same stream have the same right, the right of no <sup>165</sup> one is absolute, but is qualified by the right of the others to have the stream substantially preserved in its natural size, flow and purity, and to protection against material diversion or pollution. This is the common right of all, which must not be interfered with by any. The use by each must, therefore, be consistent with the rights of the others, and the maxim of 'sic utere tuo' observed by all. The rule of the ancient common law is still in force, 'Aqua currit et debet currere, ut currere solebat.' Consumption by watering cattle, temporary detention by dams in order to run machinery, irrigation (when not out of proportion to the size of the stream), and some other familiar uses, although in fact a diversion of the water involy



ing some loss, are not regarded as an unlawful diversion, but are allowed as a necessary incident to the use, in order to effect the highest average benefit to all the riparian owners. As the enjoyment of each must be according to his opportunity, and the upper owner has the first chance, the lower owners must submit to such loss as is caused by reasonable use. Surrounding circumstances, such as the size and velocity of the stream, the usage of the country, the extent of the injury, convenience in doing business, and the indispensable public necessity of cities and villages for drainage, are also taken into consideration; so that a use which, under certain circumstances, is held reasonable, under different circumstances would be held unreasonable. It is also material sometimes to ascertain which party first erected his works and began to appropriate the water: *Clinton v. Myers*, 46 N. Y. 511, 7 Am. Rep. 373; *New York Rubber Co. v. Rothery*, 132 N. Y. 293, 28 Am. St. Rep. 575, 30 N. E. 841; *Smith v. City of Brooklyn*, 160 N. Y. 357, 54 N. E. 787; *Prentice v. Geiger*, 74 N. Y. 341; *Bullard v. Saratoga etc. Mfg. Co.*, 77 N. Y. 525; *Merritt v. Brinkerhoff*, 17 Johns. 306, 8 Am. Dec. 404; *Crooker v. Bragg*, 10 Wend. 260, 25 Am. Dec. 555; *Arnold v. Foot*, 12 Wend. 330; *Tyler v. Wilkinson*, 4 Mason, 397, Fed. Cas. No. 14,312; *Columbus etc. Iron Co. v. Tucker*, 48 Ohio St. 41, 29 Am. St. Rep. 528, 26 N. E. 630; *Beach v. Sterling etc. Zinc Co.*, 54 N. J. Eq. 65, 33 Atl. 286; *St. Helen's Smelting Co. v. Tipping*, 11 H. L. Cas. 642; *Crossley & Sons v. Lightowler*, L. R. 3 Eq. Cas. 279, L. R. 2 Ch. App. 478; *Pennington v. Coal Co.*, L. R. 5 Ch. Div. 769; *Attorney General v. Colney Hatch Lunatic Asylum*, L. R. 4 Ch. App. 146; <sup>166</sup> *Hodgkinson v. Ennor*, 4 Best & S. 229; 3 Kent's Commentaries, 439; Gould on Waters, sec. 219; Higgins on Watercourses, 132; Washburn on Easements, 4th ed., 215; 1 Wood on Nuisance, 3d ed., secs. 364, 427.

"The question of reasonable use is generally a question of fact; but whether the undisputed facts, and the necessary inference therefrom, establish an unreasonable use, is a question of law. When the diversion or pollution (which is treated as a form of diversion) is caused by a new and extraordinary method of using the water, hitherto unknown in the state, and such method not only permanently diverts a large quantity of water from the stream, but also renders the rest so salt at times that cattle will not drink it unless forced to by necessity, fish are destroyed in great numbers, vegetation is killed, and machinery rusted, such use, as a matter of law, is unreasonable,

and entitles the lower riparian owner to relief. Where the natural and necessary result of the place selected and the method adopted by an upper riparian owner in the conduct of his business is to cause material injury to the property of an owner below, a court of equity will exercise its power to restrain on account of the inadequacy of the remedy at law, and in order to prevent a multiplicity of suits. The lower riparian owners are entitled to a fair participation in the use of the water, and their rights cannot be cut down by the convenience or necessity of the defendant's business. 'The necessities of one man's business cannot be the standard of another's rights in a thing which belongs to both': *Wheatley v. Chrisman*, 24 Pa. St. 298, 64 Am. Dec. 657. While the courts will not overlook the needs of important manufacturing interests, nor hamper them for trifling causes, they will not permit substantial injury to neighboring property, with a small but long-established business, for the purpose of enabling a new and great industry to flourish. They will not change the law relating to the ownership and use of property in order to accommodate a great business enterprise. According to the old and familiar rule, every man must so use his own property as not to injure that of his neighbor; and the fact that he has invested much money and employs many men in carrying on a lawful and useful business upon his own land does not change the rule, nor permit him to permanently prevent a material portion of the water of a natural stream from flowing over the land of a lower riparian owner, or to so pollute the rest of the stream as to render it unfit for ordinary use."

<sup>167</sup> In *Trevett v. Prison Assn.*, 98 Va. 332, 81 Am. St. Rep. 727, 36 S. E. 373, the following language is used: "In 1 Wood on Nuisances, third edition, section 427, it is said: 'The right of a riparian owner to have the water of a stream come to him in its natural purity is as well recognized as the right to have it flow to his land in its usual flow and volume. But in reference to this, as with the air, it is not every interference with the water that imparts impurities thereto that is actionable, but only such as impart to the water such impurities as substantially impair its value for the ordinary purposes of life, and render it measurably unfit for domestic purposes; or such as causes unwholesome or offensive vapors or odors to arise from the water, and thus impairs the comfortable or beneficial enjoyment of property in its vicinity; or such as, while producing no actual sensible effect upon the water, are yet of a character

calculated to disgust the senses, such as the deposit of the carcasses of dead animals therein, or the erection of privies over a stream, or any other use calculated to produce nausea or disgust in those using the water for the ordinary purposes of life, or such as impair its value for manufacturing purposes.'

"The great principle upon which the law, as thus stated, rests, is that every man must use his own property so as not to injure that of another. It is true, as urged by counsel for defendant in error, that the operation of this principle is qualified by another maxim, founded in natural law, that he who exercises only his own legal rights injures no one. The motive, good or bad, which influenced the action complained of, is generally of no importance whatever, for it is well stated by an eminent writer upon this subject that 'whatever one has a right to do, another can have no right to complain of': Cooley on Torts, sec. 6, p. 630. If, therefore, a lawful act is done in a lawful manner, though another may be injured by it, the law affords no remedy. It is *damnum absque injuria*.

"It was said by the court in *Merrifield v. City of Worcester*, 110 Mass. 219, 14 Am. Rep. 592: 'Cultivating and fertilizing the lands bordering on the stream, and in which are its sources, their occupation by farmhouses and other erections, will unavoidably cause impurities to be carried into the stream. As the lands are subdivided, and their occupation and use become multifarious, these causes will be rendered more operative, and their effects more perceptible. The water may thus be rendered unfit for many uses for which it had before been suitable; <sup>168</sup> but, so far as that condition results only from reasonable use of the stream in accordance with the common right, the lower riparian proprietor has no remedy. When the population becomes dense, and towns or villages gather along its banks, the stream naturally and necessarily suffers still greater deterioration. Roads and streets crossing it, or running by its side, with their gutters and sluices discharging into it their surface water collected from over large spaces, and carrying with it in suspension the loose and light material that is thus swept off, are abundant sources of impurity, against which the law affords no redress by action.' . . . .

"Tracing the law from the time of Lord Coke to more recent times, the court (in *Mayor etc. of Baltimore v. Warren Mfg. Co.*, 59 Md. 96), speaking through Judge Alvey, declares that: 'All common-law authorities agree that a riparian owner has the right to the natural stream of water flowing by or

through his land in its ordinary, natural state, both as to its quantity and quality, as incident to the right to the land on or through which the watercourse runs. . . . If, therefore,' said the court, 'the defendants, being upper riparian proprietors, and as such entitled to the ordinary use of the water, including the right to apply it in a reasonable way to purposes of trade and manufacture, are using the water of the stream in an unreasonable manner, and have defiled the same in such manner and to such an extent as to operate an actual invasion of the rights of the complainants, the latter are entitled to redress by action at law, and, in case the nuisance be continued, to summary relief by injunction. . . . What nature and extent of pollution of the stream will call for the active interference of the court is not in all cases easy to define. It is not every impurity imparted to the water, however small in degree, that will be the subject of an injunction. All running streams are, to a certain extent, polluted; and especially are they so when they flow through populous regions of country, and the waters are utilized for mechanical and manufacturing purposes. The washings of the manured and cultivated fields, and the natural drainage of the country, of necessity bring many impurities to the stream; but these and the like sources of pollution cannot ordinarily be restrained by the court. . . . Therefore, when we speak of the right of each riparian proprietor to have the water of a natural stream flow through his land in its natural purity, those descriptive terms must be understood in a comparative sense, as no proprietor does receive, nor can he reasonably expect to receive, the water in a state of entire purity. But any use that materially fouls and adulterates the water, or the deposit or discharge therein of <sup>169</sup> any filthy or noxious substance that so far affects the water as to impair its value for the ordinary purposes of life, will be deemed a violation of the rights of the lower riparian proprietor, and for which he will be entitled to redress. Anything that renders the water less wholesome than when in its ordinary natural state, or which renders it offensive to taste or smell, or that is naturally calculated to excite disgust in those using the water for the ordinary purposes of life, will constitute a nuisance, and for the restraint of which a court of equity will interpose.'"

In *Gehlen Bros. v. Knorr*, 101 Iowa, 700, 63 Am. St. Rep. 416, 70 N. W. 757, it is said: "We need only consider, then, what the law is as to the rights of riparian owners to the use of the waters of a non-navigable stream for artificial purposes.



Some general propositions may well be stated. The law is that as to such use, and in the absence of superior rights acquired by license, grant, or prescription, the rights of such proprietors in the water of the stream are equal: *Willis v. City of Perry*, 92 Iowa, 297, 60 N. W. 727. It follows, therefore, that the defendants had the right to use the water reasonably having reference to plaintiffs' rights therein: *Washburn on Easements*, 379. Broadly stated, the general rule is that the owner of the land through which a stream of water runs has a right to have it flow over his land in the natural channel, undiminished in quantity, and unimpaired in quality, except in so far as diminution or contamination is inseparable from a reasonable use of such water: *Willis v. City of Perry*, 92 Iowa, 297, 60 N. W. 727; *Ferguson v. Firmenich Mfg. Co.*, 77 Iowa, 578, 14 Am. St. Rep. 319, 42 N. W. 448; *Spence v. McDonough*, 77 Iowa, 462, 42 N. W. 371; 28 Am. & Eng. Ency. of Law, 948; *Elliot v. Fitchburg etc. R. R. Co.*, 10 Cush. 191, 57 Am. Dec. 85, and notes; *Moulton v. Newburyport Water Co.*, 137 Mass. 163; *Garwood v. New York etc. R. R. Co.*, 83 N. Y. 400, 38 Am. Rep. 452; *Brookville etc. Hydraulic Co. v. Butler*, 91 Ind. 138, 46 Am. Rep. 580; *Heilbron v. Fowler Switch Canal Co.*, 75 Cal. 426, 7 Am. St. Rep. 183, 17 Pac. 535; *Dumont v. Kellogg*, 29 Mich. 420, 18 Am. Rep. 102; *Union Min. Co. v. Dangberg*, 2 Saw. 450, Fed. Cas. No. 14,370; *Tyler v. Wilkinson*, 4 Mason, 397, Fed. Cas. No. 14,312; *Bullard v. Saratoga etc. Mfg. Co.*, 77 N. Y. 530; *Palmer v. Mulligan*, 3 Caines, 307, 2 Am. Dec. 270; *Davis v. Getchell*, 50 Me. 602, 79 Am. Dec. 636, and note; *Wadsworth v. Tillotson*, 15 Conn. 366, 39 Am. Dec. 391; 170 *Haskins v. Haskins*, 9 Gray, 390; *Snow v. Parsons*, 28 Vt. 459, 67 Am. Dec. 723; *City of Springfield v. Harris*, 4 Allen, 494, 81 Am. Dec. 715; *Red River Roller Mills v. Wright*, 30 Minn. 249, 44 Am. Rep. 194, 15 N. W. 167. No statement can be made as to what is such reasonable use which will, without variation or qualification, apply to the facts of every case. But in determining whether a use is reasonable we must consider what the use is for; its extent, duration, necessity, and its application; the nature and size of the stream, and the several uses to which it is put; the extent of the injury to the one proprietor and of the benefit to the others; and all other facts which may bear upon the reasonableness of the use: *Red River Roller Mills v. Wright*, 30 Minn. 249, 44 Am. Rep. 194, 15 N. W. 167, and cases cited; *Washburn on Easements*, 379.

"Now, while one riparian proprietor may not divert the water of a stream so as to deprive a lower proprietor on the

same stream of the benefit thereof, such upper proprietor may reasonably detain the water for proper purposes: Washburn on Easements, 380; Brookville etc. Hydraulic Co. v. Butler, 91 Ind. 138, 46 Am. Rep. 580; 28 Am. & Eng. Ency. of Law, 955; Gould on Waters, sec. 213; Angell on Watercourses, secs. 90-96; Gillett v. Johnson, 30 Conn. 180. The doctrine that such use by the upper proprietor may result in diminishing the quantity of water which will go down the stream, and may affect the current by retarding the flow to a reasonable extent, and still be consistent with the existence of a common right, was early held in this country, and has been constantly adhered to: Tyler v. Wilkinson, 4 Mason, 397, Fed. Cas. No. 14,312; Dumont v. Kellogg, 29 Mich. 420, 18 Am. Rep. 102; Bullard v. Manufacturing Co., 77 N. Y. 530; Eidemiller Ice Co. v. Guthrie, 42 Neb. 238, 60 N. W. 717; Gould on Waters, sec. 191; Palmer v. Mulligan, 3 Caines, 307, 2 Am. Dec. 270; Davis v. Getchell, 50 Me. 602, 79 Am. Dec. 636, and note; Van Hoesen v. Coventry, 10 Barb. 518; Oregon Iron Co. v. Trullenger, 3 Or. 1; 3 Kent's Commentaries, 439; Keeney & Wood Mfg. Co. v. Union Mfg. Co., 39 Conn. 577; Timm v. Bear, 29 Wis. 254; Whaler v. Ahl, 29 Pa. St. 98; Gould v. Boston Duck Co., 13 Gray, 442. If the general rule that each riparian proprietor is entitled to the flow of the stream according to its natural course, without interruption or diminution, should be strictly adhered to, it would result in a virtual abrogation of the well-settled doctrine that the rights of all proprietors of the stream are equal, and would 'preclude the best use of flowing waters in most cases; and, where power is <sup>171</sup> desired, the rule must yield to the necessity of gathering the water into reservoirs. It is lawful to do this where it is done in good faith, for a useful purpose, and with as little interference with the rights of other proprietors as is reasonably practicable under the circumstances': Cooley on Torts, 1st ed., p. 584; Tyler v. Wilkinson, 4 Mason, 397, Fed. Cas. No. 14,312. In Dumont v. Kellogg, 29 Mich. 420, 18 Am. Rep. 102, it was held, in an action by a mill proprietor against one having a mill and dam above him on the same stream, for damages caused by detention of the water, that it could not be said that such upper proprietor had no right to use the water to the prejudice of such lower proprietor; nor could it be held that such upper proprietor could not lawfully divert any of the water which would otherwise flow down the stream. The court said the real question was 'whether, under all the circumstances of the case, the use of the water by

one is reasonable and consistent with the correspondent enjoyment of right by the other.' ”

In *Dumont v. Kellogg*, 29 Mich. 420, 18 Am. Rep. 102, Justice Cooley, speaking for the court, said: “But as between two proprietors, neither of whom has acquired superior rights to the other, it cannot be said that one ‘has no right to use the water to the prejudice of the proprietor below him,’ or that he cannot lawfully ‘diminish the quantity which would descend to the proprietor below,’ or that ‘he must so use the water as not materially to affect the application of the water below, or materially to diminish its quantity.’ Such a rule would be, in effect, this: That the lower proprietor must be allowed the enjoyment of his full common-law rights as such, not diminished, restrained, or in any manner limited or qualified by the rights of the upper proprietor, and must receive the water in its natural state, as if no proprietorship above him existed. Such a rule could not be the law so long as equality of right between the several proprietors was recognized, for it is manifest it would give to the lower proprietor superior advantages over the upper, and in many cases give him in effect a monopoly of the stream.

“Cases may unquestionably be found in which the rule of law is laid down as broadly as it was given by the circuit judge in this case, but an examination of them will show either that the facts were essentially different, or that the general language was qualified by the context. Thus the language employed in the first instruction as <sup>172</sup> above given seems to have been quoted from Lord Tenterden in *Mason v. Hill*, 3 Barn. & Adol. 312. But there it had reference to a case of diversion of water and was strictly accurate and appropriate. The same language substantially is made use of in *Twiss v. Baldwin*, 9 Conn. 291, *Wadsworth v. Tillotson*, 15 Conn. 373, 39 Am. Dec. 391, *Arnold v. Foot*, 12 Wend. 331, and probably in many other cases; and is adopted by Chancellor Kent in his *Commentaries*, volume 3, page 439. See, also, *Bealey v. Shaw*, 6 East, 208; *Agawan Canal Co. v. Edwards*, 36 Conn. 497; *Williams v. Morland*, 2 Barn. & C. 913; *Mason v. Hill*, 5 Barn. & Adol. 1; *Tillotson v. Smith*, 32 N. H. 95, 64 Am. Dec. 355. But, as between different proprietors on the same stream, the right of each qualifies that of the other, and the question always is, not merely whether the lower proprietor suffers damage by the use of the water above him, nor whether the quantity flowing on is diminished by the use, but whether, under all the circum-

stances of the case, the use of the water by one is reasonable and consistent with a correspondent enjoyment of right by the other. 'Each proprietor is entitled to such use of the stream so far as it is reasonable, conformable to the usages and wants of the community, and having regard to the progress of improvement in hydraulic works, and not inconsistent with a like reasonable use by the other proprietors of land on the same stream above and below': Shaw, C. J., in *Cary v. Daniels*, 8 Met. (Mass.) 476, 41 Am. Dec. 532. 'The common use of the water of a stream by persons having mills above is frequently, if not generally, attended with damage and loss to the mills below; but that is incident to that common use, and for the most part unavoidable. If the injury is trivial, the law will not afford redress, because every person who builds a mill does it subject to this contingency. The person owning an upper mill on the same stream has a lawful right to use the water, and may apply it in order to work his mills to the best advantage, subject, however, to this limitation: that if, in the exercise of this right, and in consequence of it, the mills lower down the stream are rendered useless and unproductive, the law in that case will interpose and limit this common right so that the owners of the lower mills shall enjoy a fair participation': Woodworth, J., in *Merritt v. Brinkerhoff*, 17 Johns. 321, 8 Am. Dec. 404.

"It is a fair participation and a reasonable use by each that the law seeks to protect. Such interruption in the <sup>173</sup> flow 'as is necessary and unavoidable by the reasonable and proper use of the mill privilege above' cannot be the subject of an action: *Chandler v. Howland*, 7 Gray, 350, 66 Am. Dec. 487. And see *Embrey v. Owen*, 6 Ex. 353; *Hetrich v. Deachler*, 6 Pa. St. 32; *Hartzall v. Sill*, 12 Pa. St. 248; *Pitts v. Lancaster Mills*, 13 Met. (Mass.) 156; *Bliss v. Kennedy*, 43 Ill. 68."

It is very clear from these cases that the lower proprietor has no superior right to the upper one, and may not say to him that, because the lower proprietor wants to use the water for drinking purposes only, the upper proprietor may not use the water for any other purpose. Each proprietor has an equal right to the use of the stream for the ordinary purposes of the house and farm, even though such use may in some degree lessen the volume of the stream, or affect the purity of the water: *Hazeltine v. Case*, 46 Wis. 391, 32 Am. Rep. 715, 1 N. W. 66; *Ulbright v. Eufaula Water Co.*, 86 Ala. 587, 11 Am. St. Rep. 72, 6 South. 78; 1 Lewis on Eminent Domain, sec. 65. This right is



not affected by the fact that the lower proprietor is a municipality instead of an individual: *Smith v. City of Rochester*, 92 N. Y. 463, 44 Am. Rep. 393; *Haupt's Appeal*, 125 Pa. St. 211, 17 Atl. 436. It is not believed a case can be found where, out of deference to the rights of the lower riparian proprietor, it is made unlawful for the upper proprietor to make such reasonable and ordinary use of the water passing over his land as was made by the respondent in this case.

It is insisted by the people that, under the police power, it was competent to forbid any act on the part of the upper proprietor that would tend to impair the public health. It may be conceded that the police power of the state is very broad, but our attention has not been called to any principle of law, or to any case, the practical application of which will enable a village, city, or other municipality, for the purpose of obtaining a water supply, to prevent the ordinary and reasonable use of the waters of an inland lake or stream by an upper riparian proprietor, without <sup>174</sup> the exercise of the right of eminent domain or without compensation.

In what we have said we do not mean to intimate that an upper proprietor may convert his property into a summer resort, and invite large numbers of people to his premises for purposes of bathing, and give them the right possessed only by riparian owner and his family. We are undertaking to decide only the case which is presented here. Upon the record as made, we think the court should have directed a verdict in favor of respondent.

The conviction is reversed and a new trial ordered.

Hooker, C. J., Grant and Montgomery, JJ., concurred.

Long, J., did not sit.

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*A Riparian Owner* has a right to the reasonable use of a stream flowing by his premises; and, as all other owners on the stream have the same right, the right of none is absolute, but the right of each is qualified by the right of the others to have the stream substantially preserved in its natural size, flow, and purity, and to protection against material diversion or pollution: *Strobel v. Kerr Salt Co.*, 164 N. Y. 303, 79 Am. St. Rep. 643, 58 N. E. 142; *Geghten v. Knorr*, 101 Iowa, 700, 63 Am. St. Rep. 416, 70 N. W. 757; *Jones v. Conn*, 39 Or. 30, 87 Am. St. Rep. 634, 64 Pac. 855, 65 Pac. 1068; *Canton v. Shock*, 66 Ohio St. 19, 90 Am. St. Rep. 557, 63 N. E. 600. As to how far an upper riparian proprietor may pollute the waters of a stream without infringing upon the legal rights of lower proprietors, see *North Point Irr. Co. v. Utah etc. Canal Co.*, 16 Utah, 246, 67 Am. St. Rep. 607, 52 Pac. 168; *People v. Elk River Mill etc.*

Co., 107 Cal. 214, 48 Am. St. Rep. 121, 40 Pac. 486; 107 Cal. 221, 48 Am. St. Rep. 125, 40 Pac. 531; Barnard v. Sherley, 135 Ind. 547, 41 Am. St. Rep. 454, 34 N. E. 600, 35 N. E. 117; Mississippi Mills Co. v. Smith, 69 Miss. 299, 30 Am. St. Rep. 546, 11 South. 26; Helfrich v. Catonsville Water Co., 74 Md. 269, 28 Am. St. Rep. 245, 22 Atl. 72.

## FURBUSH v. MARYLAND CASUALTY COMPANY.

[131 Mich. 234, 91 N. W. 135.]

**INSURANCE—Accident.—Intentional Homicide** is an accident within the meaning of an accident insurance policy, if the insured was in no wise responsible for his death. (p. 607.)

**INSURANCE—Accident—Murder or Suicide.**—If the evidence is not necessarily inconsistent with the theory that a person insured against accident came to his death through homicide rather than suicide, the cause of his death must be determined by the jury. (p. 608.)

**WITNESSES—Opinion Evidence.**—On the question as to whether a person insured against accident came to his death through murder or suicide, a witness is not competent to give his opinion or conclusion from the condition of the snow in which the body of the insured was found lying, the condition of such body, and the surroundings, as to whether such body fell or was placed in such position, or whether a man shot while in a certain position could have fallen in the position in which the body of the insured was found. (p. 609.)

**INSURANCE—Accident—Murder or Suicide—Evidence.**—On the question as to whether a person insured against accident met his death by murder or suicide, evidence that he had been intemperate in his habits next prior to his death and was in straitened circumstances financially, and worried about his affairs, is admissible. (p. 609.)

C. R. Henry, for the appellant.

R. J. Kelley, for the appellee.

**235** HOOKER, C. J. Defendant has appealed from a judgment in favor of the plaintiff upon an accident insurance policy upon the life of her husband, who was found dead in the highway.

The deceased was a lumberman, and on the day in question started to go from Nash to Washburn, a distance of a few miles. He was afterward seen in Washburn between 9 and 10 o'clock the same day. A witness, one Lahey, one of three who found the body, started from Washburn to go to Nash. When they were about three or four miles from Washburn, Furbush passed

them, driving alone in a sleigh. After walking fifteen or twenty minutes more, the witness saw something in the road, which he took to be a buffalo robe. They went on a little farther, and found that it was the body of deceased. They left one of their number to watch the body, and then the other two walked on about half a mile, and came to some section-men working on the railroad, and told them that there was a man dead down on the road, and asked what they should do, and were told that the best thing they could do was to go to Nash and telephone to the sheriff. Thereupon all three of them went to Nash, and the station agent did telephone to Washburn, advising them to remain as witnesses. A party was made up at Washburn by the sheriff of Bayfield county, Wisconsin, and started for the body, and arrived at about 1:30 or 2 in the afternoon, and held an inquest.

It appears to have been the theory of the plaintiff that the deceased was intentionally killed by another person. The defendant claims that he intentionally took his own life, and that, whether it was a case of suicide or homicide, plaintiff should not have been permitted to recover. <sup>236</sup> The testimony offered on the trial tended to show that, shortly before the section-men heard of the death the horse of deceased was seen by them running away with the cutter, nobody being in it. The body was found close to the traveled part of the highway, the feet lying nearer the track than the head. The witness Lahey, who appears to have been a tramp, testified that he stayed the night before in an old barn at Washburn with Wallace, and met Parker the next morning in Washburn; that it was the first time that he had seen Parker; he had known Wallace two days. Lahey said that the body, when found, had a buffalo coat on, which was open; the head of the body was lying toward Washburn; that he made an examination of the snow on each side of the road to discover footprints; the traveled track was beaten down hard; that he did not see any revolver lying in the traveled part of the road near this body. "There were no tracks, trails, or roads that were beaten and traveled leading from the place where I first saw the body, except the county road."

The next witnesses to see the body appear to have been William Goodrich and Mike Miller. Witness Goodrich caught the horse about 10:30, and in about twenty minutes was informed by three men, who came up, that the owner of the horse was lying dead in the road. He went to Mr. Bates' office, and had him telephone to Washburn, and then he went to see the body,

taking Miller, the superintendent of the railroad, with him. These men did not see any revolver lying in the beaten track of the road. They found a pocket-book with nothing in it lying between the dashboard and the footrest in the cutter. Miller testified that he noticed no tracks, trails, nor paths in the snow outside of the traveled tracks.

Jared Welton testified that he was under-sheriff of Bayfield county, and received the telephone message. He went to where the body was, and, when he got there, there were several of the Elks of Ashland there, who got there about the same time that he did. He testified that he was the first man up to the body; that it lay flat on its <sup>237</sup> back; that his coat, vest, and shirt and underclothing were unbuttoned with the exception of the collar; his right hand was stretched out on the snow. He found a gold watch and chain and a five-dollar bill and two silver dollars and some other articles upon it. He also found a revolver lying near his head on the left side in the snow. There had been one shot fired out of it, which appeared to be fresh. When they first examined the body there was a good deal of blood on the left side around the ear, and at the inquest it was supposed that he had put the gun in his left ear, and that the bullet came out on the right side. The testimony of the physicians was that the bullet entered the right side of the head. The witness testified that he examined the snow and the tracks around there to find indications of a scuffle, but there was only one track, which was close to the right-hand side of the head and a little ways from the head. Other witnesses testified that there were two footprints near the head, and no other tracks. There was testimony that the deceased had a glove upon his right hand and a glove partially on his left hand.

Upon this testimony the court refused to direct a verdict for the defendant.

Defendant contends that, under the policy in question, it did not insure against any intentional killing, either by the assured or by another. The policy contained the following, viz.: "In case of injuries fatal or otherwise, intentionally inflicted upon himself by the assured, or inflicted upon himself or received by him while insane, the measure of this company's liability shall be a sum equal to the premium paid."

It is contended that an intentional homicide was not an accident. The text-books have been slow to admit that such a killing is accidental, but the majority of the adjudicated cases hold that it is where the deceased is in no wise responsible for it:



Insurance Co. v. Bennett, 90 Tenn. 256, 25 Am. St. Rep. 685; 16 S. W. 723; Hutchcraft v. Travelers' Ins. Co., 87 Ky. 300, 12 Am. St. Rep. 484, 8 S. W. 570; <sup>238</sup> Phelan v. Travelers' Ins. Co., 38 Mo. App. 640; Richards v. Travelers' Ins. Co., 89 Cal. 170, 23 Am. St. Rep. 455, 26 Pac. 762; Jones v. United States etc. Acc. Assn., 92 Iowa, 652, 61 N. W. 485; Robinson v. United States etc. Acc. Assn., 68 Fed. 825; Ripley v. Assurance Co., 2 Bigelow Ins. Rep. 738.

It was not within the province of the court to determine that this was a case of suicide. It is not a case in which it can be said that the testimony is inconsistent with any other theory than suicide or that it was inconsistent with the theory that the death was accidental. There were many circumstances surrounding the case which should be taken into consideration in determining the question whether the death was from suicide or homicide. Under such circumstances, it was for the jury to determine the question.

There are some other questions which relate to the introduction of the testimony that should be considered. It is claimed by the defendant that several witnesses were permitted to testify to conclusions of fact. Louis Cartier, after testifying that there were just two footprints at the head of the body, and no indication of a body falling in the snow, was asked the following question: "From your examination of the snow and the body and everything about the body, what do you say to whether it had fallen or had been placed there by some other person? A. I should judge the body was placed there by persons unknown."

Counsel for the defendant contends that the witness might as well have been permitted to give his opinion as to whether the man had committed suicide or had been murdered.

John A. Allo testified that at his head were two footprints; looked as though some one had stepped there and laid him there; his right foot lay on top of the left toe, etc. He was then asked the same question that was asked Cartier, and answered, "I should judge it had been placed there."

Charles Edwards testified: <sup>239</sup> "I examined the snow about where the body was lying; there were no footprints in the snow at all where his feet were; it looked as if his body must have been laid there; no impression in the snow, as if a body would fall; no foot-tracks of any description nearer than the cutter track."

He was then asked: "Now, Mr. Edwards, assuming that a man was riding in a cutter, drawn by a horse, either moving or

standing on the bridge where you found the body, if he had been killed, while in the cutter, with a pistol shot back and above his right ear and going through the brain, could he have fallen from the cutter, and been in the position, and without making any other imprints in the snow at that point than those that you found?" He answered: "I don't think it could."

Again: "If a man had been standing upon his feet upon that bridge, and by his own action sent a revolver shot through his brain as I have described, what do you say as to whether the position of the body and imprints in the snow could have been the same as those you found? A. I don't think the body could; there must have been some footmarks somewheres. Q. Mr. Edwards, taking into consideration the condition of the snow, the location of the body, and everything as you found it, what is your opinion as to whether the body had been placed there by someone? A. My judgment is that it must have been placed there."

We think this testimony was incompetent. Counsel seem to have considered the question of whether the body fell from the cutter or was placed there by some other person as the vital point in the case. It could only be determined from the position of the body and surrounding conditions. It was peculiarly the province of the jury to take into consideration these things, and themselves determine the conclusions to be drawn therefrom. These witnesses were permitted to do it for them.

Again, the defendant sought to show that the deceased had for some months been intemperate in his habits, and <sup>240</sup> that he was in straitened circumstances pecuniarily, and that he was worried about his affairs. This testimony was excluded. We think that these were circumstances which had a legitimate bearing upon the question, and the testimony should have been admitted.

We are constrained to reverse the judgment and order a new trial.

Moore, Grant, and Montgomery, JJ., concurred.

Long, J., did not sit.

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*A Death is Usually Regarded as Accidental*, within the meaning of an accident insurance policy, notwithstanding it is the result of an injury intentionally inflicted by a third person: *Richards v. Travelers' Ins. Co.*, 89 Cal. 170, 23 Am. St. Rep. 455, 26 Pac. 762; *Hutchcraft v. Travelers' Ins. Co.*, 87 Ky. 300, 12 Am. St. Rep. 484, 3 S. W. 570; *American Accident Co. v. Carson*, 99 Ky. 441, 59 Am. St. Rep. 473, 36 S. W. 169; *Union Casualty Co. v. Harroll*, 98 Tenn. 591, 60 Am. St. Rep., Vol. 100-39

Am. St. Rep. 873, 40 S. W. 1080; note to *Paul v. Travelers' Ins. Co.*, 8 Am. St. Rep. 766. Compare *Butero v. Travelers' Accident Ins. Co.*, 96 Wis. 536, 65 Am. St. Rep. 61, 71 N. W. 811. The presumption is against suicide: *Cox v. Royal Tribe*, 42 Or. 365, 95 Am. St. Rep. 752, 71 Pac. 73; monographic notes to *Supreme Conclave v. Miles*, 84 Am. St. Rep. 540; *Meadows v. Pacific Mut. Life Ins. Co.*, 50 Am. St. Rep. 441.

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## TEMPLAR v. STATE BOARD OF EXAMINERS OF BARBERS.

[131 Mich. 254, 90 N. W. 1058.]

**CONSTITUTIONAL LAW—Alien Barbers.**—A statute prohibiting an alien barber from obtaining a certificate to ply his vocation as a barber, while not denying this right to other barbers, is unconstitutional as a denial of the equal protection of the laws. (p. 613.)

F. E. Doremus, for the relator.

H. M. Oren, attorney general, and C. W. McGill, for the respondent.

**255** MONTGOMERY, J. Act No. 212 of the Public Acts of 1899 provides for the examination and licensing of barbers. Section 5 provides for the examination of an applicant concerning his ability to prepare and fit for use tools and utensils used by barbers, including the proper antiseptic treatment of razors, etc., and the nature and effect of eruptive and other diseases of the skin and scalp, and whether the same are infectious or communicable, and provides that no person so examined shall receive a certificate of the said board unless he shall appear to be skilled in the use of barbers' tools, and possessed of knowledge sufficient to prevent the spread, by means of barbers' tools and appliances, of eruptive and other diseases of the skin and scalp, and further provides that no person so examined shall receive such certificate who at the time of such examination is an alien. The relator applied to the respondent board to take the examination required by law, setting up that he is a resident of the city of Detroit; that he was born in Canada, and follows the trade of a barber as a means of livelihood; and that he has declared his intention of becoming a citizen of the United States. The board refused to receive the application upon the ground that he was an alien. The question presented is whether the provision of the act which re-

quires an applicant to be a citizen of the United States is valid. The relator contends that this provision is invalid, for the reason that it violates the provisions of the fourteenth amendment of the constitution of the United States, which declares that no state shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

In *Barbier v. Connolly*, 113 U. S. 27, 31, 5 Sup. Ct. Rep. 357, Mr. Justice Field said: <sup>256</sup> "The fourteenth amendment, in declaring that no state 'shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property."

In *Re Grice*, 79 Fed. 645, it was said: "By 'equal protection of the laws' is meant equal security under them to everyone, under similar terms, in his life, his liberty, his property, and in the pursuit of happiness. It not only implies the right of each to resort, on the same terms with others, to the courts of the country for the security of his person and property, the prevention and redress of wrongs, and the enforcement of contracts, but also his exemption from any greater burdens and charges than such as are equally imposed upon all others under like circumstances."

In Pennsylvania a statute imposing upon the employers of alien labor a tax of three cents per day for each of such laborers so employed was held unconstitutional, in that it deprived the laborers of the equal protection of the laws, in violation of the fourteenth amendment: See *Fraser v. McConway & Torley Co.*, 82 Fed. 257.

So in New York a statute made it a crime for alien laborers to be employed on public works by a contractor who was constructing them under a contract with a municipal corporation. This statute was held to violate the fourteenth amendment of the constitution, in *People v. Warren*, 13 Misc. Rep. 615, 34 N. Y. Supp. 942.

Speaking generally, Mr. Tiedeman, in his work on State and Federal Control of Persons and Property, at page 331, says:



"States have, by legislation, undertaken to protect native labor against alien labor; but in each case the legislation has been declared to be an invasion of the jurisdiction <sup>257</sup> of the United States government, and an unconstitutional interference with the rights of resident aliens."

The attorney general contends that, under the police power, the legislature may regulate callings, trades, and professions, and that it is not for the courts to pass upon the wisdom of their regulations, and that if such regulations result in excluding aliens from the privileges which citizens enjoy, it still should be held within the power of the legislature. Attention is directed to the cases of *People v. Moorman*, 86 Mich. 433, 49 N. W. 263, *People v. Phippin*, 70 Mich. 6, 37 N. W. 888, and *Metcalf v. State Board of Registration in Medicine*, 123 Mich. 661, 82 N. W. 512. The language in *People v. Moorman* is cited as sustaining the position of the attorney general, Mr. Justice Morse, referring to the case of *People v. Phippin*, declares in *People v. Moorman* that "in that case it was substantially held that no person, no matter how long he had been in the practice of his profession, had a vested right to practice medicine in Michigan." We do not hesitate to reiterate that doctrine. We think it must be considered as settled that, in the protection of the public health, the legislature has the right to provide for an examination of all persons who seek to engage in the practice of medicine, and to have their qualifications passed upon by a properly constituted board. But the practice of medicine is no more an incident of citizenship than the practice of the trade of a barber. All persons are entitled to enjoy the equal protection of the law, and while it may be competent for the legislature, in the exercise of its police powers, to provide for an examination and licensing of barbers, as was held in *State v. Zeno*, 79 Minn. 80, 79 Am. St. Rep. 422, 81 N. W. 748, and *Ex parte Lucas*, 160 Mo. 218, 61 S. W. 218, would it be contended that the legislature might provide that only white persons should be licensed? The learned attorney general, in his brief, makes this statement of the true rule: "When legislation applies to particular bodies or associations, imposing upon them additional liabilities and <sup>258</sup> restrictions, under the police power of the state, which are not purely arbitrary, the law does not violate the equal protection clause of section 1 of the fourteenth amendment to the federal constitution, if all persons brought under its influence are treated alike under the same conditions and circumstances."

We discover nothing faulty in this statement of the rule. But the difficulty with this enactment is that all persons brought under the influence of this legislation are not treated alike under the same conditions and circumstances. Before the enactment of this statute the relator had the undoubted right to ply his trade in Michigan. In the exercise of the police power, the legislature had the undoubted right to require, as a prerequisite to his plying his trade, that he submit to an examination. But had it the right to require citizenship? If it had the right to couple that with other requirements, it would have the same right to make that the only requirement. In other words, it would have the right to exclude alien labor wholly. We think the cases cited demonstrate that it had not this power.

A very different question is presented than in a case of the requirements for admission to the bar, for example, as in such case the statute confers upon the applicant who is admitted to the profession an office. He becomes an officer of the court. So, too, a different question is presented than was before the court in *Trageser v. Gray*, 73 Md. 250, 25 Am. St. Rep. 587, 20 Atl. 905—a case much relied upon by the attorney general. In that case the question presented was whether aliens could be excluded from engaging in the business of retailing liquors. This is a business peculiar to itself, which might be wholly prohibited by the legislature, and licenses might be confined to a limited number. We need not, therefore, inquire whether such legislation is an infraction of the rights of the individual not a citizen. But in the present case the relator's business is in no way injurious to the morals, the health, or even the convenience of the community, provided only he has the requisite knowledge <sup>259</sup> upon the subjects prescribed by the legislature to practice his calling without endangering the health of his patrons. To hold that he is not entitled to practice this calling because not a full citizen of the United States is to deny to him rights which we think are preserved by the fourteenth amendment.

It is not contended that the elimination of this provision will defeat the purposes of the law wholly, but it is very properly assumed by both sides that the statute may still be operative with this provision eliminated, if otherwise valid.

The writ of mandamus will issue as prayed.

Hooker, C. J., Moore and Grant, JJ., concurred.

Long, J., did not sit.

*In the Exercise of the Police Power*, a state may prohibit persons from practicing the calling of a barber without first obtaining a license or certificate of registration: *State v. Zeno*, 79 Minn. 80, 70 Am. St. Rep. 422, 81 N. W. 748; *State v. Sharpless*, 31 Wash. 191, 96 Am. St. Rep. 893, 71 Pac. 937. But a statute forbidding peddling except under a license, which provides that citizens may thus be licensed, while aliens shall not be, has been held unconstitutional: *State v. Montgomery*, 94 Me. 192, 80 Am. St. Rep. 386, 47 Atl. 165. Compare, in this connection, *Trageser v. Gray*, 73 Md. 259, 25 Am. St. Rep. 587, 20 Atl. 905; *In re Yamashita*, 30 Wash. 234, 94 Am. St. Rep. 860, 70 Pac. 482.

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## SCRIPPS v. WAYNE PROBATE JUDGE.

[131 Mich. 265, 90 N. W. 1061.]

**WILLS—Jurisdiction to Probate.**—The probate court of the domicile of the testator has exclusive jurisdiction to determine the validity of his alleged will, and if the will has been admitted to probate by any other court having no jurisdiction, the order of that court is not binding upon the court of the testator's domicile. (p. 616.)

**WILLS—Probate—Administration.**—If those interested in a will fail to present it for probate to the proper court of the testator's domicile, any person interested in the estate as heir or creditor may petition that court for the appointment of an administrator. It is no defense to such petition that the deceased made a will which is beyond the jurisdiction of such court. (p. 616.)

**WILLS—Failure to Probate—Right to Administration.**—It is not in the power of executors, by suppressing a will, or by refusing to probate it, in the court of the testator's domicile, to prevent those interested in defeating the will from having a hearing on the questions of the testator's domicile and intestacy in the probate court of the testator's domicile. In such case the court cannot refuse to proceed until the will or a certified copy thereof shall have been filed in court by some one claiming under the will. (p. 618.)

E. G. Stevenson and L. H. Butzel, for the relator.

O. Kirchner, J. C. Harper and T. L. Johnson, for the respondent.

**266** GRANT, J. George H. Scripps died April 13, 1900, in California, then his temporary place of residence. His legal domicile was formerly in Detroit, Michigan. He left a will, with two codicils attached, the will being executed in 1894 at Detroit, then his legal domicile. It is claimed by his executors that he had lived in Cleveland for some time prior to his death. The will was presented for probate in Cuyahoga county, Ohio, and was there admitted to probate July 2, 1900.

On June 30, 1900, the petitioner, James E. Scripps, a brother of the deceased, presented to the probate court of Wayne county, Michigan, a petition for administration upon the estate of said deceased, and asked for a special administrator for reasons set forth in the petition. The petition alleges the will; the proceedings taken in Ohio for its probate; that he has asked the executors therein named to present the will for probate in the probate court for the county of Wayne, the domicile of said deceased at the time of his death, so that petitioner and other heirs of said deceased may contest the validity of the will; and their <sup>267</sup> refusal to do so. The petition further alleges that the deceased was domiciled in the city of Detroit at the time of his death; that he left a large estate there, both real and personal, worth several hundred thousand dollars; that, if such a will was executed, the deceased was at the time mentally incompetent, and unduly influenced by some one of the beneficiaries named in the will; and that the residuary legatees under the will of the deceased fraudulently conspired together, for certain reasons, to have this will probated in Ohio, rather than in Michigan, although it was well known to them that his legal domicile was in Michigan.

Upon presenting this petition, Robert T. Gray was appointed special administrator. William A. Scripps and Edward W. Scripps, the executors named in said will, appeared and answered this petition, setting forth the proceedings taken in the Ohio probate court for the probate of the will, and insisting that the probate of the will there is *res adjudicata*, and is entitled, under section 1, article 4, of the constitution of the United States, to full faith and credit in this state.

Upon this petition and answer some proofs were taken, and, before the proofs were closed the judge of probate doubted his right to pass upon the question of the testacy or intestacy of the deceased without having such instrument before him. The hearing was then continued. Petitioner then filed another petition, setting forth copies of the will and codicils, alleging that they were beyond the jurisdiction of the court and could not be produced, and asked the court to proceed to determine whether the same were the last will and testament of the deceased, or whether he died intestate. Hearing was had on March 26, 1902. Upon that hearing the probate court refused to proceed further with the hearing upon either petition, holding that it had no jurisdiction to determine the question of the domicile of the deceased, or whether he died testate or intestate, until the orig-



inal papers, or duly certified copies thereof, shall be filed in said probate court for Wayne <sup>268</sup> county by some one claiming an interest in his estate by virtue of the will, and that said James E. Scripps does not claim under, but in opposition to the will. Relator then petitioned the circuit court for the county of Wayne for an order compelling the probate court to vacate such order and proceed with the hearing. This petition was denied, and the case is before us for review on certiorari.

It is, of course, the duty of those having a last will and testament in charge to promptly present it for probate upon the death of the testator. If they for any reason refuse or fail to do this, it is then the duty of those who are interested in having the will probated to take the proper steps for that purpose. The authorities, so far as we have been able to examine them, without exception, hold that the probate court of the domicile of the testator has exclusive jurisdiction to determine the validity of the will. If such will had been admitted to probate by a court having no jurisdiction, the decree or order of that court is not binding upon the court of the deceased's actual domicile. It may be binding as to property located within the jurisdiction of that court, but is not conclusive upon the courts of other jurisdictions, under the rule of state comity, or under the United States constitution. If those interested, for any reason, fail to present a will for probate at the proper court of the domicile of the testator, any party interested in the estate as heir or creditor may present a petition for the appointment of an administrator, and it is no defense to this action to say that the deceased made a will which is beyond the jurisdiction of the court of the domicile.

Under the statutes of Ohio, there can be no contest in the probate court over the probate of a will. Only the witnesses to the will, and such other witnesses as any person <sup>269</sup> interested in having the same probated, can be called. Its validity in that state cannot be contested until it has been admitted to probate, and then by a proper suit for that purpose instituted in the court of common pleas: *In re Hathaway's Will*, 4 Ohio St. 383. Under the statutes of Michigan, the only place where the due execution of a will can be contested is in the probate court at the testator's domicile (3 Comp. Laws, sec. 9282), where all parties interested are entitled to notice, while in Ohio no notice is required to be given to anyone. It was therefore held in that state that where the probate of a will was refused, and the parties had no notice of its refusal until too late to effect an

appeal to the court of common pleas, they were entitled to repropound the will, notwithstanding the former order of refusal had not been vacated: *Feuchter v. Keyl*, 48 Ohio St. 357, 27 N. E. 860. It is also held in that state after a careful review of the authorities, that the jurisdiction of a court in which a judgment was rendered may be inquired into, and, if it be shown that the facts essential to jurisdiction did not exist, the record is a nullity, notwithstanding the recitals therein: *Pennywit v. Foote*, 27 Ohio St. 600, 618, 22 Am. Rep. 340. A large number of authorities are there cited in support of the proposition. The supreme court of that state has also passed upon the question, in *Manuel v. Manuel*, 13 Ohio St. 458, in which the court holds that "the practice of first proving our wills in other states has never yet obtained." In that case the testator, whose domicile was in Ohio, made an olographic will in New Orleans, while on a visit there. The will was admitted to probate in New Orleans, and an authenticated copy brought to Ohio and admitted to record. A bill was filed to set aside the will as invalid under the laws of that state. It was held that a copy of the will was improperly admitted to record in that state, and, "by the settled rule of international law, the jurisdiction to determine the validity or invalidity of the will belongs to the courts of this state [Ohio]." So it is held in Mississippi that the capacity to make a will **270** must be determined alone by the laws of that state, the place of the domicile of the testator: *Bate v. Incisa*, 59 Miss. 513; *Sturdivant v. Neill*, 27 Miss. 157. So in New Hampshire it is held that an authenticated copy of a will and the probate thereof in a foreign country cannot be filed in a court of that state, where the domicile of the testator was in that state at the time of his death: *Stark v. Parker*, 56 N. H. 481. See, also, *Succession of Gaines*, 45 La. Ann. 1237, 14 South. 233.

This rule is also established by the supreme court of the United States. Where a transcript of the proceedings of the court of ordinary in a county in Georgia was offered for the purpose of showing that the decedent had died a resident of Georgia, intestate, and that the petitioner in a court for the District of Columbia was estopped to deny the fact, it was held that the grant of letters had no binding or probative force in contests respecting property lying outside the territorial dominion of the state of Georgia: *Overby v. Gordon*, 177 U. S. 214, 20 Sup. Ct. Rep. 603. The question is there thoroughly discussed, and many authorities cited: See, also, *Drexel v. Berney*, 122 U. S. 250, 7 Sup. Ct. Rep. 1200.

Where a divorce was obtained in the state of Indiana where the husband and wife lived in Michigan, it was held that, while "the parties had their residence within this state, the courts of Indiana had no authority to consider the question of divorcing them." The respondent was charged with bigamy, and his decree of divorce in Indiana was held no defense: *People v. Dawell*, 25 Mich. 247, 12 Am. Rep. 260.

The learned counsel for the respondent cite and rely, among other cases, upon *Shannon v. Shannon*, 111 Mass. 331. The deceased, Mr. Shannon, formerly lived in Massachusetts, removed to Indiana in 1855, made a will in 1868, and died in 1869. After removing to Indiana he obtained a divorce from his wife who resided in Massachusetts. She filed a petition for administration, claiming that his domicile was in Massachusetts, and that he died intestate.<sup>271</sup> The court did not dismiss the proceeding upon the ground that it would have had no jurisdiction if the domicile of the deceased had been at the time of his death in Massachusetts. It was found as a fact that Mr. Shannon had acquired a domicile in Indiana before he made his will, and had not abandoned it when he died. For these reasons the court held that the court of Indiana had jurisdiction for the original and conclusive probate of the will: See, also, the language in *Bradley v. Broughton*, 34 Ala. 706, 707, 73 Am. Dec. 474.

It appears from the allegations in relator's petition that one of the executors filed a petition in the probate court for the county of Wayne for the probate of the will, but subsequently withdrew it, and now insists upon the proceeding in Ohio. The relator might, perhaps, have in his petition for administration said nothing about a will, though it is difficult to see how he could do so without placing the facts before the court, and alleging that the pretended will was void. He knew of the existence of the pretended will. It certainly is not in the power of executors by suppressing a will, or by refusing to probate it at the place of the testator's domicile, to prevent those interested to defeat the will from having a hearing in the only court which has jurisdiction in the matter. It was the duty of the probate court to proceed with the case, and determine whether the domicile of the deceased was in Detroit. If the court shall find that his domicile was in Detroit, then it shall be its duty to proceed and determine whether the deceased died intestate. If the court finds that he died intestate, letters of administration must issue.

Judgment reversed, and case remanded for further proceedings, with costs to relator.

Hooker, C. J., Moore and Montgomery, JJ., concurred.

Long, J., did not sit.

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*As to the Effect in one state of a probate order or decree made in another, see Olney v. Angell, 5 R. I. 198, 73 Am. Dec. 62; Bowen v. Johnson, 5 R. I. 112, 73 Am. Dec. 49; Peck v. Cary, 27 N. Y. 9, 84 Am. Dec. 220; In re Belt's Estate, 29 Wash. 535, 92 Am. St. Rep. 916, 70 Pac. 74. And as to the extraterritorial effect of letters of administration, see In re Estate of Crawford, 68 Ohio St. 58, 96 Am. St. Rep. 648, 67 N. E. 156. And as to the effect of the foreign probate of a will, see Thrasher v. Ballard, 33 W. Va. 285, 25 Am. St. Rep. 894, 18 S. E. 411; Wickersham v. Johnston, 104 Cal. 407, 43 Am. St. Rep. 118, 38 Pac. 89; Lindley v. O'Reilly, 50 N. J. L. 636, 7 Am. St. Rep. 802, 15 Atl. 379, 1 L. R. A. 79. The effect of delay in probating a will is considered in Reide v. Benge, 112 Ky. 810, 99 Am. St. Rep. 334, 66 S. W. 997; Whitaker v. McKinney, 134 Ala. 326, 92 Am. St. Rep. 37, 32 South. 695.*

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## CUTTER v. WAIT.

[131 Mich. 508, 91 N. W. 753.]

**VENDOR AND PURCHASER—Removal of Building—Replevin.**—A vendor may maintain replevin for a house built by the vendee on the land while in possession under a contract to purchase, and afterward removed by him. Such building after removal may be treated as personalty. (p. 620.)

**REPLEVIN—Buildings Removed from Land.**—While replevin will not lie for real property, the title to buildings removed therefrom may be determined in such action by an inquiry as to their ownership at a time when they were part of the realty. (p. 620.)

**VENDOR AND PURCHASER—Rescission of Contract—Removal of Improvements.**—A person induced to enter into a contract for the purchase of lands by false representations of the vendor, as to his title, has a right, on rescission of the contract, to place himself in statu quo by removing the improvements made by him, so far as this can be done without injury to the freehold remaining. (p. 620.)

W. J. Barnard and L. H. Titus, for the appellants.

T. J. Cavanaugh, for the appellee.

**509 MONTGOMERY, J.** This is an action of replevin for a house built by the defendants upon land held by them under a contract of purchase, the plaintiff being the vendor named in the contract. The defendants removed the house from the land contracted for, and plaintiff claiming that the house when built,



became a part of the realty, and that the legal title vested in him, and that by a severance of the house from the lands the title remained unchanged, but that the house might thenceforth be treated as personalty, brought replevin. He was allowed to recover upon this theory, and there can be no doubt of his right to maintain the action, unless there was in the defense proffered a question which should have been submitted to the jury: *Michigan Mut. Life Ins. Co. v. Cronk*, 93 Mich. 49, 52 N. W. 1035.

The defense urged was that the defendants were induced to enter into the contract of purchase by false and fraudulent representations of the plaintiff as to the state of his title, and defendants contended that they had the right to rescind the contract, and remove the building from the premises. The circuit judge held, however, that it was not competent to try the title to real estate in an action of replevin. We do not so understand the rule of the law. True, replevin will not lie for real property, but it is not rare that the title to personal property is determined by an inquiry as to its ownership at a time when it was a part of the realty. Cases where such an inquiry has been entered upon without question are not infrequent: *Huron Land Co. v. Robarge*, 128 Mich. 686, 87 N. W. 1032; *Wells on Replevin*, sec. 5.

It is contended by plaintiff's counsel that there was no evidence of fraud in this case. We are not prepared to hold that the record is wholly devoid of testimony which a jury might construe as intentional misstatements as to the state of the title. If such intentional misstatements <sup>510</sup> were made, and were materially false, it was competent for the defendants to rescind the contract; and this involved the right to place themselves in statu quo, so far as it could be done without injury to the freehold remaining.

The judgment will be reversed and a new trial ordered.

Hooker, C. J., Moore and Grant, JJ., concurred.

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*Replevin* lies, in a proper case, for the recovery of a building: See the monographic note to *Sinnott v. Feiock*, 80 Am. St. Rep. 758, on when an action in replevin is sustainable.

A *Vendee* is entitled to an allowance for improvements placed by him in good faith upon the land, where the title fails: See the monographic note to *Cleland v. Clark*, 81 Am. St. Rep. 191, on betterments.

FREEMAN v. PERE MARQUETTE R. R. CO.

[131 Mich. 544, 91 N. W. 1021.]

**RAILROAD'S PASSENGERS on Freight Trains.—It is Contributory Negligence**, as matter of law, barring recovery for injury, for a passenger on a freight train to take a loose chair near an open door in a caboose, instead of a fixed seat provided for passengers, when the passenger knows that at the time the train men are engaged in making up the train. (p. 622.)

F. W. Stevens and C. McPherson, for the appellant.

Chaddock & Scully, for the appellee.

**545** MONTGOMERY, J. This is an action for negligent injury to a passenger, in which the plaintiff recovered a verdict and judgment of two hundred dollars, and defendant brings error.

The plaintiff became a passenger in a caboose, attached to a freight train. Before entering the caboose, he accepted and signed a ticket in which he agreed to exercise the highest degree of care to protect himself from injury, and agreed, if injured notwithstanding such care, to make no claim against the company. The defendant, however, does not, in the brief filed in this court, rely upon this contract as conclusive of plaintiff's rights; but it is insisted that the plaintiff's testimony taken as a whole, shows that he was guilty of contributory negligence, and that a verdict should have been directed for defendant.

The testimony of the plaintiff tends to show that, when he entered the caboose, the front door of the caboose stood open; that he then knew that the train crew was still engaged in switching, and that cars were likely to be brought in contact with the caboose with greater or less force; that there was a chair in the caboose, not fastened down, and that there were abundant seats which were fastened solid; that this chair was the chair provided for the conductor, and for use in connection with the table in one corner of the caboose, provided for the conductor for making his memoranda upon; that, instead of taking one of the regular seats provided for passengers, plaintiff took a seat in this chair, facing the front door, and awaited events; that he leaned over to sneeze, holding his head between his two hands, and just at this critical moment the collision occurred, threw him against the door, and caused the injuries complained of.

So far as the contact of the car with the caboose is concerned, and the resulting jar, it may be said that it was **546** the expected which happened. It is therefore a question of law as to

whether, with this knowledge, it was the exercise of common prudence to take this loose seat, which was certain to be thrown a greater or less distance by any jar which might occur, instead of taking the fixed seats which were provided for passengers. There is no question of ample room in the seats, as plaintiff was the only passenger. The case of *Norfolk etc. R. Co. v. Ferguson*, 79 Va. 241, is like this in principle. It was there held that it was contributory negligence, as matter of law, for a passenger on a freight train to take a chair near an open door in a caboose, instead of the fixed seat which was provided for passengers. So, in *Harris v. Hannibal etc. R. R. Co.*, 89 Mo. 233, 58 Am. Rep. 111, 1 S. W. 325, it was held that a plaintiff who knew, or by the exercise of ordinary care could have known, that the freight train upon which he was a passenger in the caboose had stopped to do switching, and that part of the train was likely to be backed against the part to which the caboose was attached, and who, without paying any attention to whether the cars were approaching or not, left his seat and stood up in the car, was guilty of such contributory negligence as barred recovery. A similar rule was laid down in *Smith v. Richmond etc. R. R. Co.*, 99 N. C. 241, 5 S. E. 896, where the plaintiff was sitting on the arm of a seat when he had every reason to expect a sudden jolt or shock from the backing of one portion of the train against another.

Plaintiff relies upon the case of *Moore v. Saginaw etc. R. R. Co.*, which was twice before the court, and is reported in 115 Mich. 103, 72 N. W. 1112, and again in 119 Mich. 613, 78 N. W. 666, and upon the case of *Stoody v. Detroit etc. Ry. Co.*, 124 Mich. 420, 83 N. W. 26. Neither case is authority for the plaintiff's recovery in the present case. In the *Moore* case the collision occurred before the plaintiff had an opportunity to occupy a seat in the car. The collision occurred when he was in the act of sitting down. In that case, however, the rule was recognized that one who takes passage on such a train is presumed to understand that the <sup>547</sup> cars must be coupled and uncoupled and shifted in the course of the yard work at the various stations, and that jars, jolts, jerks and concussions are incident to the ordinary management, and that these necessarily affect the equilibrium of persons standing in the car. Applying that rule to the present case, it may be added that such jars and jolts would be known by the passenger to necessarily cause some change in position in the loose chair occupied by him. In *Stoody v. Detroit etc. Ry. Co.*, 124 Mich. 420, 83 N. W. 26, it was held that the plaintiff was not guilty of contributory negligence in entering the car and

taking his seat, although the rest of the train was then backing toward him. In that case it appeared that he had sufficient time to enter the seat and brace himself in the seat to avoid the jar—a very different measure of precaution than taking a seat in a loose chair, facing an open door, as was done in the present case.

We are constrained to hold that, as matter of law, plaintiff was not in the present case in the exercise of due care, and the judgment will be reversed and a new trial ordered.

Hooker, C. J., Moore and Grant, JJ., concurred.

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*Passengers* cannot ordinarily recover if they voluntarily assume a position of peril from which injury results to them: *Jamison v. Chesapeake etc. Ry. Co.*, 92 Va. 327, 53 Am. St. Rep. 813, 23 S. E. 758. As to whether they are chargeable with contributory negligence in standing on the platform of a car, see *Woodroffe v. Roxborough etc. Ry. Co.*, 201 Pa. St. 521, 51 Atl. 324, 88 Am. St. Rep. 827, and cases cited in the cross-reference note thereto; *Graham v. McNeill*, 20 Wash. 466, 72 Am. St. Rep. 121, 55 Pac. 631, 43 L. R. A. 300. And as to whether a passenger on a freight train is negligent in standing up in the caboose, see *Wallace v. Western etc. R. R. Co.*, 98 N. C. 494, 2 Am. St. Rep. 346, 4 S. E. 503; *Harris v. Hannibal etc. R. R. Co.*, 89 Mo. 253, 58 Am. Rep. 111, 1 S. W. 325. The duty of a railroad company generally toward persons riding on a freight train is considered in *Baltimore etc. Ry. Co. v. Cox*, 66 Ohio St. 276, 64 N. E. 119, 90 Am. St. Rep. 583, and cases cited in the cross-reference note thereto; *Steele v. Southern Ry.*, 55 S. C. 389, 74 Am. St. Rep. 756, 33 S. E. 509; *Mathews v. Great Northern Ry. Co.*, 81 Minn. 363, 83 Am. St. Rep. 383, 84 N. W. 101.

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## NATIONAL LUMBERMAN'S BANK v. MILLER.

[131 Mich. 564, 91 N. W. 1024.]

**NEGOTIABLE INSTRUMENTS of Married Women—Consideration—Evidence.**—If a note is made by a wife and indorsed by her husband, it imports a consideration paid to her, and the holder makes out a prima facie case by introducing the note in evidence. (p. 625.)

**NEGOTIABLE INSTRUMENTS of Married Women Estoppel.** If a married woman obtains money on her note representing that it is for herself individually, and for her separate estate, she is estopped to contend that her husband persuaded her to take this means to obtain the money for him. (pp. 625, 626.)

**EVIDENCE—Conversations.**—If husband and wife are sued on a note, and the defense is set up that it was given for his benefit alone, evidence of conversations between them, not shown to have been in the presence of, or communicated to, the plaintiff, is inadmissible. (p. 626.)

**EVIDENCE—Business Relations Between Husband and Wife.** If a husband and wife are sued on a note and the defense is set up that it was given solely for his benefit, evidence as to the business



relations between them, and the amount of property and extent of the business of each, is admissible. (p. 626.)

W. J. Turner and S. H. Clink, for the appellants.

Smith, Nims, Hoyt & Erwin, for the appellee.

**565** GRANT, J. This suit is brought upon a promissory note for four thousand and forty-five dollars, dated December 30, 1899, with defendant Isabella as maker and defendant John as indorser. With the plea of the general issue defendant gave notice that she was the wife of her codefendant, and that said note was for money obtained for his individual use. The defendants are husband and wife. Isabella owned property in her own right to the amount of about fifteen thousand dollars. In 1892 she borrowed two hundred dollars of the plaintiff, for which she gave her individual note. It was renewed from time to time, and payments made until the amount was reduced to one hundred and forty-five dollars. In February, 1893, she obtained a loan from the bank of one thousand dollars, for which she gave her note. When she applied for the loan, the cashier informed her that some security would be required, and spoke to her about procuring the indorsement of Mr. Miller. She stated that she did not like to ask him, but she brought a note signed by herself, with Mr. Miller's indorsement, and obtained the money at the bank. This note also was renewed from time to time. John A. Miller also had individual notes at the bank. All these notes were, on November 18, 1896, consolidated into a single note for four thousand and seventy dollars, signed by her and indorsed by him. This was renewed from time to time, interest **566** and small payments made until December 30, 1889, the date of the note in suit. The court directed a verdict for plaintiff for the amount of one hundred and forty-five dollars, which was a part of the consideration of the note in suit, holding that it was Mrs. Miller's personal matter. He left it to the jury to determine whether, under the proofs, the one thousand dollars was obtained upon representations by Mrs. Miller that it pertained to her separate estate. Upon this point the jury found for the plaintiff. The judge instructed the jury that defendant Isabella was not liable for the balance of the note. The jury rendered a verdict for plaintiff for twelve hundred and eighty-seven dollars and thirty-five cents.

1. Plaintiff made its prima facie case by introducing the note in evidence. Defendants thereupon moved the court to direct

a verdict for the defendants on the ground that the plea and notice showed that the defendants were husband and wife, and the duty rested upon the plaintiff to prove a consideration as would bind her. Upon its face the note was hers, and it imported a consideration paid to her. It was indorsed by her husband. There was no presumption against the legality of such a note. The burden rested upon the defendant to prove facts which would relieve her from liability. The motion was properly overruled.

2. The defendants then entered into the merits of the controversy, and testimony was taken, the cashier of the bank and Mr. and Mrs. Miller giving testimony. The cashier gave the following testimony in regard to the transaction: "Mrs. Miller came and asked me if she could borrow a thousand dollars from the bank. I says, 'What on?' <sup>567</sup> and she says, 'On my note.' I says, 'On what security?' She says, 'Ain't my note good?' I says, 'I presume it is, Mrs. Miller, but we are in the habit of having some collateral security or indorser on notes of any size.' 'Why,' she says, 'you didn't ask me for any security on that two hundred dollars.' I said, 'That was a small amount, and I knew you were all right; but I think on an amount of this size our people would want some security.' She says, 'I don't know what security to give you; haven't any to give you that you would take.' I says, 'Could you give us an indorser?' She says, 'I don't know who to ask to indorse.' I says, 'Wouldn't Mr. Miller indorse for you?' She says, 'I presume he would if I would ask him, but don't want to ask him to indorse my note.' I took her application down on the book without indorser, and says: 'If you want me to submit your application in this shape, will submit it, but am afraid our people will not take it. Think Mr. Miller would not hesitate to indorse the note, and, if he would, think they would take it.' She says, 'You may put it down with Mr. Miller's name'; and I put it down, and it was passed upon by the committee favorably. The note is dated on the 24th of February, 1893, the same date of the application."

He further testified that he relied upon her statements in making the loan, and understood that the money was obtained for her separate estate. Mrs. Miller did not deny this testimony of the cashier. She did not tell the cashier that the money was for her husband. If she obtained the money representing that it was for herself individually, and for her separate estate, she will not be heard to defend on the ground that her husband persuaded her to take this course, and to obtain the money for him.

She herself testified that she was under no threats or coercion. It is evident from her own testimony that she gave the cashier to understand that she was acting in her individual capacity, and desired the money for her own use in regard to her separate estate. We think the court committed no error in leaving the question to the jury.

3. Conversations which took place between the defendants were incompetent, since no attempt was made to show that they were either in the presence of, or were communicated to, the cashier of the bank.

568 4. The court allowed a wide latitude to the plaintiff in inquiring into the business relations between the defendants, and the amount of property and extent of business carried on by each. We think the case was one justifying such inquiry, and that the court committed no error in admitting such testimony.

Judgment is affirmed.

Hooker, C. J., Moore and Montgomery, JJ., concurred.

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*A Married Woman's Note* creates an indebtedness against her if she has separate property: *O'Malley v. Ruddy*, 79 Wis. 147, 24 Am. St. Rep. 702, 48 N. W. 116. And if she assigns a note which is payable to her order, and guarantees its payment, she is liable on her guaranty, and the purchaser need not inquire as to her intended disposition of the proceeds of the sale: *Kitchen v. Chapin*, 64 Neb. 144, 97 Am. St. Rep. 637, 89 N. W. 652, 57 L. R. A. 914.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**MISSISSIPPI.**

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LOUISVILLE AND NASHVILLE RAILROAD COMPANY  
v. GULF OF MEXICO LAND AND IMPROVEMENT  
COMPANY.

[82 Miss. 180, 33 South. 845.]

**VENDOR AND PURCHASER—Option to Purchase.**—A contract to convey a strip of land of a specified width along a railroad, as surveyed, located, and staked, at any time within a specified period from date, when requested by the railroad company and upon the payment of a designated sum, is simply an option to purchase. (p. 631.)

**ADVERSE POSSESSION—Innocent Purchaser.**—If a railroad company claiming a strip of land one hundred feet wide on either side of its track, under an unrecorded contract to purchase constituting a mere option, incloses a strip fifty feet wide on either side of its track, and sufficient for all its purposes and uses that much for ten years, allowing the land owner to inclose and use the balance of the strip, it is estopped to claim such balance by adverse possession, or as against an innocent purchaser, that he holds the legal title thereto in trust for it. (p. 631.)

**ADVERSE POSSESSION — Constructive—Extent.**—Constructive adverse possession coextensive with the description in an unrecorded contract to convey under which the possessor claims, will extend only to such land as is used in connection with the land actually possessed, and to only so much as is reasonable and proper for that purpose according to the custom of the country. (p. 631.)

**ADVERSE POSSESSION.—Mixed Possession** is not enough to warrant disturbance of the record rights of innocent purchasers for value. (p. 631.)

G. L. Smith, for the appellant.

Green & Green, for the appellee.

**184** CALHOON, J. The appellee filed its bill in the court below to remove appellant's claim to certain lands as a cloud upon its title. The land in question consists of two strips of



fifty feet each, in width, adjoining on either side the fenced right of way of appellant of one hundred feet, the amount fenced being fifty feet on either side of the center of the actual railroad track. As to this fifty feet of fenced land there is no claim. There is no dispute whatever about the <sup>185</sup> facts. On the 26th of October, 1867, D. Lewis and A. E. Lewis, under whom both sides to this litigation claim, executed their separate instruments, exhibits "A" and "B" to answer, evidencing their contract with a corporation then known as the New Orleans, Mobile and Chattanooga Railroad Company, wherein the following language is used: "The said party of the first part, for the consideration of the sum of one dollar in hand paid, and the further consideration of the benefits derived from the location of the railroad of said party of the second part across the land of the party of the first part, do by these presents hereby agree to the contract and sell and convey by deed of warranty to the party of the second part a strip, parcel or piece of land situate in the county of Jackson and state of Mississippi, being a part of sections [here stating them], and described as follows: Being a strip of land two hundred feet wide, and extending across the lands of the party of the first part, and lying one hundred feet wide on each side of the center line of the railroad of the party of the second part as surveyed, located and staked across the lands aforesaid by the officers of the party of the second part; and the party of the first part agrees to execute and deliver to the party of the second part a warranty deed to said land at any time within two years from the date of this instrument, whenever required by the party of the second part so to do; provided and upon condition, nevertheless, that the said party of the second part, their successors or assigns, or legal representatives, pay to the party of the first part the whole sum of one dollar for the amount of land so conveyed as aforesaid in lawful money of United States. And the party of the second part hereby covenant and agree with the party of the first part that they will pay to the party of the first part the full sum of one dollar for the full amount of the land conveyed to them by the party of the first part upon the execution and delivery of the warranty deed to them as aforesaid by the party of the second part of the lands and premises described as aforesaid." These deeds have never been recorded. It will be noted that appellant admits in its answer <sup>186</sup> that the legal title is in appellee, but sets up that it holds the legal title in trust for appellant.

It is agreed by the parties that D. Lewis and E. A. Lewis executed these deeds in 1867, and that E. A. Lewis, with full notice of these deeds, acquired the title of D. Lewis to all the lands, subject, of course, to any interest inuring to the grantee railroad company under the deeds, and that A. E. Lewis died testate on the thirty-first day of December, 1885, and that on January 28, 1890, his devisees conveyed to H. F. Russell, and that Russell, on June 2, 1890, conveyed to John B. Lyon, who conveyed to complainant below (appellee here); and that these conveyances subsequent to the death of A. E. Lewis conveyed the whole property, without any exception or reservation whatever of the two hundred feet of land of which one hundred feet are now in controversy; and that all of these successive purchasers after the death of A. E. Lewis paid value, and had no notice whatever of the unrecorded contracts of A. E. and D. Lewis above mentioned, unless they are affected with notice of the claim to the whole two hundred feet by the railroad company by the fact of half being under fence. It is further agreed between the parties that the New Orleans, Mobile and Chattanooga Railroad Company built its railroad on a right of way cleared out not exceeding one hundred feet as surveyed, located, and staked and used said railroad, without fencing any part of the land, and that on January 1, 1869, it executed a trust deed on all its properties and franchises, and that by foreclosure of the trust the property, rights, and franchises were sold and became the property of a concern styled the New Orleans, Mobile and Texas Railroad Company, on April 28, 1880, which latter company thereafter operated the railroad, but without fencing any part of it, up to October 5, 1881, when this company conveyed all its rights and franchises to the Louisville and Nashville Railroad Company (appellant here), which took possession and operated the railroad without fencing any part of the land until some time in the year 1883, when it agreed with A. E. Lewis to fence in its track between West Pascagoula and Fountainbleau <sup>187</sup> and for some distance east of Fountainbleau, and accordingly did, in the year 1883, fence in its track by placing a fence on each side of it at a distance of fifty feet from its center on either side; and that appellant has operated its railroad and maintained that fence up to some time in the year 1901, when it rebuilt its fence on each side of the track at a distance from the center of one hundred feet instead of fifty feet, as before. It is further agreed that the land in dispute is uncultivated, and that none of the occupying railroad

companies have ever exercised any visible acts of ownership over any part of the land not inclosed by the fences erected in 1883 until the year 1901, when the fences were extended to inclose two hundred feet instead of one hundred feet, as before. It is further agreed between the parties that, after the erection of the fence in 1883, A. E. Lewis ran a fence from the point where the western line of section 32 (part of the land conveyed) intersects the railroad for a distance of a mile and a half to Gravelline Bayou, which connects with the gulf or bay and the West Pascagoula river, and extends from the gulf or bay to the railroad track; so that, after this fence was built a tract of land south of the track was bounded on the west by this fence and Gravelline Bayou, and on the south by this bayou and the gulf, and on the east by West Pascagoula river, which boundaries, in connection with the railroad fence, formed a pasture from which cattle could not escape, and that E. A. Lewis in his life used this inclosure as a pasture, which use was continued to the time of sale to complainant, and the complainant has from time to time rented it under verbal leases for pasture purposes, and this use has been continuous up to the date of the lawsuit. It is further agreed by the parties that neither appellant nor any of its grantor companies has ever needed for use as right of way any more than one hundred feet in width. On the pleadings, exhibits, and agreed state of facts the chancellor below decreed for the appellee.

Very clearly, exhibits "A" and "B" conveyed no title whatever to the original railroad company. They are in no sense conveyances. <sup>188</sup> They are not bonds for title. By them the railroad company acquired simply an option to demand conveyances, but this right to demand could not be exercised unless within two years from October 25, 1867, the date of the instruments, and not then without tender of the purchase price, and then only for two hundred feet "as surveyed, located, and staked." Without compliance with the express conditions, the railroad company had no rights unless such as they might acquire by actual adverse possession exclusive in its nature: 1 Am. & Eng. Ency. of Law, 857-859; 3 Washburn on Real Property, 6th ed., sec. 1981. The railroad company undoubtedly acquired title by prescription to the fifty feet on each side of its track which it fenced in in the year 1883, but only because of the inclosure did it acquire any title to that, even as against D. Lewis and A. E. Lewis, much less as against innocent purchasers under them.

There is another principle which defeats the claim of appellant. The doctrine of constructive adverse possession coextensive with the description in the conveyance "will extend only to such land as is used in connection with the land actually possessed, and to only so much as is reasonable and proper for that purpose according to the custom of the country": 1 Am. & Eng. Ency. of Law, 864. There is no proof of this, and so, even if the option was a conveyance, appellant's claim falls: Jackson v. Woodruff, 1 Cow. 276, 13 Am. Dec. 525; Day v. Atlantic etc. R. R. Co., 41 Ohio St. 392; Thompson v. Burhans, 61 N. Y. 52; Coleman v. Eldred, 44 Wis. 210. See 3 Washburn on Real Property, 6th ed., secs. 1981 to 1986, for observations reaching all phases of this case. The legal title is conceded to be in appellee. The claim that this legal title is held in trust for appellant cannot be sustained on the facts in this record. There were no visible acts of ownership by appellant, and its possession was, if it had any, not even exclusive. Appellee was certainly in joint, if not exclusive, possession of the southern part. A mixed possession is not enough to warrant disturbance of the record rights of innocent purchasers for value: Billington v. Welsh, 5 Binn. 129, 6 Am. Dec. 406; Bell v. Twilight, <sup>189</sup> 45 Am. Dec. 367; Boyce v. McCulloch, 3 Watts & S. 429, 39 Am. Dec. 35. There was no such change of ownership of the land in controversy as to "arrest the attention" of purchasers: Stevens v. McGee, 81 Miss. 644, 33 South. 73.

Affirmed.

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*The Essentials of Adverse Possession* are discussed in the monographic note to De Frieze v. Quint, 28 Am. St. Rep. 158-162, and the recent cases of Stiff v. Cobb, 126 Ala. 381, 85 Am. St. Rep. 38, 28 South. 402; Ashford v. Ashford, 136 Ala. 631, 96 Am. St. Rep. 82, 34 South. 10; Dewitt v. Shea, 203 Ill. 393, 96 Am. St. Rep. 311, 67 N. E. 761; Truth Lodge v. Barton, 119 Iowa, 230, 97 Am. St. Rep. 303, 93 N. W. 106; Jangraw v. Mee, 75 Vt. 211, 98 Am. St. Rep. 816, 54 Atl. 189. What constitutes color of title is discussed in the monographic note to Power v. Kitching, 88 Am. St. Rep. 701-729. Actual possession of a part of a tract, under color of title, usually draws thereto constructive possession of the entire tract: See the note to Power v. Kitching, 88 Am. St. Rep. 703. Compare Jackson v. Woodruff, 1 Cow. 276, 13 Am. Dec. 525; Denham v. Holman, 26 G. 182, 71 Am. Dec. 198; Willamette Real Estate Co. v. Hendrix, 28 Or. 485, 52 Am. St. Rep. 800, 42 Pac. 514; Wheeler v. Taylor, 32 Or. 421, 67 Am. St. Rep. 540, 52 Pac. 183.



## LOTT v. PAYNE.

[82 Miss. 218, 33 South. 948.]

**DEEDS—Construction—Easement.**—A deed to a strip of land limiting the grantee's interest to a private easement or for street purposes only, does not authorize such grantee to take exclusive possession of the land. (p. 632.)

**EJECTMENT—Possession—Easement.**—The owner of a strip of land over which another has a right of way may maintain ejectment against such other when he exercises exclusive possession over such strip. (p. 633.)

Ejectment to recover a strip of land lying between lots owned by plaintiff and defendant. One Durham conveyed the strip of land in dispute and other lands adjoining to Mrs. Lott, the plaintiff. Durham conveyed to one Witherspoon and the latter to Payne, the defendant, lands adjoining said strip by deed, reciting that such strip of land in dispute was to be used by the grantee "as a private easement, or for street purposes only." Judgment for defendant and plaintiff appealed.

Neville & Wilborne and W. H. Hardy, for the appellant.

S. A. Witherspoon, for the appellee.

**221** WHITFIELD, C. J. It is perfectly manifest that the language, "said strip of ground to be used as a private easement or for street purposes only," was meant to clearly limit the estate granted by Durham to Witherspoon, and by Witherspoon to appellees: *Hart v. Gardner*, 74 Miss. 153, 20 South. 877; *Robinson v. Mississippi R. R. Co.*, 59 Vt. 426, 10 Atl. 522; *Richards v. North West etc. Church*, 20 How. Pr. 317, and other authorities cited by counsel for appellant. It was manifest error to refuse to reopen the case and permit Durham, the grantor, to show the whole environment—the situation of the parties and of the property at the time of the execution of the deed to Witherspoon, and at the time of **222** the execution of the deed of Witherspoon to appellees. But sufficient appears from the testimony admitted to show that the parties all intended the words quoted as qualifying and limiting Witherspoon's and appellee's right to the mere easement and use of the strip in controversy as a right of way for street purposes, and that the action of all parties has conformed to this intention. The thing to be ascertained in the construction of a deed, as in the construction of any other contract, is the intention of the par-

ties, and that intention is perfectly manifest here. Under the two deeds in evidence, appellees have the easement, but Mrs. Lott the title to the fee; and under the testimony showing that appellees have taken exclusive possession of the strip, and appropriated it as if it were their own, to the utter exclusion from it of the appellant, it is clear that ejectment was maintainable by appellant against appellees. This is expressly decided in this state in *Gordon v. Sizer*, 39 Miss. 805, and announced as the correct rule in the American and English Encyclopedia of Law, second edition, volume 10, pages 473, 474.

Reversed and remanded.

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*An Easement*, it is said, cannot be the subject matter of an action in ejectment: *Village of Lee v. Harris*, 206 Ill. 428, 69 N. E. 230, 99 Am. St. Rep. 176, and see the cases cited in the cross-reference note thereto. But in *San Francisco v. Grote*, 120 Cal. 59, 65 Am. St. Rep. 155, 52 Pac. 127, 41 L. R. A. 335, it is held that ejectment may be maintained by a municipal corporation to recover possession of a street dedicated to a public use, whether it or the adjacent proprietor owns the fee.

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## ADAMS v. COLONIAL AND UNITED STATES MORTGAGE COMPANY.

[82 Miss. 263, 34 South. 482.]

**TAXATION—Loans by Nonresidents—Mortgages.**—If a nonresident lender of money has no place of business, or location or agent within the state, and accomplishes the loan beyond the limits of the state, the fact that negotiations for the loan were made by a person in the state, and that it is secured by mortgage on property within the state, does not subject it to taxation therein. (p. 635.)

**MORTGAGES.**—Mortgages have no Estate or interest in the land mortgaged. (p. 637.)

**TAXATION—Loans by Nonresidents.**—A statute providing for the taxation of money loaned, and specifying that such loans shall be taxable, in the county where the lender resides, is temporarily located, or has a place of business, applies to such nonresidents only as have a residence, location, or place of business within the state. (p. 637.)

R. N. Miller, D. A. Scott and T. E. Cooper, for the appellant.

Mayes & Harris, J. H. Watson, H. R. Boyd and Smith, Hirsh & Landau, for the appellee.

**392** WHITFIELD, C. J. One of these cases is here from the circuit court of Coahoma county; the other from the chancery court of Copiah county. The one from Copiah county

presents the question whether the interest of a mortgagee is such an interest in the land itself, covered by the mortgage, as renders it liable to taxation. The one from Coahoma county presents the question whether the notes and mortgages, as "solvent credits," have a "business situs" in that county. There is a distinct line of decisions holding with our case (*Jahier v. Rascoe*, 62 Miss. <sup>393</sup> 699) that wherever a money lender has a local agent in another state, and permits that agent to control the evidences of debt, and the mortgages securing them, and to continue, for a long course of dealing, the business of lending, collecting, and relending money in the state of the agent's residence, such evidences of debt, and the mortgages securing them, have what has come to be known as a "business situs" for purposes of taxation and for other purposes. This principle is thus expressed in *Jahier v. Rascoe*, 62 Miss. 699: "Wherever it appears that the debt arose as an incident to a business conducted in this state," etc. However phrased, the principle is this: That wherever the money of a lender in one state is by the principal intrusted to the control of an agent in another state for the purpose of being kept in the latter state, and loaned out, collected, and reloaned, or habitually kept on deposit, for safety merely, as held in *Re Romaine*, 127 N. Y. 80, 27 N. E. 759, 12 L. R. A. 401, so as thus to remain, through a course of dealing, so long as to become localized as a part of the whole mass of personal property in the latter state, such money acquires what is known as a "business situs" for the purpose of taxation, as well as for certain other purposes not necessary to be dealt with here.

The statement of facts in the Coahoma county case does not contain any stipulation that Mr. Glover was the agent of the appellee. But the facts as to his agency are practically the same with those as to the agency of Powell in *State v. Smith*, 68 Miss. 79, 8 South. 294, and it was there held, rightly or wrongly, that Powell was not the agent of the lender. The lender (the appellee) has its place of residence in England. It has a local agency in Memphis, Tennessee; but it is expressly agreed that it has no office or place of business in this state. The agreement does not set out that Mr. Glover secured all the loans. On the contrary, it was expressly agreed that loans were secured by other attorneys than Mr. Glover, and sometimes by the borrowers direct. It is further agreed that the notes and <sup>394</sup> the trust deeds were prepared by the appellee in Memphis, and forwarded to the applicant or his attorney for execution, and that

the securities, when signed and acknowledged by the borrower, were delivered to his attorney, with the understanding that he was to transmit them to the appellee's office in Memphis. It is further agreed that the trust deeds and notes are immediately sent, after the contracts are consummated, to the appellee's home office in Hull, England, where they remain until they mature, when they are returned to the agent of the appellee at Memphis for collection. It is further agreed that David Houghton, the trustee in all the instruments involved, is a resident of Hull, England. It is further agreed that the applications sent to Mr. Glover were sent at his request, and that they would be sent to anyone who would desire to make use of them, and that some of these very loans were made upon applications that came from other attorneys or from the borrowers direct. The agreed statement (which the reporter will set out in full) further expressly provides that this case "is to be tried in all the courts to which the same may come, by appeal or otherwise, upon the facts set out in the agreement, and none other."

We think on this statement of facts we are concluded by the case of *State v. Smith*, 68 Miss. 79, 8 South. 294, as to the Coahoma county case. This court said in that case: "There can be no doubt that, where an agency is created in this state for the loaning of money, and the business of loaning it is carried on here—this state being the locality in which the transaction is begun and completed—and the debt acquires a situs here, from the course of dealing between lender and borrower, through the agency established here, it is taxable; but where the nonresident lender has no place of business or location or agent in this state, and accomplishes the loan beyond the limits of the state, the fact that negotiations for the loan were made by persons in this state, and it was secured by mortgage on property in this state, does not subject it to taxation here. 395 In the case before us the creditor has no agent in this state, and no place of business here. The money was not sent here to be loaned. The evidence of debt was not here. The business of lending was not conducted in this state. The debt was secured by a mortgage on property in this state, and the loan was obtained by the application of persons in the state transmitted to persons beyond its limits, who forwarded the money from without the state. It was not embraced by section 497 of the Code of 1880."



The section of the Code of 1892, under which this tax is sought to be imposed, is the same with section 497 of the Code of 1880. *State v. Smith*, 68 Miss. 79, 8 South. 294, is conclusive of this Coahoma county case. It has been too long recognized as the law, and business investments have been too long made upon the faith of it, to permit it to be questioned. The remedy is with the legislature, not with the courts. Counsel for appellant earnestly insist that the clause in the trust deeds, to wit: "The contract embodied in this conveyance and the notes secured hereby shall be construed according to the laws of Mississippi, where the same is made," localizes and domesticates the debts therein, and subjects the same to taxation in this state. The facts show where a contract is made, and the court held in the *Smith* case that, although the negotiations were concluded in this state, and the contract made, as shown by the facts in that case—substantially identical with the facts here—yet it was not a contract "made" here, and that Powell was the agent of the borrower. As to the last propositions, dealt with in a very summary way in the *Smith* case, we say nothing; but as to its interpretation of section 497, Code of 1880, it seems to us sound. Whether one is an agent depends, not on paper recitals, but on the facts.

We are unable to see any difference between that case and this as to how the business of lending was conducted, and feel bound by that decision. The object of the clause in the contract <sup>396</sup> that it should be construed according to the laws of Mississippi undoubtedly was to enable this grasping corporation to secure the abnormally high rate of interest allowed in this state—ten per cent. The point made in the last brief filed for appellant—that the order of the board of supervisors is conclusive—is untenable. The board cannot fix situs by an order; the facts determine situs.

As to the Copiah county case, it has been too long settled in this state to admit of further debate that a mortgagee has no interest or estate in the land mortgaged: *Buckley v. Daley*, 45 Miss. 338; *Freeman v. Cunningham*, 57 Miss. 67; *Beckett v. Dean*, 57 Miss. 232. In *Buckley v. Daley*, 45 Miss. 338, the court says: "The estate in the land is the same thing as the money due upon it. Under our decisions the extent of the mortgagee's right is to sell the property for the purpose of realizing his debt—a mere right to resort to the security for the payment of the debt. He has no title which is vendible under execution. It is held that, after breach of condition, he

may maintain ejectment; but this he can do only as a means to the end of enforcing his security." It is expressly said that "his estate is neither legal nor equitable," and that he has no "interest in the property, or right to it, except as an incident to the chose in action secured by it." These decisions are conclusive in favor of appellee in the case from Copiah county; for the effort in that case is solely to tax the mortgages as if they were land, or, to phrase it a little differently, to tax the mortgagee's interest as real estate. This has not yet been done in this state; on the contrary, the very language of section 3757 in the Code of 1892, "shall be taxable for the same in the county in which such persons may reside, or have a place of business, or be temporarily located at the time of the assessment," indicates clearly that the legislature, in this section, dealt with loans of this sort as following, according to the general rule of law, the person of the creditor, and as being taxable at his domicile. At the <sup>397</sup> time of the enactment of this statute the learned commissioners who framed this section, and the legislature which adopted it, must be presumed to have known of the rule announced in the *Smith* case, *supra*, and of the maxim or legal fiction, "*Mobilia personam sequuntur*," which we have referred to, and of the three cases which we have referred to, as to the quality of the mortgagee's interest in the land mortgaged, and hence to have intended, in re-enacting this section in the very words in which it had been enacted in the Code of 1880, section 497, and substantially in article 23, page 76, of the Code of 1857 and in the Code of 1871, section 1682, to preserve and perpetuate the rule that loans of this character unlocalized in this state, are to be taxed to the owner at his domicile. That is the interpretation of this section in the *Smith* case, and many sessions of the legislature have been held since with no change in the section.

There are other questions in these cases, upon which we desire to remark. First, it is beyond controversy that the interest of a mortgagee in the lands mortgaged, whether it be, as here, a mere right to sell land to pay the debt—a chose in action only—or whether it be, as held by the United States supreme court and many state courts, an actual estate in the lands itself, is in either case a sufficient interest therein, in constitutional law, to empower the legislature to tax it, by express enactment, as an estate in land. This is conclusively settled by the United States supreme court in *Savings etc. Soc. v. Multnomah County*, 169 U. S. 429, 18 Sup. Ct. Rep. 392, and in *New Orleans v.*

Stemple, 175 U. S. 321, 20 Sup. Ct. Rep. 110. See, also, Bristol v. Washington County, 177 U. S. 133, 20 Sup. Ct. Rep. 585, and State Tax on Foreign-Held Bonds, 15 Wall. 300, and Walker v. Jack, 31 C. C. A. 462, 88 Fed. 576, opinion by Judge Taft; and Howell v. Gordon, 127 Mich. 517, 86 N. W. 1042; and Allen v. National State Bank, 92 Md. 509, 84 Am. St. Rep. 517, 48 Atl. 78, 42 L. R. A. 760. In <sup>398</sup> the Multnomah county case, the United States supreme court thus expresses it: "The state may tax real estate mortgaged, as it may all other property within its jurisdiction, at its full value. It may do this by taxing the whole to the mortgagor, or by taxing to the mortgagee the interest therein represented by the mortgage, and to the mortgagor the remaining interest in the land. And it may, for the purpose of taxation, either treat the mortgage debt as personal property to be taxed, like other choses in action, to the creditor at his domicile or treat the mortgagee's interest in the land as real estate, to be taxed to him, like other real property, at its situs." The legislature of this state, therefore, has the undoubted power to pass a law subjecting the interest of every mortgagee in land in this state, though a nonresident of the state, to taxation here, legislatively fixing the situs of that interest in this state for the purpose of taxation by this state, which protects the mortgagee, and furnishes him the sole forum for enforcing his claim. And we wish to add, with all the emphasis which we can command, that the next legislature of this state ought to pass just such an act promptly. The record in these cases discloses the great necessity for such legislation. Strong insistence is placed by counsel for appellee on the proposition that it is not good public policy to enact such a law, for the reason that, in the absence of such taxation, the rate of interest will be made less to our people; and yet what are the facts shown by this record? First, that this mortgagee has charged the highest rate of interest allowed by our law—a rate so high as to be rarely allowed anywhere else in the United States; second, whilst doing this, it has not paid the state one cent in the way of taxes. In other words, it has charged the highest rate of interest, and paid no taxes here; and it may be safely assumed, from the history of such organizations, that it will always charge the highest rate of interest allowed by any state, whether it is required to pay any taxes or not. The proposition of counsel, therefore, does <sup>399</sup> not fit in with the facts of the case. But this is not all this record shows. It shows, third, that this mortgagee has not only paid no taxes here, whilst charging

the highest rate of interest allowed, but has actually put into these mortgages a stipulation (a) that the mortgagor should pay all taxes on the land, and (b) should also pay all taxes which the law of the state might, in the future, compel the mortgagee to pay on the mortgage debt. Surely, the legislature will need no further argument than these three propositions to convince it of the necessity and the propriety of compelling these foreign lenders of money to pay, just as all other citizens pay, their proper share of taxes for the protection afforded them by this state.

It is strongly urged that *State v. Smith*, 68 Miss. 79, 8 South. 294, is "antiquated and obsolete, and in plain conflict with the modern decisions" on the subject of taxation, especially the cases cited from the United States supreme court, relied on. We think the trouble is not so much with that decision—at least as to its interpretation of the statute—as with the statute itself. Originating in 1857, at a time in this state when agriculture was everything, and commercial interests of slightest comparative importance, the failure of the legislature to follow the advanced statutes of other states on the subject of choses in action, including mortgage debts, is to be attributed to the conditions, until quite recently obtaining in Mississippi, as to agriculture and commerce.

We have read critically all the cases cited from other state supreme courts and the United States supreme court, and the doctrine of these, the latest cases on the power and propriety of the legislature's compelling the owners of the mortgage debts and other choses in action to pay taxes on the same in the state where they must be enforced or collected, and, to that end, of giving them all a "business situs" there, or, as to mortgages, of legislatively declaring the interest of the mortgagee to be an estate in the land for the purpose of taxation, and fixing its <sup>400</sup> situs in the state where the land lies, is by us most emphatically approved. We quote, to give it our special approval, the following from the masterly opinion of Mr. Justice Holmes in *Blackstone v. Miller*, 188 U. S. 189, 23 Sup. Ct. Rep. 277: "What gives the debt validity? Nothing but the fact that the law of the place where the debtor is will make him pay. It does not matter that the law would not need to be invoked in the particular case. Most of us do not commit crimes, yet we are, nevertheless, subject to the criminal law, and it affords one of the motives for our conduct. So, again, what enables any other than the very creditor, in proper person, to collect the debt? The law of the same place. To test it, suppose New York should turn



back the current of its legislation, and extend to debtors the rule still applicable to slander—‘*actio personalis moritur cum persona*’—and should provide that all debts hereafter contracted in New York and payable there should be extinguished by the death of either party. Leaving constitutional considerations on one side, it is plain that the right of the foreign creditor would be gone. Power over the person of the debtor confers jurisdiction, we repeat. And this being so, we perceive no better reason for denying the right of New York to impose a succession tax on the debts owned by its citizens than upon the tangible chattels found within the state at the time of death. The maxim, ‘*Mobilia personam sequuntur*,’ has no more truth in the one case than in the other. When logic and policy of the state conflict with a fiction, due to historical tradition, the fiction must give away.” And also the following from the able opinion of the Maryland supreme court in *Allen v. National State Bank*, 92 Md. 509, 84 Am. St. Rep. 517, 48 Atl. 78: “Conceding, for the present that the interest of the mortgagees is in the nature of a chose in action, the general rule that its situs for taxation is the residence of the owner is a mere fiction of law, and yields, whenever it is necessary, for the purpose of justice, that the actual situs of the thing should be examined, <sup>401</sup> and whenever the legislative intent is manifested that this legal fiction should not operate.”

We also call special attention to the following well-considered statements of the law, one from the supreme court of Pennsylvania and the other from the court of appeals of New York. Says the former in *Maltby v. Reading etc. R. R. Co.*, 52 Pa. St. 140: “The principle of taxation as the correlative of protection, perfectly just in itself, is as applicable to a nonresident as to the resident owner, because civil government is essential to give value to any form of property without regard to ownership, and taxation is indispensable to civil government. . . . It is apparent that the intrinsic and ultimate value of the loan, as an investment, rests on state authority; i. e., the state which made it property, and which preserves it as property. Then it would seem that this kind of property, more than any other, ought to contribute to the support of the state government. And I suppose it is upon this ground that the legislature discriminates between corporation loans and private debts as objects of taxation. The artificial debtor, itself a creature grant, is so dependent upon the government—it lives and moves and has its being so entirely by the favor of the government—that

not only what it owns, but what it owes, is thought fit to be taxed." Says the court of appeals of New York, in *People v. Commissioners of Taxes*, 23 N. Y. 224: "The fiction or maxim, 'Mobilia personam sequuntur,' is by no means of universal application. Like other fictions, it has its special uses. It may be resorted to when convenience or justice so require. In other circumstances, the truth and not the fiction affords as it plainly ought to afford, the rule of action. The proper use of legal fictions is to prevent injustice. 'No fiction,' says Blackstone, 'shall extend to work an injury; its proper operation being to prevent a mischief or remedy an inconvenience which might result from the general rule of law.' So, Judge Story, referring to the situs of goods and chattels, observes: 'The general doctrine is not controverted, <sup>402</sup> and although movables are for many purposes to be deemed to have no situs, except that of the domicile of the owner, yet, this being but a legal fiction, it yields whenever it is necessary, for the purpose of justice, that the actual situs of the thing should be examined.' He adds—quite pertinently, I think, to the present question: 'A nation within whose territory any personal property is actually situated has entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situated there.' I can think of no more just and appropriate exercise of the sovereignty and jurisdiction of a state, or nation, over property situated within it, and protected by its laws, than to compel it to contribute toward the maintenance of the government and law."

It is earnestly insisted that these foreign money lending corporations have many millions of money loaned in this state on mortgages on land, and that they pay no taxes in return for the protection they get from the state whose courts and laws alone make their securities available. This is, beyond all controversy, a great wrong to the people of this state, whether such money lenders be nonresident persons or nonresident corporations. The constitution of the state makes it the duty of the legislature to tax all property not legally exempt; and when the present defect in the law, in this regard, is brought to its attention it is not to be doubted that the legislature will promptly rectify the situation.

We make a closing observation: The Multnomah county case is not applicable here because it was in construction of the act of Oregon authorizing such taxation. The case of *Allen v. National State Bank*, 92 Md. 509, 84 Am. St. Rep.

517, 48 Atl. 78, has no application, for the reason that in that state the statute of 1896 fixed the situs of the mortgagee's interest for taxation in the county where the land was located, and for the further reason that in Maryland the mortgagee's interest is more than a mere lien. And it will be found, upon examination, that the <sup>403</sup> other cases cited by learned counsel for plaintiff, in Oregon, in California, in Missouri, in Michigan, in Indiana, in Massachusetts, in New York, and in New Jersey, all depend either upon express statutory or constitutional provision. Indeed, in Missouri, in *Russell v. Croy*, 164 Mo. 69, 63 S. W. 849, the supreme court of Missouri actually held the third amendment to the constitution of Missouri adopted in 1890, which was taken literally from the constitution of California to be itself unconstitutional because of its discriminating against corporation mortgages. See, as showing that these cases rest on statutory or constitutional provisions, *Mumford v. Sewall*, 11 Or. 67, 50 Am. Rep. 462, 4 Pac. 585; constitution of California adopted in 1879, art. 13, sec. 4; *Common Council v. Assessors*, 91 Mich. 78, 51 N. W. 787, 16 L. R. A. 59; *Village of Howell v. Gordon*, 127 Mich. 517, 86 N. W. 1042; *Allen v. National State Bank*, 92 Md. 509, 84 Am. St. Rep. 517, 48 Atl. 78, 52 L. R. A. 760; *Insurance Co. v. Commonwealth*, 137 Mass. 80; *State v. Runyon*, 41 N. J. L. 98; and *In re Blackstone's Estate v. Miller*, 171 N. Y. 682, 64 N. E. 1118; *Blackstone v. Miller*, 188 U. S. 203, 23 Sup. Ct. Rep. 277. This last was a succession tax case, where the tax "was upon the transfer, not upon the deposit," and so not in point.

The case of *New Orleans v. Stemple*, 175 U. S. 309, 20 Sup. Ct. Rep. 110, will be seen, upon proper analysis, to fall within the principle of those cases defining what "a business situs" for the mortgages of this sort is. The supreme court of the United States in that case say, as pointed out by counsel for appellee: "1. That the property in question was clearly property arising from business done in Louisiana, being property of the deceased, a resident of New Orleans; 2. That the same had never been out of the state, but that the money was still on deposit in New Orleans banks, and the notes and mortgages were still in New Orleans in the hands of the <sup>404</sup> agent of the plaintiff; and 3. That undeniably the moneys were to be kept in the state for re-investment or other use, and that the credits were in the hands of a local agent for the same purpose"; and all that the court held was that under those circumstances they were taxable under

the Louisiana statute, which statute provided, amongst other things, that "all bills receivable, obligations, or credits arising from business done in this state, are hereby declared assessable within this state."

We have given these cases the most painstaking consideration, and our conclusions are: 1. That the legislature has the power to fix the situs of a mortgagee's interest in land, whether it be an estate in the land or a mere chose in action in this state for the purpose of taxation, such legislation having been declared in the Multnomah county case "not a deprivation of property without due process of law," and not a denial of "the equal protection of the laws"; 2. That the legislature of this state has not yet passed such a statute; and 3. That we commend to the earnest consideration of the legislature at its next session, the prompt passage of a duplicate of the Oregon law. The provisions of this statute tax the interest of the mortgagee to him as land, and the rest to the mortgagor, thus avoiding double taxation, and, having been upheld by the supreme court of the United States, will be unassailable.

Affirmed.

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*The Situs of Property for purposes of taxation is discussed in the monographic note to Buck v. Miller, 62 Am. St. Rep. 448-477. See, too, Armour Packing Co. v. Augusta, 118 Ga. 552, 98 Am. St. Rep. 128, 45 S. E. 424. At page 456 of this note it is stated that credits have their situs at the domicile of the creditor and are there taxable. And the fact that the debt is secured by mortgage of property situated in another state does not affect it for the purpose of taxation. According to Allen v. National Bank, 92 Md. 509, 84 Am. St. Rep. 517, 48 Atl. 78, 52 L. R. A. 760, a state may tax all mortgages, or the interest stipulated for thereon, on land within the state, in the county where the land is located, no matter whether the mortgages are owned by citizens of the state or nonresidents.*



## BUTTERFIELD LUMBER COMPANY v. HARTMAN.

[82 Miss. 494, 34 South. 328.]

**HOMESTEADS ON PUBLIC LANDS—Sale of Timber.**—A contract by a homestead claimant on public lands with a third person, that in consideration of an advance of money to complete the homestead entry and obtain patent for the land, he will sell the timber thereon to such person is valid and not against public policy, and may be consummated by such sale of the timber after issuance of patent. (p. 644.)

Bill to set aside a trustee's deed in so far as it conveys timber on certain land and a certain right of way thereon. One Harness, a homestead claimant on public land, after his entry thereon, made an agreement with the Butterfield Lumber Company that, in consideration of the latter's advancing him money to complete his entry and obtain his patent, he would sell it all the pine timber on his land and also a right of way over it. After the issuance of such patent Harness and wife conveyed to such company such pine timber and right of way and the conveyance was duly recorded. Harness and wife then gave a deed of trust on the land to Hartman, who obtained a trustee's deed thereto under a sale under his deed of trust. Judgment dismissing the bill and the complainant appealed.

T. Brady, Jr., for the appellant.

P. Z. Jones, for the appellee.

**497 CALHOON, J.** We are driven to the conclusion that the decree of the court below must have been the result of an opinion that the agreement between Esau Harness and the grantor of appellant that, in consideration of the advance money to perfect his homestead entry and get his patent, Esau would sell the timber on the land in controversy, was against public policy and void, and made void also the subsequent sale of the timber to reimburse for that advance. We are not in accord with that view: United States Rev. Stats., secs. 2290, 2291, 2296 (U. S. Comp. Stats. 1901, pp. 1389, 1390, 1398), with 1 Gould & Tucker's Notes, p. 537. On the testimony we cannot escape the conviction that the appellee had such notice as should put any reasonable man on inquiry, which would have disclosed the existence of the conveyance of the timber and right of way by Esau to the grantor of appellants.

Reversed, and decree here in accordance with the prayer of the bill.

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*The Principles Involved in the Principal Case* are further discussed by the Mississippi court in the subsequent cases of *Anderson v. Wilder* (Miss.), 35 South. 875; *Stanford v. Eastubuchie Lumber Co.* (Miss.), 36 South. 10; *Orrell v. Bay Mfg. Co.* (Miss.), 36 South. 561. A lease of the timber interest in a homestead executed before final proof is held void in *Millikin & Co. v. Carmichael*, 134 Ala. 623, 92 Am. St. Rep. 45, 33 South. 45. And in *Moffatt v. Bulson*, 96 Cal. 106, 31 Am. St. Rep. 192, 30 Pac. 1022, it is held that a contract to sell and convey lands taken up under the homestead laws, made before final proof, is illegal and void. Compare *Weber v. Laidler*, 26 Wash. 144, 90 Am. St. Rep. 726, 66 Pac. 400.

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## KENOYE v. BROWN.

[82 Miss. 607, 35 South. 163.]

**COTENANCY—Conveyance by One of Specific Part.**—If one cotenant makes a conveyance by metes and bounds of a part of the common estate, the deed is voidable in so far as it operates to the prejudice of his cotenants, at their election; but conveys the interest of the grantor in the part conveyed as against him, and if in subsequent partition, that particular tract is assigned to the tenant conveying, the title inures by estoppel to his grantee. (p. 646.)

**COTENANCY—Conveyance by One of Specific Part.**—A conveyance by one cotenant of a specific part of the common property by metes and bounds is inoperative to impair any of the rights of his cotenants, nor does it convey any interest in any part of the common property not specifically conveyed by such deed. (p. 646.)

E. N. Thomas and A. J. Rose, for the appellant.

J. H. Wynn, for the appellees.

611 **WHITFIELD, C. J.** The true principle to be deduced from the authorities is that, where one tenant in common makes a conveyance by specific metes and bounds of a part of the common estate, such deed is voidable in so far forth as it operates to the prejudice of his cotenants at their election, but will convey the interest of the grantor in the parcels specifically conveyed, as against the grantor, and if, in the subsequent partition, the particular tract thus conveyed by metes and bounds should be assigned to the cotenant conveying, the title will inure, by virtue of the doctrine of estoppel, to his grantee. The limitation is always strictly observed, that such deed shall not be permitted to operate to the prejudice of the cotenants of

the grantor. There is one authority cited—*Young v. Edwards*, 33 S. C. 404, 26 Am. St. Rep. 689, 10 L. R. A. 55, 11 S. E. 1066—which holds that in such case the deed shall operate to convey to the grantee not simply the interest of the grantor in the lands specifically conveyed by metes and bounds, but the entire interest of the grantor in the whole tract, provided, however, the land so conveyed by metes and bounds does not exceed, either in area or <sup>612</sup> value, the aliquot share of the grantor in the whole tract; and it is this last qualification which makes this authority, if sound, inapplicable in this case, since in this case the tract conveyed by metes and bounds largely exceeded both in area and value, Mary Brown's aliquot share in the whole tract. But the Mississippi doctrine is as first stated, and as set out in *Richardson v. Miller*, 48 Miss. 335, 336, to wit: That in such cases all that the grantee gets in any case is the interest of the grantor in the part conveyed by metes and bounds. We understand Mr. Freeman to approve this doctrine, from various expressions cited below. As, for example he says in section 205: "But in no case can the conveyance of one tenant in common, or of any less than all the cotenants, give the grantee any greater rights than those held by the grantor or grantors." And in section 204 he says: "If, however, there remain any states wherein the courts really intend to assert that a conveyance by one cotenant of part of the common property is void, in any other sense than that such conveyance will not operate to diminish or impair the rights of the nonassenting cotenants, such courts are falling into the minority, as the more recent decisions tend strongly and surely toward the recognition of such conveyance as a valid transfer of all the grantor's interest in the property therein described, entitling the grantee to certain rights that the cotenants of the grantor cannot wantonly disregard." Note the expression, "Valid transfer of all the grantor's interest in the property therein described"—that is to say, in the deed, not in the whole tract. In the case of *Gates v. Salmon*, 35 Cal. 576, 95 Am. Dec. 139, cited by Mr. Freeman, on page 203, in his work on Cotenancy and Partition, the court says: "The rights thus assigned to the grantee are precisely those pertaining to the grantor in the special tract—no greater and no less. The grantor, before his conveyance of the special tract, held his undivided interest therein subject to the contingency of the loss of it, if on partition of the general tract the special tract should <sup>613</sup> be allotted to one of his cotenants. The grantee then acquires all the interest of his grantor in the special tract, and

that interest is a tenancy in the special tract in common with the cotenants of his grantor; but this conveyance did not sever the special tract from the general tract, so far as the cotenants are concerned, and the general tract is therefore liable to a partition, so far as the cotenants of the grantor are concerned, as it would be had the conveyance of the special tract not been made." 17 Encyclopedia of Law, second edition, page 684, states the rule thus: "The true doctrine, as deduced from actual decisions, seems to be that such conveyances are absolutely void as against cotenants whose rights are prejudiced thereby, and who have not consented to them or ratified them, but that, when confirmed or assented to by the other cotenants, such conveyances are valid as against all parties. The assent of the cotenant in such case need not necessarily be by deed, but may be inferred from long acquiescence in the grantee's title. In any case it seems that a tenant cannot complain of a conveyance of a specific part of the common estate by a cotenant where his own rights are not injuriously affected thereby. And a court of equity will respect the rights of the grantee, so far as this can be done consistently with the rights of the cotenants, and wherever practicable, will confirm the title of the grantee by allotting to his grantor that portion of the land conveyed." In the case of *Stark v. Barrett*, 15 Cal. 368, Field, C. J., afterward associate justice of the United States supreme court, says: "This is the settled law, and hence a conveyance by one tenant of a parcel of a general tract owned by several is inoperative to impair any of the rights of his cotenants. The conveyance must be subject to the ultimate determination of their rights, and upon obvious grounds. One tenant cannot appropriate to himself any particular parcel of the general tract, as, upon a partition, which may be claimed by the cotenants at any time, the parcel may be entirely set apart in severalty to a cotenant. He cannot defeat this possible <sup>614</sup> result whilst retaining his interest, nor can he defeat it by the transfer of his interest. He cannot, of course, invest his grantee with rights greater than he possesses. The grantee must take, therefore, subject to the contingency of the loss of the premises, if upon the partition of the general tract they should not be allotted to the grantor. Subject to this contingency, the conveyance is valid, and passes the interest of the grantor." If the "grantee takes subject to the contingency of the loss of the premises, if upon partition of the general tract they should not be allotted to the grantor," manifestly the grantee only gets the grantor's undivided in-



interest in the part embraced in the deed, and not his undivided interest in the whole of the original tract. The grantee in such case must look to his grantor on the warranty in his deed. The precise point is decided in accordance with the rule in *Richardson v. Miller*, 48 Miss. 335; in *Dennison v. Foster*, 9 Ohio, 126, 34 Am. Dec. 429, where the court says: "The effect of such deed is to pass to the purchaser the grantor's proportional interest in the part described in the deed. Tenants making such separation of interests and their heirs are bound by it, especially if the deed contains covenants of warranty." And again, the point is decided in *Soutter v. Porter*, 27 Me. 405, where the court say: "Such a conveyance of a tenant in common, however, cannot, in any event, operate contrary to the expressed declarations and intention of the parties, to convey an estate in common instead of an estate in severalty." This is undoubtedly sound. The grantor meant to convey an estate specifically marked out, by metes and bounds, in severalty. All that the grantor may get out of that particular estate on subsequent partition inures to his grantee, properly enough, under the estoppel arising out of the deed. But to hold that the grantee, when he loses the particular tract, will get his grantor's undivided interest in the whole of the original tract, would be to extend the estoppel beyond the deed, and give an undivided **615** interest in the common estate, instead of what was granted—an estate in severalty. And so in *Dorn v. Dunham*, 24 Tex. 366, the court say: "If, under such an agreement, the obligor were unable to make title by reason of the land falling to the share of another in the partition between the cotenants, the remedy of the obligee would be by suit for damages for the breach of the contract." These authorities certainly make it clear that the rule of *Richardson v. Miller*, 48 Miss. 335, is the sound rule. The expression in that opinion that such a deed is void (quoted from Kent) must be understood to mean that it is voidable at the election of cotenants who will be prejudiced thereby. Mr. Freeman is entirely right in saying such deeds should not be spoken of as absolutely void, but as voidable at the election of the cotenants whose rights are prejudiced thereby. In the case of *Kimball v. Street Ry. Co.*, 173 Mass. 152, 53 N. E. 274, decided March, 1899, Holmes, J., now associate justice of the supreme court of the United States, says that, whilst there have been expressions to the effect that such a deed is void, it "seemed to that court hardly to need argument that such a deed, accompanied by possession, was only voidable." We quote

but one other authority—the opinion of Bell, J., in *Whitton v. Whitton*, 38 N. H. 127, 75 Am. Dec. 167: “He has an interest in the question whether the property shall be divided, and, if so, in what manner, precisely so much greater than an ordinary tenant in common, as he is liable to have his entire interest assigned to another in the partition, and his whole estate defeated, without redress or compensation.” We refer especially, in conclusion, to the case of *Worthington v. Staunton*, 16 W. Va. 208, as containing the best exposition of this whole subject we have seen anywhere. See, also, *Emeric v. Alvarado*, 90 Cal. 456, 27 Pac. 356.

Affirmed.

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## CONVEYANCE BY ONE COTENANT OF SPECIFIC PART OF COMMON PROPERTY.

- I. Validity of Conveyance.
  - a. Assent by Cotenant.
- II. Effect as Against Grantor.
  - a. As Estoppel.
  - b. What Interest Passes.
- III. Effect on Purchaser.
  - a. Generally.
  - b. Rights as Cotenant.
  - c. Partition and Rights Thereunder.

### I. Validity of Conveyance.

Undoubtedly, authority is not wanting among the earlier cases to sustain the proposition that a conveyance by metes and bounds of a portion of the common estate by one tenant in common, is void, and not merely voidable at the election of the cotenant. Such was the express holding in *Duncan v. Sylvester*, 24 Me. 482, 41 Am. Dec. 400. Expressions in other cases fully sustain this rule. Thus, in *Marshall v. Trumbull*, 28 Conn. 185, it was said: “Now, it is well settled that one tenant in common can neither sell nor encumber any part of the estate by metes and bounds so as to prevent such a division or distribution as would give the other tenants in common an unencumbered title to the part thus sold or encumbered. Deeds and other conveyances of such property are not merely inoperative against the rights of the other tenants when a partition is made, but they are undoubtedly void, and the other cotenants may at all times so treat them.” In *Griswold v. Johnson*, 5 Conn. 363, the court said: “The deed of this common estate by metes and bounds, the one tenant in common then attempting to make a partition of the property without any co-operation of the other, is undoubtedly void.” Other authorities are to the same effect: *Porter v. Hill*, 9 Mass. 34, 6 Am. Dec. 22; *Blossom v. Brightman*, 21 Pick. 285; *Peabody v. Minot*, 24

Pick. 328; Boston Franklinite Co. v. Condit, 19 N. J. Eq. 401; Smith v. Benson, 9 Vt. 138, 31 Am. Dec. 614.

The rule thus broadly stated will not stand the test of time and authority, because the proposition maintained in the great majority of the cases is that a tenant in common cannot convey a distinct portion of the estate by metes and bounds to the prejudice of his cotenants or their assigns, and that, as to them, such deed is inoperative and voidable at their election, and many of such cases expressly hold that such deed binds the grantor therein by way of estoppel. The general rule is, that a conveyance by one tenant in common of a specific part of the common property by metes and bounds to a stranger can have no legal effect or operation to the prejudice of the cotenant of the grantor; but such conveyance is valid as between the parties to it, although not binding on cotenants not joining in or assenting thereto as to whose interests it is prejudicial: Gates v. Salmon, 35 Cal. 576, 95 Am. Dec. 139; Hartford etc. Ore Co. v. Miller, 41 Conn. 112; Varnum v. Abbot, 12 Mass. 474, 7 Am. Dec. 87; Phillips v. Tudor, 10 Gray, 78, 69 Am. Dec. 306; Richardson v. Miller, 48 Miss. 311; Jeffers v. Radcliff, 10 N. H. 242; Great Falls Co. v. Worster, 15 N. H. 412; Whitton v. Whitton, 38 N. H. 127, 75 Am. Dec. 163; Holcomb v. Coryell, 11 N. J. Eq. 549; Boston etc. Co. v. Condit, 19 N. J. Eq. 394; Crocker v. Tiffany, 9 R. I. 505; Jewett v. Stockton, 3 Yerg. 492, 24 Am. Dec. 594; McKey v. Welch, 22 Tex. 390; Dorn v. Dunham, 24 Tex. 366; Good v. Combs, 28 Tex. 35; Worthington v. Staunton, 16 W. Va. 208. Many cases hold that a conveyance of a specific portion of common lands by one cotenant, or by any number of them less than the whole, is not void, but cannot be made operative to the prejudice of the cotenants not uniting in the conveyance: Gates v. Salmon, 35 Cal. 576, 95 Am. Dec. 139.

A conveyance by one tenant in common of his interests in distinct parcels of the common estate is valid as between the parties to it, although it will not bind his cotenants to whose interests it is prejudicial: Crocker v. Tiffany, 9 R. I. 505. A conveyance made by one of several cotenants purporting to convey a specific part of the common property is not void: Young v. Edwards, 33 S. C. 404, 26 Am. St. Rep. 689, 11 S. E. 1066, 10 L. R. A. 55. And such conveyance will be respected in so far as it may be consistent with the rights of the other cotenants: Camoron v. Thurmond, 56 Tex. 22; Wells v. Hardenburg, 11 Tex. Civ. App. 3, 30 S. W. 702. The general rule, as sustained by all of the late cases, is thus stated in Young v. Edwards, 33 S. C. 404, 26 Am. St. Rep. 691, 11 S. E. 1066, 10 L. R. A. 55: "We see no reason why a conveyance, which purports to describe by metes and bounds the portion of the common property which the grantor intends to convey, is not valid as between the parties to such a deed. Of course such a conveyance will not be allowed to operate to the prejudice of the rights and interests of the other cotenants, but where it can be given full effect without injury to the other cotenants, there is no reason why it should not be sustained. Such we understand

to be the view sustained by the weight of the authorities elsewhere.' At the most, a deed by a cotenant of a specific portion of the entire tract by metes and bounds purporting to convey the fee therein to a stranger, is voidable, only when it is prejudicial to the interests of the other cotenants: *Kimball v. Commonwealth etc. Ry. Co.*, 173 Mass. 152, 53 N. E. 274. In *Barnhart v. Campbell*, 50 Mo. 597, it is held, against the whole current of authority, as we conceive, that a conveyance of his interests in the common property by metes and bounds by a tenant in common is valid, even as to his cotenant, and it is therein said that the statute of partition prevents any injustice.

**a. Assent by Cotenant.**—Undoubtedly a conveyance of his interest in the common estate by a tenant in common by metes and bounds of part of the land is good and valid, if the other tenants in common assent thereto, or confirm or ratify such conveyance: *Hartford etc. Ore Co. v. Miller*, 41 Conn. 112. Such conveyance becomes operative and passes the land to the grantee by metes and bounds if the other cotenants, before partition, confirm and ratify it, and after partition if that portion is allotted to the purchaser thereof, and in either case such deed will convey all of the interest of the grantor and will be binding on him and also on the grantee: *Worthington v. Staunton*, 16 W. Va. 209. Such assent need not be by deed, and may be inferred from any act which shows an acquiescence in the title of the purchaser. Doubtless such assent would be inferred from a silence of thirty years, during which time the interests of the original cotenants have been conveyed to strangers: *Goodwin v. Keney*, 49 Conn. 563. If all the cotenants give conveyances at different times of the common property in specific parcels by metes and bounds to the same person, their several assent is implied, and the conveyances taken together constitute a valid title, and the same principle seems to apply if the several interests of the cotenants are taken at different times in execution or compulsory proceedings: *Stevens v. Norfolk*, 46 Conn. 227; *Butler v. Wormer*, 25 Mich. 53, 12 Am. Rep. 218.

## II. Effect as Against Grantor.

**a. As Estoppel.**—The rule as sustained by the great weight of authority is, that although a conveyance by one joint tenant or tenant in common of a specific part of the common property by metes and bounds to a stranger, whether the conveyance is by deed or by the levy of an execution, cannot have the effect of prejudicing the rights or interests of his cotenant, yet such conveyance will operate as an estoppel against the grantor and those claiming under him: *Varnum v. Abbot*, 12 Mass. 474, 7 Am. Dec. 87; *Richardson v. Miller*, 48 Miss. 311; *Holcomb v. Coryell*, 11 N. J. Eq. 548; *Dennison v. Foster*, 9 Ohio, 126, 34 Am. Dec. 429; *McKey v. Welch*, 22 Tex. 390; *Cox v. McMullin*, 14 Gratt. 82; *Worthington v. Staunton*, 16 W. Va. 208. If a cotenant undertakes to



convey the whole title to a specific tract out of the common property, his conveyance is not void, but operates as an alienation of all his right and interest in such tract, and he is estopped as against his grantee from denying that he owned a less interest than his deed purports to convey, and any interest acquired by him therein upon allotment in partition inures to his grantee: *Emerie v. Alvarado*, 90 Cal. 444, 27 Pac. 356.

**b. What Interest Passes.**—Although a tenant in common cannot work a division of the common property by conveyance of his share by a deed by metes and bounds, yet such a conveyance, especially if accompanied with covenants of warranty, will, as against him, be treated as a conveyance of his entire interests in the common land: *Gates v. Salmon*, 35 Cal. 576, 95 Am. Dec. 139; *Emerie v. Alvarado*, 90 Cal. 444, 27 Pac. 356; *Warthen v. Siefert*, 139 Ind. 233, 38 N. E. 464; *Hunt v. Crowell*, 2 Edm. Sel. Cas. 385; *Dennison v. Foster*, 9 Ohio, 126, 34 Am. Dec. 429; *Young v. Edwards*, 33 S. C. 404, 26 Am. St. Rep. 689, 11 S. E. 1066, 10 L. R. A. 55; *Wells v. Heddenberg*, 11 Tex. Civ. App. 3, 30 S. W. 702; *Cox v. McMullin*, 14 Gratt. 82. If one tenant in common conveys his interest in undivided real estate by metes and bounds, such conveyance will pass all his title therein within the boundaries described in the deed: *Crook v. Vandervort*, 13 Neb. 505, 14 N. W. 470. A deed by a tenant in common conveying a specific number of acres, undivided in a tract described, is not void for uncertainty, but is an effectual conveyance of such a proportion of the tract as the whole number of acres conveyed bears to the whole number of acres in the tract and entitles the grantee to all the rights and remedies incident to the tenancy in common: *Gratz v. Land etc. Co.*, 82 Fed. 381.

### III. Effect on Purchaser.

**a. Generally.**—One joint tenant or a tenant in common of lands may convey his interest in a particular portion by specific metes and bounds, and the grantee's title is good and valid as against his grantor and all other persons except his cotenant and his heirs and assigns, if to their prejudice: *Stark v. Barrett*, 15 Cal. 562; *Frost v. Curtis*, 172 Mass. 402, 52 N. E. 515; *McElroy v. McLeay*, 71 Vt. 396, 45 Atl. 898.

**b. Rights as Cotenant.**—Without doubt one tenant in common, owning an undivided interest in real estate, cannot convey to a stranger a specific portion of the common tract, and put the purchaser in exclusive possession of the particular part thus conveyed: *Mattox v. Hightshue*, 39 Ind. 95; *Shepardson v. Rowland*, 28 Wis. 108. The grantee from such cotenant, however, acquires under such a conveyance all the interest of his grantor in the common property, which interest is a tenancy in the special tract with the cotenants of his grantor: *Gates v. Salmon*, 35 Cal. 576, 95 Am. Dec. 139; *Emerie v. Alvarado*, 90 Cal. 444, 27 Pac. 356. Such grantee is entitled to all the rights and remedies incident to a tenancy in common until

partition: *Gratz v. Land etc. Co.*, 82 Fed. 381, 40 L. R. A. 393; *March v. Huyter*, 50 Tex. 243; *Cox v. McMullin*, 14 Gratt. 82.

**c. Partition and Rights Thereunder.**—A conveyance by one tenant in common, of a special portion of common premises does not sever the special tract from the general tract of which it is a part, so far as the cotenants of the grantor are concerned, and as regards them, the whole tract is subject to partition the same as it would be had the conveyance of the segregated tract not been made: *Gates v. Salmon*, 35 Cal. 576, 95 Am. Dec. 139. The deed of a cotenant of a segregated portion of the land held in common, describing it by metes and bounds, cannot in any way operate to the prejudice of the other tenants in common, and they have the right to have the land partitioned unaffected by such conveyance: *Worthington v. Staunton*, 16 W. Va. 208. While a cotenant has no power to divert the title of his cotenants by selling a specific part of the undivided common property to their prejudice, yet a court of equity will protect such purchaser, if it can be done without injury to the other cotenants, by setting apart to the grantee of one cotenant the particular tract purchased: *Emeric v. Alvarado*, 90 Cal. 444, 27 Pac. 356; *Young v. Edwards*, 33 S. C. 404, 26 Am. St. Rep. 689, 11 S. E. 1066, 10 L. R. A. 55; *Camoron v. Thurmond*, 56 Tex. 22; *Furrrh v. Winston*, 66 Tex. 521, 1 S. W. 527; *Wells v. Heddenberg*, 11 Tex. Civ. App. 3, 30 S. W. 702; *Cox v. McMullin*, 14 Gratt. 82; *Worthington v. Staunton*, 16 W. Va. 208. And if a tenant in common conveys with covenant of warranty a segregated part of the common property by metes and bounds, and upon partition a material part of the land thus conveyed is allotted to the other cotenants, so that the purchaser does not receive the substantial inducement to his contract of purchase, a court of equity may cancel and annul such deed and place the parties in statu quo: *Worthington v. Staunton*, 16 W. Va. 208. On partition the granting cotenant is estopped to deny that he conveyed a less interest than the entire title to the specific tract conveyed by him: *Wells v. Heddenberg*, 11 Tex. Civ. App. 3, 30 S. W. 702.

## BALL v. SLEDGE.

[82 Miss. 749, 35 South. 447.]

**REPLEVIN—Jurisdiction.**—The Affidavit Required by Statute as a Basis for Replevin Fixes the Jurisdiction of the court as regards the value of the property, unless it is shown that a false valuation was made for the purpose of conferring jurisdiction. (p. 655.)

**LANDLORD AND TENANT—Lien of Landlord as Against Purchaser.**—A landlord has a lien on all the agricultural products raised on the leased premises to secure his rent and supplies furnished, and such lien may be successfully asserted not only on the products themselves, but also against the purchaser thereof with or without notice of such lien. (pp. 655, 656.)

**PAYMENT IN PROPERTY Subject to Lien—Right to Repayment.**—One who receives an agricultural product from a debtor and applies its proceeds to the satisfaction of an existing debt, giving receipts therefor, if afterward forced to pay such proceeds to a landlord or one holding a paramount lien on the product sold, is entitled to demand and enforce repayment from his debtor. (p. 656.)

**LANDLORD AND TENANT—Lien of Landlord—Products Out of State.**—The lien of the landlord for rent and advances on agricultural products raised on the leased premises, does not follow such products out of the state. One who purchases them outside the state with notice of the landlord's lien is not liable to him. (p. 656.)

Moore & Clark, for the appellants.

Sillers & Owen, for the appellee.

754 **TRULY, J.** The first instruction given for appellee told the jury that, if they believed from the evidence that the value of the property involved exceeded two hundred dollars at the date of the institution of the suit, they should find for the defendant. This was fatal error. Section 3707 of the Code of 1892, stating how the action of replevin shall be commenced, wrought a radical change in section 2613, the corresponding section of the Code of 1880. This amendment and enlargement was intended to provide an easy plan by which the rights of parties litigant might be speedily and finally determined. The rigidity of the technical rules in matters of procedure was relaxed, and a simple method devised for the commencement of the action. Under section 3707, the plaintiff files an affidavit in statutory form, stating therein the residence 755 of the defendant, the location of the property, and his valuation thereof, whereupon the officer taking the affidavit makes the writ returnable to the proper court, whether of his own or another county. The venue is fixed by the residence of the defendant or location of property, and the jurisdiction by the value of the

property as these are set out in the affidavit; and the jurisdiction of the court, thus fixed, can only be defeated by proving a different venue, or by showing that a false valuation of the property was made on "purpose to confer jurisdiction." On this point, section 649 of the Code of 1892 applies to justice of the peace as well as circuit courts. It is true, as decided in *Biddle v. Paine*, 74 Miss. 494, 21 South. 250, that the value of the property is the test of jurisdiction in actions of replevin; but, as value is only a question of estimation, varying as the individual judgments of men may differ, the valuation fixed by the pleadings is primarily accepted as true. It is also true that the jurisdiction of the court thus acquired may be defeated, and the plaintiff nonsuited in consequence; but, in order to do this, conflicting testimony as to the value of the property involved is not sufficient. The proof must go further, and show that the valuation was knowingly and purposely falsely magnified or diminished in order to avoid the constitutional limitations of jurisdiction. Any other rule, as pointed out in *Fenn v. Harrington*, 54 Miss. 733, would work hardship to the litigant who honestly over or under estimates the value of the property involved, or whose valuation differed from that of other witnesses, or from the conclusion arrived at by the justice of the peace or the jury. The jurisdiction of the courts was not intended to be left as a matter of conjecture, to be acquired, and liable to be defeated, by honest differences upon a mere matter of opinion. This rule was not correctly stated by the first instruction for the appellee. The jurisdiction of the court was not dependent upon what conclusions as to value the jury might arrive at from the proof on the trial in the circuit court, and the 756 question of value was not for the consideration of the jury in this connection. If it should become manifest during the progress of a trial that a court, for any cause, was without jurisdiction, the presiding judge should so decide, and dismiss the case. The question was, not what the jury believed the property to be worth, but, did the appellants knowingly underestimate the value for the purpose of vesting the justice of the peace with jurisdiction? In this view, there was no testimony which warranted the giving of this instruction.

The second instruction given for appellee was also erroneous. It is well settled that the landlord has a prime lien on all the agricultural products raised on the leased premises, to secure his rent and supplies for the current year; and this lien may be successfully asserted, not only on the products themselves,



but against the purchaser thereof, in this state whether with or without notice of the existence of the lien. In the instant case it is admitted that appellants had actual notice of the relation of landlord and tenant which existed between appellee, as tenant, and Williamson, as landlord. Consequently, the landlord could have legally asserted his lien for rent in arrears against appellants for the value of all cotton produced on the leased premises, received by them in this state from the tenant. The sole question for consideration, therefore, was what amount, if any, was legally due by appellee to his landlord, Williamson, on his rent note. Whatever this amount, appellants were liable therefor, to the extent of the value of the cotton received by them in this state; and, having paid it, they could rightfully subtract it from the net proceeds of the cotton which they had credited on Sledge's indebtedness to them, and proceed to collect the balance then due them as provided by the terms of the deed of trust which they hold. The fact that the agent of appellants had, through mistake, given appellee a full receipt, and had canceled and surrendered the trust deed, did not alter the legal status of affairs. One who receives cotton 757 from a debtor, and applies the proceeds thereof to the satisfaction of an existing indebtedness, and gives receipts therefor, if afterward forced to pay such proceeds to one holding a paramount lien on the cotton, is not deprived of his right to demand and enforce repayment from his debtor. The property in controversy is subject to the trust deed of appellants for whatever amount was legally due Williamson by Sledge as rent, and which was paid by appellants out of the cotton liable therefor.

The second instruction refused for appellants correctly stated the law herein announced, and it should have been given.

The third instruction asked by appellants was correctly refused. It was decided in *Millsaps v. Tate*, 75 Miss. 150, 21 South. 663, upon a case strikingly similar to the one here presented, that the lien granted landlords by our law did not attach to cotton shipped out of the state, and the purchaser was not liable, even where he had actual notice of the existence of the lien. The fact that appellants paid the landlord a portion of the proceeds of cotton received beyond the confines of the state does not alter the controlling legal principle. The record does not show that the payment was made by the direction of the tenant, and appellants in this case are not asserting any rights as assignees of the landlord.

Upon the record here presented, the measure of appellants' rights is the amount of rent, if any, due Williamson by Sledge, and paid by appellants, to the value of the cotton received by them in this state.

Reversed and remanded.

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*The Right of a Landlord* to reserve the title to or a lien on the crops to be raised by his tenant is considered in *De Vaugh v. Howell*, 82 Ga. 336, 9 S. E. 173, 14 Am. St. Rep. 162, and note; *Brown v. Neilson*, 61 Neb. 765, 87 Am. St. Rep. 525, 86 N. W. 498, 54 L. R. A. 328. It has been held that a purchaser from a tenant of crops subject to a landlord's lien for rent is liable to the landlord for the unpaid rents to the extent of the value of the crops purchased, although he had no notice of the lien: *Note to Almand v. Scott*, 12 Am. St. Rep. 244. But see *Rogers-Ruger Lumber Co. v. Murray*, 115 Wis. 267, 95 Am. St. Rep. 901, 91 N. W. 657, 59 L. R. A. 737. As to the continuance of a statutory lien on logs after their removal from the state, see *North Pac. Lumber Co. v. Lang*, 28 Or. 246, 52 Am. St. Rep. 780, 42 Pac. 799.

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**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**OHIO.**

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PITTSBURG, CINCINNATI, CHICAGO AND ST. LOUIS  
RAILWAY COMPANY v. LYNCH.

[69 Ohio St. 123, 68 N. E. 703.]

**NEGLIGENCE—Rescuer of Person in Peril from, may Recover Notwithstanding His Contributory Negligence.**—If a person is placed in great peril through the negligence of a railway corporation, and his rescue is attempted, resulting in injury to the rescuer, he may recover of the corporation if his attempt is not made under circumstances or in a manner constituting rashness or recklessness, though the person rescued was guilty of such contributory negligence that he could not have recovered had he been injured. (p. 661.)

**MASTER AND SERVANT—Injury to Servant in Attempting a Rescue.**—If a person is put in great peril through the negligence of a master or his servants, and another servant attempts a rescue and is injured thereby, his right to recover for such injury is not unfavorably affected by the fact that he was an employé of the master. (p. 661.)

Action against the defendant railroad company by Lynch, who had been in its employ as a watchman. While in the performance of his duties, he observed a woman in great peril from a caboose which, without warning, had been kicked over a crossing in a village. She was apparently unconscious of the approach of the car and in imminent danger of being run down by it. While there was evidence of the negligence of the railway, there was also testimony tending to show that the woman was guilty of contributory negligence. She was rescued by the watchman who was himself caught and severely injured by the caboose. The court instructed the jury as follows: "The plaintiff claims that he was struck by a car and injured while he was in the act of rescuing a woman from danger and saving her life. To hold the railroad company responsible

in damages for this injury, it must be shown that the woman was in danger of being run over and injured by the approaching car, and that such danger was caused or created by the negligence of the railroad company, and that in making an effort to rescue the woman the plaintiff was not guilty of contributory negligence. These are questions of fact which it will be your duty to determine from the evidence.

"If you find that the peril to which the woman was exposed was caused by such negligence of the company, you will then inquire whether the plaintiff, Lynch, in passing onto the track and attempting to rescue the woman was guilty of contributory negligence.

"The law will not impute negligence to an effort to preserve human life unless made under such circumstances as to constitute rashness in the judgment of prudent persons. If the plaintiff believed, and had good reason to believe, that he could save the life of the woman without serious injury to himself, the law will not impute to him blame for making the effort. The attending circumstances, as shown by the evidence, must be regarded; the alarm, the excitement and confusion, if you find any to have existed on said occasion; the uncertainty, if any, as to the proper move to be made; the promptness, if any, required, and what liability to mistake as to the best course to pursue. All these circumstances, as shown by the evidence, may be considered by you in determining whether, under the peculiar circumstances of this case, the plaintiff was in the exercise of ordinary care at the time he received his injuries."

Verdict and judgment for the plaintiff, which, on appeal to the circuit court, was affirmed.

Dunbar & Sweeney and T. D. Healea, for the plaintiff in error.

T. H. Loller and D. A. Hollingsworth, for the defendant in error.

**132** SHAUCK, J. With respect to the general instructions given to the jury upon the subjects of negligence and the measure of recovery it is sufficient to say that they were in substantial accordance with the familiar cases. But regarding the peculiar circumstances of the case, counsel for the company insist that the rescuer could not recover for the injury to him if the person rescued was in peril because of such contributory negligence on



her part as would have prevented a recovery by her if she had been injured. The trial judge was not requested to give to the jury an instruction embracing that view of the law; but the verdict for the plaintiff appears to have been returned without regarding the evidence tending to show negligence on her part, and it is assumed that this was in accordance with the instruction given that the law will not impute negligence to one attempting to save <sup>133</sup> human life unless the attempt is made under such circumstances, or in such a manner, as to constitute rashness or recklessness. The jury had been told in another portion of the charge that there is no presumption of negligence against either party, and they perhaps understood the word "impute" to be used in its theological sense, and the instruction to signify that his right of action was not affected by her negligence. This portion of the charge was given in the language of this court in *Pennsylvania R. R. Co. v. Langendorf*, 48 Ohio St. 316, 29 Am. St. Rep. 553, 28 N. E. 172, 73 L. R. A. 190, but it is insisted that the case cited and the present case are distinguishable by the two facts that the person whose rescue was there attempted was an infant incapable of negligence, while here she was chargeable with the consequences of her conduct; and *Langendorf* was a stranger to the company, while the plaintiff in the present case was its employé. Obviously, the cases present the suggested differences of fact. Are those differences of legal significance? Apparent support is given to the view presented by counsel for the company by commentators whose conclusions have been affected by misconceptions of the three cases which they cite: *Evansville etc. R. R. Co. v. Hiatt*, 17 Ind. 102; *Donahoe v. Wabash etc. Ry. Co.*, 83 Mo. 560, 53 Am. Rep. 594; *Sann v. H. W. Johns Mfg. Co.*, 16 App. Div. 252, 44 N. Y. Supp. 641. In none of these cases was the judgment placed upon the ground that the person whose rescue was attempted had been guilty of negligence which was contributory merely, but that his was the only negligence which the case presented—that the defendant had not been negligent. The cases were determined upon the self-evident proposition that an action of negligence cannot be prosecuted successfully against one who has not been negligent. In the present case the jury were distinctly instructed that their <sup>134</sup> verdict must be for the company unless the evidence showed that it had been negligent as charged in the petition. The view of the law which was given to the jury in the present case was expressed by Grover, J., in *Eckert v. Long Island R. R. Co.*, 43 N. Y.

502, 3 Am. Rep. 721. It has been adopted in Pennsylvania R. R. Co. *v.* Langendorf, 48 Ohio St. 316, 29 Am. St. Rep. 553, 28 N. E. 172, 13 L. R. A. 190, and in many other cases. It is worthy of notice that while some of them were cases of the rescue, or attempted rescue, of infants, that fact has not been regarded as having legal significance, and the judgments have been placed upon grounds which are found in the present case. If the view now urged by counsel is considered as unaffected by the decided cases, it must be rejected because of the impracticability of applying it. It invokes the principle of subrogation as the test of the plaintiff's right to recover. If that principle should be adopted to determine his right to recover, for equal reason it should determine the amount of his recovery. By what process could it be ascertained what the extent of her injury would have been if the attempted rescue had failed? The view presented would lead to the conclusion that if the attempted rescue had failed and she had been injured without her fault, no right of action would have accrued to him because such right would have accrued to her. The insurmountable difficulties which would be met in an attempt to apply the suggested doctrine in an action under the statute for the benefit of the next of kin when the injuries of the rescuer prove fatal, need not be stated. It seems clear that the law will not admit of the suggested refinement.

Lynch's right of action is not unfavorably affected by the fact that he was an employé of the company. Approbation of his conduct should not lead to a recovery in his favor contrary to the doctrines of the law <sup>135</sup> upon the subject, but a brief consideration of those doctrines will show that his recovery was proper. The evidence tended to show, and the charge required that it should establish, the negligence of the company. One is liable for the consequences of his negligence unless there appears to be a contributing cause arising from conduct of the plaintiff which, in the eye of the law, is reprehensible, such as unlawfulness or negligence. Can it be said that the generous and heroic performance of duty is reprehensible? It is according to settled and salutary rules that a recovery is denied one who voluntarily goes into a place of danger, omitting to use present opportunities for circumspection and care, and failing to discharge his primary duty to regard his own safety. But if the reason of the law is its life, can it be said that the same judgment awaits one who is required to act under circumstances which leave no opportunity

for circumspection, and in the discharge of the primary duty to regard the safety of others? Would it be considerably said that the duty imposed upon a railway company to keep a watchman at a crossing such as this would be discharged by keeping a watchman under instructions to care for those only who, if injured, might maintain actions against it? The duty is to the public. The present case showed that the woman rescued was in great peril. Though called as a witness for the company, she testified to her utter confusion at the time of the accident, and that she did not know whether she was swept from the track by the hand of the watchman or the end of the caboose. There was, therefore, a situation which called upon the watchman to act with the utmost promptness, and for that situation he was not responsible. No fact of legal significance distinguishes the present case from <sup>136</sup> Pennsylvania Railroad Co. v. Langendorf, 48 Ohio St. 316, 29 Am. St. Rep. 553, 28 N. E. 172, 13 L. R. A. 190, and the conditions to the plaintiff's recovery were properly stated to the jury. To the authorities cited in that case may be added Gibney v. State, 137 N. Y. 1, 33 Am. St. Rep. 690, 33 N. E. 142, 19 L. R. A. 365, and Eckert v. Long Island R. R. Co., 57 Barb. 555.

Judgment affirmed.

Burket, C. J., Spear, Davis, Price and Crew, JJ., concur.

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*Where One Person is Exposed to Peril* of life or limb by the negligence of another, the latter is liable for injuries received by a third person in a reasonable effort to rescue the person so imperiled, if the rescuer does not act recklessly or unnecessarily expose himself to danger: Chattanooga Light etc. Co. v. Hodges, 109 Tenn. 331, 60 L. R. A. 459, 70 S. W. 616, 97 Am. St. Rep. 844, and cases cited in the cross-reference note thereto; monographic note to Gilson v. Delaware etc. Canal Co., 36 Am. St. Rep. 849.

## GERMANIA FIRE INSURANCE COMPANY v. SCHILD.

[69 Ohio St. 136, 68 N. E. 706.]

**INSURANCE POLICY Void in Part, When Void as a Whole.—**

If a policy issues insuring several articles separately valued, with a condition that the entire policy shall be void if the interest of the insured is not stated therein, and such interest is not so stated as to one of such articles, the policy is wholly void. (p. 665.)

Action on a policy of insurance containing a clause as follows: "This entire policy shall be void if the insured has concealed or misrepresented, in writing, or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss." The subjects of the policy as there valued were: Office furniture, two hundred and fifty dollars; surgical instruments and medicines, two hundred and fifty dollars; operating chair, seventy-five dollars; and medical library, one hundred dollars. It was proved at the trial that the operating chair had been bought by the plaintiff on a conditional purchase, and that the title remained in the vendor at the time it was destroyed. The trial court instructed the jury that while there could be no recovery as to this chair, because the interest of the assured was not truthfully stated, as to the other articles plaintiff was entitled to recover. Verdict and judgment for the plaintiff accordingly. The case was taken to the circuit court on a petition in error, where the judgment was affirmed.

C. W. Fuller and Andrews Brothers, for the plaintiff in error.

A. M. Beattie, for the defendant in error.

**139** DAVIS, J. It has been twice adjudged by this court that policies of insurance, like other contracts, should be reasonably construed, so as to give effect to the express <sup>140</sup> words of the parties and not to defeat their intention: *West v. Citizens' Ins. Co.*, 27 Ohio St. 1, 9, 10; *Travelers' Ins. Co. v. Myers*, 62 Ohio St. 529, 57 N. E. 458, 49 L. R. A. 760. See, also, *Joyce on Insurance*, secs. 208, 216. And this rule of construction should be observed notwithstanding the rule that when a policy is open to two interpretations which are equally



fair, that one should be preferred which would give to the insured the greater indemnity.

There is no ambiguity in this policy; and it is not contended that it is ambiguous. Counsel for the defendant in error insists that the words: "This entire policy shall be void," etc., have no more force than if the word "entire" were omitted, and that therefore this case is controlled by *Coleman & Co. v. Insurance Co.*, 49 Ohio St. 310, 34 Am. St. Rep. 565, 31 N. E. 279, 16 L. R. A. 174. There is much force in the argument that the clauses, "This policy shall become void," and "This entire policy shall become void," mean the same thing; but by no legitimate construction can the latter clause be restricted to less than the whole policy and whatever is included in it, and therefore the strength of the argument, if it has any, goes to the soundness of the decision in *Coleman & Co. v. Insurance Co.*, 49 Ohio St. 310, 34 Am. St. Rep. 565, 13 N. E. 279, 16 L. R. A. 174. The two cases, however, are plainly distinguishable. In the former case the language used in the policy, whether ambiguous in itself or not, had frequently been the subject of construction and ingenious debate, resulting in diametrically opposite conclusions in the courts. In this case the parties, no doubt with knowledge of previous controversies, seem to have endeavored to put the indivisible character of their contract beyond controversy by inserting the word "entire"; and in our judgment they succeeded in their purpose. Unless we reject this controlling word and thus make a new contract for the parties, the <sup>141</sup> policy means precisely what it says and cannot be valid in part and void in part. The parties have agreed that it should not be a severable risk and they have clearly expressed that intention.

In one case the policy provided that: "This entire policy, unless otherwise provided by agreement indorsed thereon or added hereto, shall be void," etc. It was held that: "The stipulation in regard to the forfeiture is applicable to the policy as an entirety": *Agricultural Ins. Co. v. Hamilton*, 82 Md. 88, 51 Am. St. Rep. 457, 33 Atl. 429, 30 L. R. A. 633.

In another case the policy contained these words: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void, if the subject of insurance be a building on ground not owned by the insured in fee simple." The insured owned the building which was insured, but did not own the land on which it stood. The court said: "We have looked to see whether the suit might not go on as

to the chattels contained in the building. The words of the written contract are: 'This entire policy, etc., shall be void if the subject of insurance is a building,' etc. This language is plain and must control"; and the court directed the lower court to enter judgment for the defendant: *Martin v. Insurance Co. of North America*, 57 N. J. L. 623, 31 Atl. 213.

In New York the court of appeals has distinguished a policy providing that "this entire policy and every part thereof shall be void" from cases which are cited, and which are like *Coleman & Co. v. Insurance Co.*, 49 Ohio St. 310, 34 Am. St. Rep. 565, 31 N. E. 279, 16 L. R. A. 174, the court saying: "This policy is quite different in its legal effect from those considered in the cases cited, it not being expressly provided in those policies, as in this, that a misrepresentation of the situation of one of the subjects insured should invalidate the insurance on all other property covered by <sup>142</sup> the policy": *Smith v. Agricultural Ins. Co.*, 118 N. Y. 518, 526, 23 N. E. 883. "Every part thereof" includes the whole the same as "this entire policy"; and we therefore do not regard this New York policy as materially differing in its provisions from the one in the case at bar.

The judgments of the circuit court and the court of common pleas are reversed.

Burket, C. J., Shauck, Price and Crew, JJ., concur.

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*The Principal Case* is supported by *Agricultural Ins. Co. v. Hamilton*, 82 Md. 88, 51 Am. St. Rep. 457, 53 Atl. 429, 30 L. R. A. 633; *Stevens v. Queen Ins. Co.*, 81 Wis. 335, 29 Am. St. Rep. 905, 51 N. W. 555; *Bills v. Hibernia Ins. Co.*, 87 Tex. 547, 47 Am. St. Rep. 121, 29 S. W. 1063, 29 L. R. A. 706; *Manchester Fire Assur. Co. v. Glenn*, 13 Ind.\*App. 365, 55 Am. St. Rep. 228, 40 N. E. 926, 41 N. E. 847. But see *Pioneer Mfg. Co. v. Phoenix Assur. Co.*, 110 N. C. 176, 28 Am. St. Rep. 673, 14 S. E. 731; *Coleman v. Insurance Co.*, 49 Ohio St. 310, 34 Am. St. Rep. 565, 31 N. E. 279, 16 L. R. A. 174; *German Ins. Co. v. York*, 48 Kan. 488, 30 Am. St. Rep. 513, 29 Pac. 586; *German Ins. Co. v. Fairbank*, 32 Neb. 750, 29 Am. St. Rep. 459, 49 N. W. 711; *Southern Fire Ins. Co. v. Knight*, 111 Ga. 622, 78 Am. St. Rep. 216, 36 S. E. 821, 52 L. R. A. 70; *Hanover Fire Ins. Co. v. Crawford*, 121 Ala. 258, 77 Am. St. Rep. 55, 25 South. 912.

## MANHATTAN LIFE INSURANCE COMPANY v. BURKE.

[69 Ohio St. 294, 70 N. E. 74.]

**COMPROMISE—Rescission of Must be Attended with a Return of the Benefits Received.**—Where a party to a compromise desires to set aside or avoid it and be remitted to his original cause of action, he must place the other party in statu quo by returning or tendering the return of whatever has been received by him under the compromise if of any value, and, so far as possible, any right lost by the other party in consequence thereof. (p. 668.)

**PLEADING in Action to Rescind a Compromise.**—Where a party seeks to rescind a compromise, his petition should allege the return or tender prior to, or at least contemporaneous with, the commencement of the suit. This rule obtains as a general proposition, though the contract of settlement was induced by the fraud or fraudulent representation of the other party. (p. 669.)

**INSURANCE—Liquidated Demand, Policy is not a.**—A policy of insurance is not a liquidated demand which cannot be satisfied by the payment of a sum less than its face where there is a dispute whether liability under it exists. (p. 672.)

**A COMPROMISE cannot be Vacated on the Ground that the Plaintiff Signed a Contract of Release Without Knowing Its Contents** and accepted a check from the insurance company in the supposition that he was receiving payment of his policy, if it appears that, though he did not read the release, he understood that the agents of the insured were there to settle the entire claim and had no other purpose, and that by signing and delivering the release and surrendering the policy he was assenting to a settlement for the amount paid. (pp. 672, 673.)

Action upon a policy of life insurance issued by the defendant on the life of George Messmore and assigned by him to the plaintiff, Burke. The complaint alleged the payment by the defendant of two thousand dollars, and that the balance of three thousand dollars, with interest, remained unpaid. The defendant pleaded (1) that the procuring of the policy and its assignment to the plaintiff was a mere scheme to cover a gambling transaction, the plaintiff having no insurable interest in the life of the assured; (2) that after the death of Messmore a controversy arose between the plaintiff and the defendant respecting his right to recover under the policy, whereupon they entered into an agreement to compromise, whereby the plaintiff was to pay, and in fact paid, two thousand dollars in settlement of the disputed claim, and, in consideration of the payment, the plaintiff surrendered the policy to be canceled and signed a writing showing that such policy had been surrendered and annulled and all rights under it relinquished. The plaintiff for a reply to the second defense pleaded that

the writing was obtained from him by fraud of the defendant and by the false and fraudulent representations of the defendant's agents. Before the impaneling of the jury, the defendant moved the court for a judgment upon the pleadings, on the ground of departure in the reply, and that the pleading disclosed that the matter in controversy had been settled. The motion was overruled. Testimony was afterward taken before the jury against the objections of the defendant, and it offered evidence to sustain its claim of settlement, and the plaintiff, in reply, gave rebutting evidence to establish his allegation of fraud. The court was asked by the defendant to instruct the jury that if there was a settlement and a payment and acceptance of two thousand dollars, the plaintiff could not recover, whether the settlement was procured by fraud or not, for the reason that he had made no offer to restore the money received. The court refused to so instruct, and a verdict and judgment were given for the plaintiff for the balance claimed to be due. This judgment, on appeal, was affirmed by the circuit court.

Maxwell & Ramsey and Robert Ramsey, for the plaintiff in error.

M. A. Dougherty, for the defendant in error.

**300** SPEAR, J. The judgment of affirmance announced after the first hearing of this case, Manhattan Life Ins. Co. v. Burke, 68 Ohio St. 681, 69 N. E. 1135, was not the unanimous decision of the court, three judges only concurring therein. The case having been more fully argued on the rehearing, and further considered by the court, is now for disposition as upon the original submission.

Counsel for the company at the trial rested its case upon two propositions, and they rest it upon the same propositions here. If their position is correct, then the judgments below are erroneous and should be **301** reversed; if not then the judgments should be affirmed.

The propositions are that the reply is a departure not permissible under our rules of practice, and that under the facts as disclosed by the pleadings, there could be no recovery, inasmuch as the plaintiff had failed to allege, as he had failed to prove, any return or tender back of the money received in the settlement.

The two may be treated together, and, put in legal phrase, the proposition is: A compromise, although procured by fraud,



is a bar to an action upon the original claim until rescinded by a tender back of the consideration paid.

On the other hand, as an answer to this, it is claimed that where fraud has induced the agreement, the settlement is not binding, since fraud vitiates all contracts, and no tender back or payment is necessary to authorize a suit on the original contract where the judgment asked for will attain that result, which is this case.

In determining the vital legal question, however, it is important to keep in mind certain features of the controversy shown by the pleadings and the testimony. The plaintiff's suit was upon the original contract; it was not a suit to rescind a contract, or to reform it, nor an action for damages on account of fraud. No mistake is shown in the paper itself; nor is it alleged in the pleadings that the plaintiff signed any paper which he did not understand and did not intend to sign; the claim is that he was induced to agree to sign, and to sign the contract, a contract of settlement otherwise lawful and valid, by the fraud and misrepresentation of the agents and employés of the company. The presence of a controversy between the parties as to whether any liability at all existed **302** on the part of the company in favor of the plaintiff, is shown by the allegations of the answer and as clearly shown by the testimony introduced by the plaintiff himself. It is also clear that, to settle this disputed demand, the execution of the release and surrender of the policy by the plaintiff was had, and the payment of the two thousand dollars by the company made.

The real question then is this: Where, at the time of the compromise of a claim founded on contract, a dispute exists between the parties as to the liability of the alleged debtor in any sum whatever, he denying that anything is owing, and an amount less than the claim is paid to the claimant in settlement of the controversy, can the party claimant maintain an action at law on the original contract, without tendering back the sum received, even though his assent to the settlement was obtained by the fraudulent and false representation of the other party?

No dispute exists between counsel, and we presume no doubt exists, of the soundness of the general proposition that where a party to a compromise desires to set aside or avoid the same and be remitted to his original rights, he must place the other party in statu quo by returning or tendering the return of

whatever has been received by him under such compromise, if of any value, and so far as possible, any right lost by the other party in consequence thereof. In an action to rescind, the petition should allege the fact of such return or tender, prior to, or at least contemporaneous with, the commencement of the suit. Further, as a general proposition, the rule obtains even though the contract of settlement was induced by the fraud or false representations of the other party; the ground being that by electing to retain the property, the party **303** must be conclusively held to be bound by the settlement: 8 Cyc. of Law & Proc., 531. No further authorities seem necessary in support of these propositions.

Numerous exceptions have, however, been engrafted on this general rule. One is that restoration is not necessary where the money received by the party was due him in any event and if returned could be recovered back. *Bebout v. Bodle*, 38 Ohio St. 500, may be referred to as illustrative. An action was brought by Phoebe S. Bodle on a note signed by William Bebout as principal and Solomon Bebout as surety. Solomon pleaded his suretyship and an extension of time for payment by agreement to pay interest between the plaintiff and the principal maker without his consent. Plaintiff, by reply, admitted the agreement and receipt of the interest money, but alleged that the agreement to extend was procured by fraud. Solomon demurred to the reply, contending that as no offer to pay back the interest money had been pleaded, the reply was insufficient. But the district court held, and this court held, that such payment back was not necessary, as, in any event, the principal maker owed the debt, and all of it. Of course, the payment back would have been the doing of a vain thing, inasmuch as the plaintiff was admittedly entitled to the interest paid, whether by virtue of the settlement, or by the principal maker's original liability, which liability was in no way impaired. The law does not require an idle ceremony. A less obvious distinction, at least one more likely to be misconstrued, is sought to be engrafted to the effect that an offer to return is unnecessary if the judgment asked for will accomplish that result. If this be conceded as a naked proposition, yet its application to the case before us is not clear, and the decisions cited **304** as illustrating it do not seem to closely resemble our case. The principal one is that of *Allerton v. Allerton*, 50 N. Y. 670. The plaintiffs, the defendant, and one McPherson were partners. The defendant (who had managed the busi-

ness), by fraudulent representations to plaintiffs as to the unprofitable character of the business, and that he (defendant) in conjunction with them would sell out to McPherson, induced plaintiffs to unite with him in such sale upon being refunded the amount invested by them, and thereafter defendant represented that he had sold out, and paid to plaintiffs the money advanced by them, while in fact defendant did not sell but retained his interest, and subsequently acquired McPherson's interest; the business was profitable, and defendant had received large gains and profits. They asked that the sale be declared void, that defendant account for all moneys received by him, and that they have judgment for their portion of the profits less the amount received. It is to be noted that this was a suit brought directly to set aside the alleged agreement. It was in chancery, tried by the court, and, as appears by the record, the plaintiffs were entitled to an accounting and to judgment, if the claim of fraud should be maintained. The court was appealed to as a court of equity by the injured parties, by a proper pleading, to rescind a contract induced by fraud and then for an accounting. They did not, as in the present case, attempt themselves to rescind and ignore the contract. The case gives little, if any, aid in determining our question. And that it does not apply to a case like ours is distinctly held by the same court in *Gould v. Cayuga Co. Nat. Bank*, 86 N. Y. 75, where the *Allerton* case is referred to as an action in equity to rescind, in which the rights of the parties could be fully regarded <sup>305</sup> and protected. The *Gould* case, as is the case at bar, was an action on the original claim, and it was there held that one who seeks to rescind a compromise of a disputed claim on the ground of fraud must restore or offer to restore whatever of value he has received; that in an action at law upon the original claim the plaintiff must show that he thus rescinded the fraudulent compromise prior to the commencement of the suit; if no rescission is shown, a final determination of the court that plaintiff was entitled to more than the sum paid is no answer to the objection. A case involving a similar question is that of *O'Brien v. Chicago etc. Ry. Co.*, 89 Iowa, 644, 57 N. W. 425. It is there held that where a settlement with an employé on account of damages sustained from a personal injury was procured by false representations that other witnesses to the accident were against him, and the promise that he would be given work as long as he behaved himself, which promise was broken, and that

the employé was in such condition mentally as not to understand the effect of the release which he signed, such settlement is not a bar to an action for damages for the injury, and that a tender of the amount received is not necessary before an action on the original liability. The record does not clearly show that the company disputed its liability at the time of the settlement, and a fair inference is that it did not, for it does appear that the court rested its judgment on the proposition that "one who attempts to rescind a transaction on the ground of fraud is not required to restore that which in any event he would be entitled to retain either by virtue of the contract sought to be set aside, or of the original liability." This proposition is taken from the opinion and syllabus in *Kley v. Healy*, 127 N. Y. 306 555, 28 N. E. 593, and that case is relied upon as authority for the Iowa decision. That action was one brought to procure the cancellation of a satisfaction of a judgment upon the ground that it was obtained by fraud, and that the judgment be restored as a valid lien. The court held that the defendant would be entitled to what she had received, whatever might be the result of her action for a rescission. If the action failed she was entitled to what had been paid; if she succeeded the sum was less than she was concededly entitled to by the original judgment. Hence, an offer to return was not necessary. Here, too, was an appeal to a court of equity to procure a rescission. It, like the *Allerton* case, would seem to fall short of affording a solution of our case. The holding in the *Kley* case is consistent with earlier New York cases, notably *Cobb v. Hartfield*, 46 N. Y. 533, and *McMichael v. Kilmer*, 76 N. Y. 36, and with a host of other cases in that state and elsewhere in which the general rule hereinbefore given is maintained.

After very full consideration of the controversy in all its bearings, and an extensive examination of authorities, we are satisfied that the case at bar comes within the general rule and not within any of the exceptions sought to be engrafted upon it. The rule may be briefly stated: If at the time of the agreement there was, without dispute, an amount due equal to the amount paid, as in *Bebout v. Boble*, 38 Ohio St. 500, and in *Kley v. Healy*, 127 N. Y. 555, 28 N. E. 593, then no tender is necessary; but if, at the time of the settlement, it is denied by the alleged debtor that anything is owing, and a dispute as to that liability exists, and that is settled by payment and release, then a return or tender is necessary. There



being in this case a controversy between the <sup>307</sup> parties, a disputed claim which the parties, being sui juris at the time deliberately settled, the one executing a full and sufficient release, intending to do just what he did do, and the other paying a money consideration therefor, the release, whether obtained by fraudulent representations or not, is binding until set aside either by a tender or return of the money received, or by a direct proceeding in a court of equity for that purpose, upon equitable terms, and the claim for rescission in such case on the ground of fraud cannot be made by a reply.

It is to be borne in mind that the parties were settling a controversy. It was the settlement of this dispute that afforded the consideration for the compromise of the original claim. True it is that the amount received was discounted from the recovery. But that is no answer. We say as the New York court said in the Gould case. Suppose the verdict had been the other way, what would have been the position of the defendant in respect to the money paid under the release? Clearly there would be no recourse to recovery back from the plaintiff. The compromise agreement is binding upon the plaintiff in error, and could not be rescinded or set aside at its instance. If binding on one side it must be on the other so long as it exists. It did exist at the time this action was brought; it had not been rescinded, and consequently, while it bound one party it must equally bind the other: *Lyons v. Allen*, 11 App. D. C. 543; *East Tennessee etc. Ry. Co. v. Hayes*, 83 Ga. 558, 10 S. E. 350.

It is urged with much confidence that the face of this policy was a liquidated demand and that the payment of a less sum could not satisfy it, even though accepted as such, because there was no consideration for giving up the rest. The rule of law stated is good. <sup>308</sup> But it is not correct to say that a policy of insurance is a liquidated demand. It is not identical with an instrument for the payment of money only, nor the judgment of a court. The every-day business of the courts shows to the contrary. The original consideration may be sufficient, and there may be a legal delivery of the instrument, and yet, when the event insured against occurs, there may be and in a great many instances there are, good and sufficient defenses to a recovery. There was such defense pleaded in this case. To characterize such a contract as a liquidated demand is a consideration in terms. It is safe to say that a claim concerning which a defense may be made is not a li-

quidated claim, and if a defense is made it is a proper subject of compromise. One may buy his peace. The law favors the amicable settlement of disputes.

In argument it is urged that the plaintiff below signed the contract of release without knowing its contents; that in accepting the check for two thousand dollars he supposed he was receiving payment on the policy, and hence the release is not binding upon him, and there was no settlement. The plaintiff does testify that he did not read the paper; that he couldn't read writing although he could write his own name, and that the signatures on the release and on the check are his; that he signed them. He undertakes to say, further, that he received this money as a payment on the claim. It is true, also, that the jury, in addition to the general verdict, returned answers to divers interrogatories in which it is found that the parties did not agree to settle; that the two thousand was not paid plaintiff in full settlement of the policy; that the release and check did not express the intention of the plaintiff, etc. But the testimony <sup>309</sup> of Burke himself leaves no sort of question but that he perfectly understood that the agents of the company were there to settle the entire claim; that they had no other purpose, and that, by signing and delivering the release and surrendering the policy he was assenting to a settlement for the amount paid. He was *sui juris*, and in law able to look out for his own interests. The testimony respecting the alleged fraud would be potent in a suit properly brought, and the finding of the jury with respect to it might be conclusive of the facts in a suit involving them properly pending before a jury. But, over and against it all, there is the release and the surrender of the policy, and the retention of the money received, which are, while the contract of compromise remains unrescinded, controlling. In the words of another, restitution before absolution is as sound in law as in theology.

But it is insisted, finally, that the case is ruled by *Insurance Co. v. Hull*, 51 Ohio St. 270, 46 Am. St. Rep. 571, 37 N. E. 1116, and that to reverse the judgment below will be to overrule that case. We do not think so. The holding in that case involved the effect of a suppression of a criminal prosecution, and the decision is based on that fact. A contract attempted to be founded upon such consideration has no legal efficacy; it is against public policy, is void absolutely, and incapable of ratification. It is otherwise with a contract

induced by fraud. Such contract is voidable only. We may not agree with all of the argument and all of the conclusions stated in the opinion by the learned judge who reported that case, but our case does not require any criticism upon the decision, much less an overruling of it. Indeed the opinion itself, in the concluding paragraph, emphasizes the distinction between that <sup>310</sup> case and one where the contract sought to be rescinded has been induced by fraud. The distinction was also made by the learned trial judge in his charge wherein he said to the jury, among other things, that if there was a settlement as claimed and a promise that the plaintiff should not be prosecuted on the charge of burning the property formed no part of the consideration for such settlement, she could not recover; but if such promise was a part of the consideration, the contract was void and constituted no defense to the action.

We do not overlook the claim made in argument that the testimony of the plaintiff was that at the time of the settlement there were threats of imprisonment. He does so testify. But there is no claim made in the pleadings of the suppression of a criminal prosecution, nor was there any offer to amend the pleadings; and whether, if they had been amended and that charge made the testimony would have supported it, we need not inquire. Besides, all the evidence was subject to the objection made at the outset of the trial.

As conclusion we are of opinion that no right of recovery was shown on the part of plaintiff below and that the judgments in his favor are erroneous. The former entry of affirmance will be set aside, and judgment for plaintiff in error will be rendered in accordance with this opinion.

Reversed.

Burket, C. J., Davis, Shauck, Price and Crew, JJ., concur.

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*As to the Effect of Compromises and Releases made in ignorance of one's rights, see the monographic note to Alabama etc. Ry. Co. v. Jones, 55 Am. St. Rep. 507-512. That a compromise of a claim under an insurance policy fraudulently procured may be rescinded or set aside, see Titus v. Rochester German Ins. Co., 97 Ky. 567, 53 Am. St. Rep. 426, 31 S. W. 127, 28 L. R. A. 478; McLean v. Equitable etc. Assur. Soc., 100 Ind. 127, 50 Am. Rep. 779; Berry v. American Cent. Ins. Co., 132 N. Y. 49, 28 Am. St. Rep. 548, 30 N. E. 254. And it has been held that where a release has been procured by fraud, suit may be brought on the original cause of action without first offering to return the amount paid for such release: Indiana etc. Ry. Co. v. Fowler, 201 Ill. 152, 94 Am. St. Rep. 158, 66 N. E. 394. See, also, Insurance Co. v. Hull, 51 Ohio St. 270, 46 Am. St. Rep. 571, 37 N. E. 1116, 25 L. R. A. 37, and compare Chicago etc. R. R. Co. v. Curtis, 51 Neb. 442, 66 Am. St. Rep. 456, 71 N. W. 42.*

## LUHRIG COAL COMPANY v. LUDLUM.

[69 Ohio St. 311, 69 N. E. 562.]

**ARREST in Civil Action, Affidavit for.**—In an affidavit to procure an order for the arrest of the defendant under the statutes of Ohio, certainty to a general intent is all that is required. Such certainty consists of such clearness and distinctness of statement of the facts constituting the cause of action that they may be understood by the party who is to answer them, by the jury who are to ascertain the truth of the allegations, and by the court who is to give judgment. (p. 677.)

**ARREST in Civil Action—Affidavit, When Sufficient.**—An affidavit which states the nature of the claim sued upon, that all the averments of the petition are true, and that the defendant fraudulently contracted the debt and had at the time no intention or expectation of making payment, and was indebted to an amount largely in excess of the value of all his property, is sufficient to authorize the arrest of the defendant in a civil action under the statutes of Ohio. (p. 678.)

**DEBT, When Deemed to be Fraudulently Contracted.**—If a debt is contracted by one whose indebtedness to his knowledge largely exceeds in amount the value of his property, and when he does not intend or expect to pay and has no reasonable expectation of paying, the debt is fraudulently contracted. (p. 678.)

Action for the recovery of eight hundred and twenty-five dollars and ninety-nine cents for coal sold and delivered by the plaintiff to the defendant. With the plaintiff's petition was filed an affidavit as follows:

"State of Ohio,        }  
Hamilton County. } ss.

"William Montgomery, being duly sworn, says he is the authorized agent of the plaintiff herein, the Luhrig Coal Company, and that the claim sued on in this action is on an account for coal sold and delivered to the defendant at his request, for which defendant promised to pay plaintiff what the same was reasonably worth, which is set forth in the account marked Exhibit 'A,' attached to the petition, and all the averments of said petition are made part of this affidavit; that said claim is just, and its amount is eight hundred and twenty-five dollars and ninety-nine cents, with interest from October 4, 1899.

"Affiant says that the defendant fraudulently contracted the debt and incurred the obligation on which this suit has been brought; and that at the time of each purchase of the coal set out in the petition and each item thereof, said defendant was indebted to an amount largely in excess of the value of all



his property and assets, had knowledge of such facts at each of said times, and that at each of said times he did not intend or expect to pay for the coal so purchased, and had no reasonable expectation of paying for the same."

An order of arrest having been procured on this affidavit, the defendant moved for its vacation on various grounds, among which was that the affidavit did not state facts sufficient to warrant the issuing of the order of arrest. The court granted the motion and ordered the accused released from custody, finding the affidavit to be insufficient. The plaintiff excepted to the order and filed its petition in error to circuit court, where the order was affirmed.

Burch & Johnson, for the plaintiff in error.

Shay & Cogan, for the defendant in error.

**313** BURKET, C. J. The only question in this case, worthy of report, is as to whether the affidavit is sufficiently full and certain to meet the requirements of the statute in such cases.

So much of section 5492 of the Revised Statutes as applies to this case is as follows:

"An order for the arrest of defendant shall be made by the clerk of the court in which the action is brought, when there is filed in his office an affidavit of the plaintiff, his authorized agent or attorney, stating the nature of the plaintiff's claim; that it is just, and the amount thereof, as nearly as may be, and establishing one or more of the following particulars:

"5. That he . . . fraudulently contracted the debt, or incurred the obligation for which suit is about to be or has been brought. The affidavit shall also contain a statement of the facts claimed to justify the belief in the existence of one or more of such particulars."

**314** It will be noticed that in the forepart of the section an order of arrest is allowed when an affidavit is filed, stating the nature of the plaintiff's claim, that it is just, and the amount thereof, as nearly as may be, and establishing one or more of the six particulars for an arrest mentioned in the section. This word "establishing," standing alone, would seem to mean the same as proving by affidavit, but the latter part of the section, which provides that the affidavit shall also contain a statement of the facts claimed to justify the belief in the existence of one or more of such particulars, seems to modify the meaning of the word "establishing," to the extent that when the plaintiff has a

belief in the existence of one or more of said particulars, and sets out facts tending to justify such belief, and makes positive affidavit thereto, he thereby establishes such particular.

As this affidavit is a part of the plaintiff's proceeding against the defendant for the recovery of his claim—a charge against him—certainty to a certain intent, in general, is all that can be required. As to such certainty, it is held that it consists in such clearness and distinctness of statement of the facts constituting the cause of action, that they may be understood by the party who is to answer them, by the jury who are to ascertain the truth of the allegations, and by the court who is to give judgment: *Rex v. Horne*, Cowp. 682; 6 Cyc. Law & Proc. 727; *The King v. Lyme Regis*, 1 Doug. 158. See, also, *Crofton v. State*, 25 Ohio St. 253.

The affidavit in question in this case fully meets the above requirements as to certainty. It charges in the words of the fifth particular of the statute that the defendant fraudulently contracted the debt and incurred the obligation on which the suit was <sup>315</sup> brought, and then states the facts claimed to justify the belief in the existence of this particular, as follows: "And that at the time of each purchase of the coal set out in the petition and each item thereof, said defendant was indebted to an amount largely in excess of the value of all his property and assets, had knowledge of such facts at each of said times, and that at each of said times he did not intend or expect to pay for the coal so purchased, and had no reasonable expectation of paying for the same."

This fully and clearly informed the defendant, and he must have so understood it, that he would be required to answer the charge, that at the time of the several purchases of coal he was indebted to an amount largely in excess of the value of his property and assets; that he had knowledge of such facts at the time of each purchase; that he did not intend or expect to pay for the coal so purchased; and that he had no reasonable expectation for paying for the same. This statement in the affidavit, as to the facts justifying the belief that the defendant fraudulently contracted the debt and incurred the obligation, is so clear and certain, that not only the defendant, who was to answer the charge, but also the court who was to ascertain the truth of the allegations and render judgment, could not fail to fully and clearly understand the facts upon which the plaintiff relied. That being so, the affidavit is certain to a certain intent in general, and sufficient. The affidavit is re-

quired to contain a statement of the facts claimed to justify the belief, and not the evidence proving such facts. The rule as to the statement of such facts in such an affidavit, is the same as the rule as to the statement of facts in a pleading. The facts claimed to justify the belief should be stated in the affidavit, and then <sup>316</sup> upon the hearing of the evidence tending to prove such facts should be brought forward.

In the case at bar, the charge in the affidavit, that at the times of the several purchases of coal, the indebtedness of the defendant largely exceeded the value of all his property and assets, that he had knowledge of that fact, that he did not intend or expect to pay for the coal, and had no reasonable expectation of paying for it, is a charge of facts clearly showing that the debt was fraudulently contracted; because he who purchases property not intending to pay for the same is guilty of a fraud: *Wilmot v. Lyon*, 49 Ohio St. 296, 34 N. E. 720.

It is therefore clear that the court of common pleas erred in sustaining the motion to vacate the order of arrest, and in discharging the defendant from custody, and that the circuit court erred in affirming the common pleas.

The orders and judgments of both courts will be reversed, and cause remanded to the court of common pleas for further proceedings according to law.

Spear, Davis, Shauck, Price and Crew, JJ., concur.

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*As to Sufficiency of the Affidavit* for the arrest of a debtor in civil actions, see *Read v. Randel*, 2 Har. 327; *Paul v. Ward*, 21 Ind. 211; *In re Lee*, 49 Mich. 629, 14 N. W. 685; *Vankirk v. Staats*, 24 N. J. L. 121. Consult, also, *Coffee v. Haynes*, 124 Cal. 561, 71 Am. St. Rep. 99, 57 Pac. 482; *Magruder v. Shelton*, 98 N. C. 545, 2 Am. St. Rep. 349, 4 S. E. 141; note to *Lathrop v. Clapp*, 100 Am. Dec. 505.

*The Purchase of Goods* with the intention not to pay for them is fraudulent. The mere fact, however, that the buyer is insolvent and knows that he is, which he does not disclose to the seller, is not usually regarded as fraudulent: See the monographic notes to *Thurston v. Blanchard*, 33 Am. Dec. 707, 708; *Reid v. Cowduroy*, 18 Am. St. Rep. 364; and the subsequent cases of *Skinner v. Michigan Hoop Co.*, 119 Mich. 467, 75 Am. St. Rep. 413, 78 N. W. 547; *Miller v. White*, 46 W. Va. 67, 76 Am. St. Rep. 791, 33 S. E. 332; *Hart v. Moulton*, 104 Wis. 349, 76 Am. St. Rep. 881, 80 N. W. 599.

**RICHARDS v. LOUIS LIPP COMPANY. RICHARDS v. AMERICAN FIRE BRICK AND CLAY COMPANY.**

[69 Ohio St. 359, 69 N. E. 616.]

**ESTOPPEL to Urge that a Member of a Mutual Protective Association did not Sign the Constitution.**—If a policy insuring against loss by fire is issued by a mutual protective association to one who has not signed its constitution, he may be estopped when sued for an assessment, and the association when sued upon a liability arising under the policy, from asserting that he is not a member of the association because of such failure to sign. (p. 680.)

Two actions, one brought to recover an assessment on a policy insuring against loss by fire, and the other to recover for damages suffered by the fire. In both cases policies had been issued by a mutual protective association to a supposed member, who had not signed the constitution, and it was claimed on this ground that the policies were void and neither created obligations to pay future assessments on the part of the policy holder, or on the part of the association to pay losses incurred. In each case it was claimed that the policy had been issued in good faith and the premium paid and retained, and that therefore an estoppel had arisen precluding the denial of liability. In the action on the assessments, judgment was given for the defendant, but in that on the insurance policy seeking to recover for the loss, the judgment was for the plaintiff, the one cause was determined by the court of common pleas of Tuscarawas county, and the other by a like court in Hamilton county. In each case the judgment was affirmed by the circuit court.

Patterson A. Reece, Smith W. Bennett and J. W. Yeagley, for the plaintiff in error.

Peck, Shaffer & Peck and Neely & Patrick, for the defendants in error.

**363 DAVIS, J.** The Aetna Fire Association was duly organized under sections 3686-3690 of the Revised Statutes. The first of those cases is an action by the holder of a policy issued by this association, to recover for a loss sustained by fire. In the other case the cause of action set out in the petition is an assessment by the court of common pleas of Hamilton county in the matter of the dissolution of the said fire association. In both cases resistance is made to recovery, on



the ground that a policy issued by such an association is void unless the assured shall have signed the constitution of the association. In contending for this proposition some reliance is placed on the following language which appears in the opinion in *State v. Manufacturers' Mut. Fire Assn.*, 50 Ohio St. 149, 33 N. E. 402, 24 L. R. A. 252, viz.: "To become a member the person must sign his name to the constitution." This is merely a construction of the language of the statute (Rev. Stats., sec. 3690), which is that: "All persons who sign such constitution shall be considered and held to be members of the association, and shall be held in law to comply with all the provisions and requirements of the association." In that case the question which is before us in these cases did not arise and was not considered, viz.: Whether the assured, on the one hand, might not be estopped by his conduct, when sued for assessments, from asserting <sup>364</sup> that he had not complied with the law, or that he was not legally a member; and whether, on the other hand, the association might not be estopped by its conduct, when sued on its policy, from asserting that it had not required and obtained the signature of the assured to the constitution. The remark in the opinion in *State v. Manufacturers' Mut. Fire Assn.*, 50 Ohio St. 149, 33 N. E. 402, 24 L. R. A. 252, while it is strictly correct, was made with reference to a wholly different controversy, and is not pertinent here.

There is no provision in the statute that a policy issued by a mutual protective association shall be void if the assured does not sign the constitution. It is only by inference that it can be said that it even would be voidable. To allow either party to the policy to set up his own wrong as a defense to an obligation incurred under the policy, where the policy has been issued and held in good faith as an indemnity and where premiums have been paid and received under it, is not only manifestly unjust, but contrary to settled rules of law. It was held in *Tone v. Columbus*, 39 Ohio St. 281, 48 Am. Rep. 438, that: "Want of power in the corporation may be waived, or an estoppel may arise from failure to assert it at the proper time." And in *Matt v. Roman Catholic etc. Soc.*, 70 Iowa, 455, 30 N. W. 799, it was held that, "a religious society, formed under the auspices of a church, which includes a mutual life insurance scheme as one of its features, cannot defend against a suit on one of its policies upon the plea of ultra vires, when it has been receiving the assessments on the policy." In an

action upon a bond and mortgage given to a "loan and fund association," reciting in the bond that the signer is a member of such association, and recognizing the obligation of the by-laws, it was held that in the absence of <sup>365</sup> fraud, the signer was estopped to deny that he was a member of the association: Howard Mut. Loan etc. Assn. *v.* McIntyre, 3 Allen (Mass.), 571. In Parker *v.* United States Bldg. etc. Assn., 19 W. Va. 744, it was held that, "the failure of a member to sign the constitution of such association, if he has for a long time acted as a member of the association, will not prevent the association from enforcing the performance of a contract made with such member, though it be a contract which the association was not authorized to make with any but a member." Finally, it was held by this court, in Trumbull County Mut. Fire Ins. Co. *v.* Horner, 17 Ohio, 407, that a member of a mutual fire insurance company, when sued upon an assessment upon his deposit note, to pay a loss occasioned by fire, cannot set up a defense that he and his associate corporators have neglected to comply with the provisions of their charter.

It is our opinion, therefore, that the judgment of the circuit court of Hamilton county, and that of the court of common pleas, in the case of the Louis Lipp Company, should be and are hereby affirmed; and that in the case of the American Fire Brick and Clay Company, the judgments of the circuit court of Tuscarawas county and of the court of common pleas, were erroneous; but on authority of Slingluff *v.* Weaver, 66 Ohio St. 621, 64 N. E. 574, and Gompf *v.* Wolfinger, 67 Ohio St. 144, 65 N. E. 878, the case is dismissed for want of jurisdiction.

Burket, C. J., Spear, Shauck and Price, JJ., concur.

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*That an Insurance Policy* issued by a company in violation of law may be binding upon it, see State Mut. Fire Ins. Assn. *v.* Brinkley etc. Co., 61 Ark. 1, 54 Am. St. Rep. 191, 31 S. W. 157, 29 L. R. A. 712; Pennypacker *v.* Capital Ins. Co., 80 Iowa, 56, 20 Am. St. Rep. 395, 45 N. W. 408, 8 L. R. A. 236. Consult, in this connection, Commonwealth Mut. Fire Ins. Co. *v.* Hayden, 60 Neb. 636, 83 Am. St. Rep. 545, 83 N. W. 922. As to whether an insurance company may be estopped to set up the defense of ultra vires when sued on a contract of insurance, by reason of its having received the premiums thereon, see In re Assignment Mutual etc. Ins. Co. *v.* Barker, 107 Iowa, 143, 70 Am. St. Rep. 149, 77 N. W. 868.

CLEVELAND, PAINESVILLE AND EASTERN RAIL-  
ROAD COMPANY v. PRITSCHAU.

[69 Ohio St. 438, 69 N. E. 663.]

**JURY TRIAL.—Statement of Facts by Counsel.**—Issues of fact, in so far as they depend on oral testimony, should be determined on the testimony of sworn witnesses, and statements of fact by counsel in the presence of the jury to influence their verdict are improper. (p. 686.)

**JURY TRIAL.—Questions of Counsel** following statements of fact made by him, where the object is to mislead the jury as to the facts in evidence, are improper. (p. 687.)

**JURY TRIAL.—Arguments and Statements by Counsel** before the evidence is closed are not in the course of the regular argument. The order of trial should not be disregarded by statements made by counsel during the introduction of evidence, especially under a statute declaring that counsel shall not be heard in argument until all the evidence has been introduced. (p. 687.)

**JURY TRIAL.—Remarks which Should not be Permitted.**—The ridiculing of uneducated witnesses because of their ungrammatical speech and the offering of insults to others without cause afforded in the case should be forbidden as tending to the suppression of truth. (p. 687.)

**JURY TRIAL.—The Repetition of Incompetent Inquiries** to which objection had been sustained, to prejudice the case in the estimation of the jury, discloses a purpose calling for immediate and complete suppression. (pp. 687, 688.)

**JURY TRIAL.—Improper Conduct of Counsel cannot be Overlooked on the Ground That It may have Prejudiced the Jury Against His Client**, where it does not appear from the record that it in fact resulted in such prejudice. (p. 688.)

**JURY TRIAL.—Power of Court Over Counsel.**—A trial court should not permit such conduct on the part of counsel as must result in a mistrial and render the granting of a new trial necessary in case a verdict is returned in favor of the client of such counsel. (p. 688.)

**JURY TRIAL.—Failure to Suppress Improper Conduct of Counsel, When Requires a Reversal of the Judgment.**—If a trial court, on objection made, fails to suppress improper conduct of counsel in the presence of the jury, as by making statements of fact before the jury, insulting witnesses, and the like, without cause therefor appearing in the case, a judgment in favor of such counsel must be reversed, unless it affirmatively appears that by instructions from the court or retraction by counsel, the prejudicial tendency of his misconduct has been averted. (p. 689.)

Ford, Snyder, Henry & McGraw, for the plaintiff in error.

W. S. Kerruish, for the defendant in error.

438 SCHAUCK, J. Mrs. Pritschau brought suit in the court of common pleas against the railroad company to recover on account of personal injuries which she sustained while a passenger on one of its cars, the injury resulting from collision

with another car, alleged to be caused by the negligence of the company. Upon issues joined the cause was tried to a jury, the trial resulting in a verdict in her favor for two thousand two hundred and ninety-one dollars. The company's motion for a new trial was overruled, and a judgment was rendered in her favor which, on petition in error, was affirmed by the circuit court. Her right to recover compensation for her injuries is not now disputed. The only question before us respects the amount of her recovery, which is alleged to be excessive, <sup>439</sup> and a reversal is sought because of misconduct of her counsel upon the trial of the cause. The record is voluminous, and many of its pages are devoted to recounting interruptions by her counsel, protests by his adversary, and observations of the court with respect thereto. A statement of all these instances would unduly expand this report. The grounds of complaint may be regarded as represented by a few of the instances taken from the record.

The record before us was made upon the second trial of the case. While counsel for the company was cross-examining the plaintiff herself, with respect to the extent of her injuries, he inquired of her whether she did not receive a caller in her parlor upon the evening of the day of her injury. She answered that she did not. Whereupon her counsel interrupted by saying: "That was all blown up before." Counsel further inquired of her whether she sent for a physician upon the day of the accident, whereupon her counsel observed: "I object; you might as well ask her if she blew her nose." In her further cross-examination with respect to her testimony upon the former trial, her counsel interrupted; whereupon the counsel for the company objected to the interruption, and the court observed: "It seems to disturb counsel on the other side, so counsel ought not to interfere." Mr. Kerruish: "I am interfering in the interest of economy of time and good sense." Upon her further cross-examination with respect to her occupation after the accident, she was inquired of whether she did not keep boarders during a portion of the time; and her counsel, upon re-examination, observed: "I want to clean these boarders out; wipe them out all together. Well, we have exterminated the boarders." Having admitted upon her cross-examination that she had <sup>440</sup> walked about the village of her residence, she was inquired of by adversary counsel whether she limped upon those occasions. She answered: "Why, I limped from being lame, of course; it makes a person limp." Whereupon the following



colloquy occurred: Mr. Kerruish: "I think there is a nigger in the fence about that thing myself." Mr. Henry: "I object to that." Mr. Kerruish: "She has been limping ever since. Now he wants to know whether she limped."

Another witness for the plaintiff, upon cross-examination was inquired of, whether, in view of his former relation he did not feel particularly kind toward the plaintiff. Whereupon her counsel interrupted: "Well, isn't it creditable to her?" Upon the direct examination of a witness for the plaintiff, her counsel propounded a question, assuming a state of facts here which no evidence tended to establish, and further assuming that the witness had knowledge thereof. Adversary counsel objected and asked the court to rebuke counsel for propounding a question of that character. Whereupon the court said: "Well, I think I will administer the rebuke to counsel because you are assuming that this witness knows things; there is no evidence as yet tending to show any such thing, and I think you are very much out of order." Mr. Kerruish: "Just a word on that point: Nobody knows better than I how to deport myself, but inasmuch as this gentleman imputed to me an improper motive, I thought I might inquire of him the things I know he knows." Upon the cross-examination of another witness, who had been called on behalf of the defendant, inquiry was made respecting the professional standing of one of the physicians who had attended the plaintiff. Mr. Kerruish interrupted as follows: "Now, it is perfectly evident what kind of <sup>441</sup> business they have been in down in Irondale, peeking into things of that sort."

Upon the examination of a medical witness who had been called by the defendant, plaintiff's counsel inquired of him why he had been selected to make an examination to which he had testified. He answered: "Well, don't ask me why he selected me, ask him." Whereupon plaintiff's counsel observed: "Well, I know, and so does everybody else; I don't care much, I simply wanted you to acknowledge it, that is all." Upon the cross-examination of a very young lady, who had been called as a witness by the defendant, plaintiff's counsel saw fit to examine her upon the subject of her familiarity with the city of Cleveland. She answered that she had been there about a month and was sick during the entire time. Whereupon counsel interrupted: "I don't care about your sickness; the least said about that the better." An objection by defendant's counsel was sustained by the court, and plaintiff's counsel interposed:

"We will pass over the sickness charitably. I put it upon charitable grounds." Upon the cross-examination of another physician who had been called by the defendant, plaintiff's counsel inquired of him as to the mode of ascertaining differences in the lengths of injured limbs. Upon receiving the answer of the witness, counsel interposed: "By gracious! that was done splendidly." Upon objection the counsel further said: "I thought it was complimentary to the witness." Upon the cross-examination of another witness, a woman who had been called by the defendant, plaintiff's counsel interrupted his own cross-examination to say: "Now, you are getting into tangles here of the worst kind." Upon objection by counsel for the defendant, plaintiff's counsel observed: "I guess your <sup>442</sup> woman isn't telling the truth, and you know it." Upon the cross-examination of another witness, respecting a supposed conversation with another person, the witness said she had no recollection of it. Whereupon plaintiff's counsel interrupted his own cross-examination to say: "I will have to fix the time and place and blow you up on that." Upon the cross-examination of the same witness, he inquired of her as to her failure to recognize the plaintiff upon an occasion referred to, and then inquired whether it was in consequence of a failure of the witness' observation or a change in the appearance of the plaintiff. The witness answered: "I think, perhaps, it was a little of both." Counsel thereupon interrupted himself to say: "Now, that is sensible; I like your style first rate; that is nice." Upon objection by adversary counsel, plaintiff's counsel observed: "Won't you let me compliment your witness when she is deserving of it?" Upon the examination of another witness called by the defendant, she was inquired of as to the origin of a written statement which she had signed, the inquiry being whether it was written in her presence. Counsel for the plaintiff objected; and, upon the suggestion of his adversary, "it is in your favor," he replied: "I don't want any of her favors. I think, your honor, that they should be reprimanded for bringing a witness like this into court. If it was two hundred years ago it would be punished." Upon the cross-examination of another witness called by the defendant, no evidence of any improper conduct on its part having appeared, counsel for the plaintiff inquired: "Well, do you know any of the crowd that have been trying to defeat this woman of her rights?" Upon the calling of Mr. F. A. Henry as a witness for the defendant, before any testimony had been given by <sup>443</sup> him, plaintiff's counsel interrupted to

say: "I am willing to admit that Mr. Henry will swear to anything that is necessary here."

In response to objections to the numerous interruptions and improprieties of counsel for the plaintiff, of which a few are embraced in the foregoing statement, the court made many observations whose nature and effect are indicated by the following selections. Upon being called upon by counsel for the defendant to sustain an objection to an improper question, and to require counsel to desist from an improper course of examination, the court said: "Oh, I think I have done all I can do; I sustain the objection." Again, "I think counsel is in fault in indulging in too many statements, a habit that counsel has got into in thirty years of practice, to interject in your arguments for the purpose of getting advantage with the jury. You are not conscious of it, but others notice it, and I notice it, and it is that the other side object to." "That was wholly out of order, Mr. Kerruish, it is not prompted by any desire to gain advantage, but by force of inveterate habit." Mr. Kerruish: "I think it is a good habit." Court: "No, I think it is a bad habit." "The jury will disregard the statements of counsel as to whether the witness is telling the truth or not. I think we ought to have no interruptions and no comments at all." "Well, it doesn't seem to have any effect; I have endeavored to rebuke counsel several times." "I have repeatedly admonished counsel, but it don't avail very much against the habits of forty years." "I have said a great many times there ought not to be any interference at all; the only thing to do is to object if you do object." Another time, when called upon to admonish counsel, the court said: "I have done that so much, I am getting tired of doing the ~~444~~ same thing over and over again. Now repeat the question." Upon a similar request the court said: "I do not think I will do that; I have done that so much that I am getting tired of it."

The record before us contains the solemn assurance that the repeated and prolonged scenes of disorder which it describes occurred upon "the trial of this cause." Adopting the euphemism, the trial was made to last through more than two weeks, obviously to the waste of most of the time so employed, and to the great discredit of the administration of justice. But these evils are accomplished and irremediable; and we have only to determine whether the law requires the plaintiff in error to submit to a result so reached. The determination of that question will not only justify, but require, some observations which

might seem too obvious to be entitled to a place in a treatise on the conduct of trials. It is the requirement of the law that issues of fact, in so far as they depend on oral testimony, shall be determined upon the testimony of witnesses who speak under the obligations of an oath, and who are subject to cross-examination. It is also required by established general rules, to which the issues of this case present no exceptions, that statements of fact, to influence the verdicts of juries, must be from the personal knowledge of the witnesses, and that mere hearsay and inference must be excluded. All of these requirements were disregarded in numerous instances presented by the record. On the trial, counsel for the prevailing <sup>445</sup> party, during that portion of the trial which, in orderly inquiry, is devoted to the introduction of evidence, made statements purporting to present facts, some of the statements being in corroboration of the testimony of witnesses, some of them being of matters which were not otherwise suggested in the case. The instances in which statements of facts were followed by questions, not for the purpose of eliciting such facts as were in the knowledge of the witnesses, but to mislead the jury as to the facts in evidence, are subject to the same criticism.

The order of trial prescribed by section 5190 of the Revised Statutes does not differ in any respect, which is here material, from that which had been pursued before the enactment of the statute. But since the general assembly has thought the order of sufficient importance to be a proper subject for legislation, there is added reason for adhering to the order which it prescribes. The section definitely provides that counsel shall not be heard in argument until all the evidence has been introduced. Manifest disregard of this order of trial appears in some of the comments of counsel which were made during the introduction of evidence, and which are presented in the statement of the case, and in many others which are not included in the statement. Not only were these comments untimely, but some of them were of such character that they should not have been permitted at any time. Certainly there is, and must be, much latitude allowed to counsel in argument when the time for argument has arrived; but the ridiculing of uneducated witnesses because of their ungrammatical speech, and the offering of insults to others without cause afforded in the case, should be forbidden as tending to the suppression of the truth. The repetition of incompetent <sup>446</sup> inquiries, to which objection had been sustained, was for the



obvious purpose of eliciting a repetition of the objection and to prejudice the case in the estimation of the jury. It should need no comment to show that the purpose which prompted such conduct called for its complete and immediate suppression.

It is suggested that the conduct of counsel was so grossly violative of propriety and decorum that it probably had the effect to offend the jury and to secure for his client a smaller verdict than would otherwise have been returned. That suggestion should not be permitted to control our judgment. If it be assumed that the orderly administration of justice is not to be insisted upon, and that the truth may, by accident, be evolved from such scenes as were here enacted, it is sufficient that the misconduct of counsel was, in its natural effect, prejudicial to the rights of the plaintiff in error, and it does not appear from the record that it did not, in fact, result in such prejudice. An examination of the cases cited, and others, justifies the conclusion that for such misconduct, and even for that which is less flagrant, judgments are always reversed, unless it is made to appear that its natural effect has been averted by court or counsel, or both. It is due to differences in the character of the misconduct rather than to differences of opinion in reviewing courts that it has, in some cases, been held that the effect of the misconduct may be eliminated by instructions, and in others that it cannot be. In this case the final instructions to the jury were silent upon the subject. Throughout the record a trial judge, personally distinguished for learning and probity, appears as a grieved observer of continued improprieties which he thought himself powerless to suppress. It is entirely clear that he was unable to <sup>447</sup> end them by admonition and entreaty, but he was clothed with ample power to suppress them inexorably. The county in which he sat has the complement of county buildings. From the body of the people a few are selected as members of the bar because their qualities are supposed to authorize the expectation that they will render important aid in the administration of justice. Some prime mistakes in the selection are remediable. If the court had sustained the motion for a new trial it would have been a too long deferred recognition of the rights of the plaintiff in error, though it would have made this proceeding in error unnecessary. That it should have been sustained is obvious. But it is much more important to observe that the trial judge should not have permitted such conduct on the part of counsel as would result in a mistrial.

This was due not only to the parties to the suit, but to the public. But few pages of this record had unfolded when there was manifest occasion for continuing the cause and dealing with offending counsel according to his deserts. The observations of the trial judge, from time to time, show that he had an intelligent appreciation of the gravity of the offenses which were committed before him. Why he thought it less important to suppress them than to give correct instructions to the jury as to the law of the case, does not appear. In a comparison of causes, a mistrial because of an erroneous view of the legal rights of the parties would be entitled to more charitable consideration. The suggestion by the trial judge that a course of toleration was chosen because of the inveteracy of counsel's habit acquired in forty years of similar practice, was most unfortunate. Is it necessary to say that there can be no prescriptive right to hinder the administration of justice by conduct <sup>448</sup> which squanders time and leads to mistrials? Can the suggested discrimination against younger members of the bar be justified or even tolerated?

It is required by the reasons involved and by the decided cases that the judgments of the court of common pleas and the circuit court be reversed, and the cause remanded to the former court for a trial according to law.

Reversed.

Burket, C. J., Spear, Davis, Price and Crew, JJ., concur.

#### MISCONDUCT OF COUNSEL OTHER THAN IN ARGUMENT.\*

- I. Introduction and Scope of Note.
- II. Knowingly Asking Incompetent and Inadmissible Questions.
- III. Statements by Attorneys as to What They Expect to Prove in Offering Testimony.
- IV. Insulting Witnesses.
- V. Disparaging Opponent's Evidence as It Comes in.
- VI. Improper Questions of, or Remarks Concerning, Jurors.
- VII. Improper Statements Concerning the Law Governing the Case.
- VIII. Effect of Similar Misconduct by Opponent, or Where Misconduct was Provable by Adversary.
- IX. Necessity of Objection to Misconduct.
  - a. In General.
  - b. When it may be Dispensed With.
- X. Language Used must be Prejudicial to Warrant a Reversal.
- XI. Granting New Trial for Misconduct.

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\*REFERENCES TO MONOGRAPHIC NOTES.

Misconduct of counsel in argument: 48 Am. Rep. 336; 56 Am. Rep. 814; 58 Am. Rep. 648; 9 Am. St. Rep. 559.

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- XII. Duty of Court to Instruct Jury to Disregard Improper Remarks.**
- XIII. Duty of Court to Reprimand Offending Counsel.**
- XIV. Means of Stopping Misconduct.**

### **I. Introduction and Scope of Note.**

The misconduct of counsel in the trial of causes, such as occurred in the principal case, may well call down the condemnation of every fair-minded student of the law, tending, as it necessarily must, to the creation of disorder, the suppression of truth, and the demoralization of justice in general. It is a matter of regret that lawyers should knowingly violate the fundamental principles of legal ethics, by indulging in such tactics as insulting and browbeating witnesses, in many instances present only because forced to be there, by knowingly asking improper questions, seeking and hoping thereby to influence the jury, and by persisting in arguing their case during the entire trial.

It is to be noted with satisfaction that the courts have taken a firm stand against such misconduct, refusing to allow a verdict, obtained by such means, to stand, for, as has been remarked: "A case that cannot be won fairly upon the evidence, by the use of legal and lawyer-like methods, presumably does not deserve to be won": *Sutton v. Chicago etc. Ry. Co.*, 98 Wis. 157, 73 N. W. 993. See, also, *Ward v. Reed* (Mich.), 96 N. W. 458.

The remarks of counsel made during a trial stand on the same footing as those made in argument: *Welch v. Union Cent. Life Ins. Co.*, 117 Iowa, 394, 90 N. W. 828; but it has been thought advisable in this note to discuss only such cases as deal with misconduct other than in argument, in order to get a clearer idea as to what behavior has and has not been considered so prejudicial as to warrant disturbing a judgment.

### **II. Knowingly Asking Incompetent and Inadmissible Questions.**

One of the most common forms of misconduct is that of knowingly asking incompetent questions, in order to obtain an advantage with the jury, and persisting in repeating them, although held inadmissible by the trial court; and a verdict obtained by such conduct will be set aside: *Hood v. Chicago etc. Ry. Co.*, 95 Iowa, 331, 64 N. W. 261; *Phillips v. United States Ben. Soc.*, 120 Mich. 142, 79 N. W. 1; *Ather-ton v. Defreeze*, 129 Mich. 364, 88 N. W. 886; *Belyea v. Minneapolis etc. Ry. Co.*, 61 Minn. 224, 63 N. W. 627; *Cosselmon v. Dunfee*, 172 N. Y. 507, 65 N. E. 494, affirming 59 App. Div. 467, 69 N. Y. Supp. 271; *Yarborough v. Weaver*, 6 Tex. Civ. App. 215, 25 S. W. 468; *Hoeks v. Sprangers*, 113 Wis. 123, 87 N. W. 1101, modified, 113 Wis. 123, 89 N. W. 113; *Barton v. Bruley* (Wis.), 96 N. W. 815. So it is improper for counsel to put leading questions, and after they have been excluded, ask questions on the same subject in proper form: *Sullivan v. Chicago etc. Ry. Co.*, 119 Iowa, 464, 93 N. W. 367, where the court said: "The reasons for the rule prohibiting leading and

suggestive questions come readily to the mind, requiring but a moment's thought. Justification for such rule is not needed, in any sense. When a question obnoxious to the rule has been put to a witness, the mischief is done. His mind has been directed to the specific point upon which favorable testimony is wanted, and the answer desired is generally suggested. Now, to permit an answer to a question, proper in form, where it immediately follows one that was improper, in the sense that it carried with it a plain suggestion of the answer desired, is to take away very much, if not all, the probative force of the rule forbidding leading and suggestive questions. If a witness be favorable to the party calling him, and especially if he be a willing witness, he will have been apprised of what is expected of him, and the subsequent properly framed question can be as readily and satisfactorily answered to the advantage of the questioner as could the prior improper one. While we should hesitate to reverse a case on this ground alone, yet, generally speaking, the practice is to be condemned."

Where the mere putting of a question conveys to the jury information which cannot be properly laid before them, thus tending to render the trial unfair and illegal, a verdict so obtained stands on exactly the same basis as if the illegal evidence were introduced by error in ruling by the court. But where the incompetent evidence conveys no information other than that contained in testimony not objected to, the verdict will not be set aside: *Dow v. Town of Weare*, 68 N. H. 345, 44 Atl. 489.

It has been held that there is no rule of law precluding an attorney from asking a witness a question, even though he know it to be improper, if it be civil and respectful, but sharp practice should not be permitted: *Hollenbeck v. Missouri Pac. Ry. Co.* (Mo.), 38 S. W. 723.

### III. Statements by Attorneys as to What They Expect to Prove in Offering Testimony.

A party has a right, when he has a witness on the stand, to offer to prove such facts as may be thought material to the case, and it is not improper for counsel to state to the court the facts he expects to prove by the witness: *Chicago etc. R. Co. v. Fietsam*, 123 Ill. 518, 15 N. E. 169, affirming 24 Ill. App. 210. So an attorney may state the grounds on which he relies as justification for questions to which opposing counsel objected, care being taken by the judge promptly to check any apparent effort to make them the opportunity for the assertion of inadmissible matters: *Gilbert v. Michigan Cent. R. Co.*, 116 Mich. 610, 74 N. W. 1010.

It is improper for counsel, on a motion to reopen the case for more evidence, made while the argument is in progress, to state the names of witnesses and what their evidence would be without first asking that the jury retire; but where it does not appear that he acted in bad faith or to get facts before the jury by artful practice, a new



trial will not be granted solely on that account: *Georgia etc. R. Co. v. Evans*, 87 Ga. 673, 13 S. E. 580. The fact that counsel makes improper statements, in offering incompetent testimony, will not work a reversal where the testimony is promptly excluded and it appears improbable that the jury were prejudiced by the remarks: *Provost v. Brueck*, 110 Mich. 136, 67 N. W. 1114.

It is improper for counsel to state what he could prove if he were allowed to do so, where an objection to his question has been sustained, and is reversible error if the court does not instruct the jury that it is improper: *McDuff v. Detroit Evening Journal Co.*, 84 Mich. 1, 22 Am. St. Rep. 673, 47 N. W. 671. See, also, *Turner v. Muskegon etc. Co.*, 97 Mich. 166, 56 N. W. 356.

So, where the court refused to permit certain questions to be put on cross-examination of one of the opposing witnesses, by counsel for the plaintiff who then remarked that the attorneys on the other side were afraid that the witness would tell, this was held so prejudicial that the trial court should have set aside a verdict for the plaintiff on its own motion: *Thompson v. Toledo etc. Ry. Co.*, 91 Mich. 255, 51 N. W. 995.

The rule that a judgment may be reversed for stating or arguing upon pertinent facts not in evidence does not apply to statements made by an attorney while testifying as a witness: *Baker v. City of Madison*, 62 Wis. 137, 22 N. W. 141, 583.

#### IV. Insulting Witnesses.

Witnesses, while on the stand, should not be insulted, and are entitled to protection: *West Chicago St. R. Co. v. Groshon*, 51 Ill. App. 463; *Chicago City Ry. Co. v. Barron*, 57 Ill. App. 469. In the latter case it is said: "It is sufficient to say that each person who is called as a witness, whether high or low, rich or poor, of good or ill repute, of an orderly or dissolute life, has, while upon the witness-stand, an absolute right to respectful treatment. The witness is there, not simply of his own accord, but at the command of the law, and counsel have no right while he is upon the stand to treat him otherwise than if he was the highest gentleman in the land.

"Counsel may think, and it may be the case, that the business which the witness follows is nefarious, or his life disreputable, but the witness, while he may be made to testify to facts which show such to be the case, is not in the course of an examination to have his life characterized by counsel as disreputable or wicked, and the instances are exceedingly rare in which, while a witness is upon the stand, it is proper in discussion carried on with the court, to speak offensively of the life and character of such witness."

So remarks of counsel for plaintiff during the examination of a witness for an unsuccessful defendant, over proper objections, that such witness had been "fixed" by defendant's counsel, and that he had to depend upon "fixing witnesses," there being no evidence of such fact, are grounds for setting aside the verdict: *Ashland Land*

etc. Co. v. May, 51 Neb. 474, 71 N. W. 67. See, also, Sutton v. Chicago etc. Ry. Co., 98 Wis. 157, 73 N. W. 993. A question which charges dishonesty may be as prejudicial as a direct statement to the same effect: George v. Swafford, 75 Iowa, 491, 39 N. W. 804.

Counsel should refrain from remarks during the examination of witnesses, putting the question directly and receiving the answer without comment: Baker v. Sherman, 71 Vt. 439, 46 Atl. 57. Calling a witness by his first name is not misconduct, as tending to lower him in the jury's estimation: Enright v. City of Atlanta, 78 Ga. 288.

#### **V. Disparaging Opponent's Evidence as It Comes in.**

Counsel should not disparage evidence offered by his adversary as it comes in, by addressing the court in the hearing of the jury upon the infirmities of the evidence, declaring at the same time that he does not object to its reception but desires it to be received: Travelers' Ins. Co. v. Sheppard, 85 Ga. 751, 12 S. E. 18.

#### **VI. Improper Questions of, or Remarks Concerning, Jurors.**

By improperly questioning jurors or addressing to them improper remarks, undue advantage, prejudicial to the opposing side, may be gained, and these should stand upon the same footing as questions or remarks addressed to witnesses.

In Lipschutz v. Ross, 84 N. Y. Supp. 632, an action for personal injuries, a talesman was asked by the plaintiff's attorney if he was interested in a certain insurance company. This was objected to and overruled. The plaintiff's attorney stated that he understood the case was being defended by the insurance company, and the court remarked that the plaintiff had a right to find out if such company was interested. These statements of the attorney and the court were held reversible error, citing Wildrick v. Moore, 66 Hun, 630, 22 N. Y. Supp. 1119; Cosselmon v. Dunfee, 172 N. Y. 507, 65 N. E. 494; Manigold v. Black River Traction Co., 81 App. Div. 381, 80 N. Y. Supp. 861.

In Gundlach v. Schott, 95 Ill. App. 110, affirmed 192 Ill. 509, 85 Am. St. Rep. 348, 61 N. E. 332, during the selection of the jury, attorney for the plaintiff, in examining the first four men called as jurors, asked if they knew a man by the name of Holland, an insurance agent. Opposing counsel objected, stating that he knew no such man, whereupon plaintiff's attorney stated that he had reason to believe he did know him, because he had been around trying to compromise the case. It was held that this would have been sufficient ground to warrant a reversal, if the court had not interposed and directed the jury to disregard the remarks.

Where counsel, in arguing a motion for a mistrial, became abusive of the jury, stating, in the hearing of the jury, among other things, that some of the jurors had gone into the jury-box with souls blackened with perjury and bribery, and that all hell could not change

their minds, this was held such misconduct as to warrant awarding a new trial, where a verdict was given in favor of the offending counsel: *State v. Noland*, 85 N. C. 576. See, also, *Hagen v. New York etc. R. Co.*, 79 App. Div. 519, 80 N. Y. Supp. 580.

#### **VII. Improper Statements Concerning the Law Governing the Case.**

It is also reversible error for counsel to make remarks derogatory of the law governing the case. So where an attorney stated in the presence of the jury that a decision of the supreme court, employed with reference to the law of the case on trial, was as rotten as hell itself, a new trial was granted: *Martin v. Courtney*, 81 Minn. 112, 83 N. W. 503.

#### **VIII. Effect of Similar Misconduct by Opponent, or Where Misconduct was Provoked by Adversary.**

The fact that opposing counsel was equally reprehensible in misconduct is only a greater reason for setting aside a verdict: *Ensor v. Smith*, 57 Mo. App. 584; *Baldwin v. Grand Trunk Ry. Co.*, 64 N. H. 596, 15 Atl. 411. "The verdict is set aside," said the court in the latter case, "not because the party gaining it introduced incompetent evidence before his adversary did the same thing, nor because he introduced more incompetent evidence than his adversary, but because a material part of his evidence was inadmissible and prejudicial, and the trial was unfair and illegal."

Prejudicial remarks of counsel are not excused because provoked by opposing counsel: *Welch v. Union Cent. Life Ins. Co.*, 117 Iowa, 394, 90 N. W. 828. But see *St. Louis etc. Ry. Co. v. Daughtery* (Tex. Civ. App.), 31 S. W. 705, where the fact that opposing counsel's repeatedly asking leading questions, which were excluded, was held to excuse an improper remark, provoked thereby. In *State v. Haverly*, 4 Idaho, 484, 42 Pac. 506, certain improper remarks of a district attorney were assigned as error. The court there said: "While the remarks might have been exceptionable, had they been volunteered by the district attorney, when, as appears by the record, they were responsive to or in reply to remarks by defendant's counsel, we hardly think they amount to reversible error, especially when the jury were instructed by the court to disregard them."

#### **IX. Necessity of Objection to Misconduct.**

a. **In General.**—In order to take advantage in the upper court of an improper remark of counsel, it is usually necessary that it be objected to at the time it was made, and exception noted, or that the jury be instructed not to consider it: *Klink v. People*, 16 Colo. 467, 27 Pac. 1062; *Metropolitan St. R. Co. v. Johnson*, 90 Ga. 500, 16 S. E. 49; *Hoyt v. Carpenter*, 6 Kan. App. 305, 51 Pac. 71; *Hollenbeck v. Missouri Pac. Ry. Co. (Mo.)*, 38 S. W. 723.

In *Fayetteville etc. Ry. Co. v. Combs*, 51 Ark. 324, 11 S. W. 418, an attorney made an effort to put in evidence an offer of compromise, stated to have been made by the other side, following it with

a statement, in the jury's hearing, of the details of the time, manner and amount of the offer. The appellant made no attempt to check or prevent the objectionable statement, and the court, of its own motion, rejected the offer. The court held that it was the duty of the losing party to act promptly, and if he could have prevented the injury thereby and did not do so, was in no attitude to complain. That the act of improperly introducing in evidence an offer to confess judgment must be objected to at the time, or the error is waived, see *Riech v. Bolch*, 68 Iowa, 526, 27 N. W. 507.

**b. When It may be Dispensed With.**—An objection or exception may be dispensed with if the misconduct is of so flagrant a nature as to leave a sinister impression in the minds of the jury, which neither rebuke nor retraction can eradicate: *German-American Ins. Co. v. Harper*, 70 Ark. 305, 67 S. W. 755; *Chicago etc. R. Co. v. Kellogg*, 55 Neb. 748, 76 N. W. 462, which were both cases of misconduct in argument.

Where a series of improper questions is put and statements made, it is not necessary to show objections to each one of them: *Hood v. Chicago etc. Ry. Co.*, 95 Iowa, 331, 64 N. W. 261; *Welch v. Union Life Ins. Co.*, 117 Iowa, 394, 90 N. W. 828, both of which cases quote with approval from *Henry v. Railway Co.*, 66 Iowa, 56, 23 N. W. 260, where it is said: "When such a question is asked, an objection by opposing counsel, even if sustained by the court, does not prevent the mischief. Whatever injury or prejudice there may be to the opposing party is accomplished by asking the question."

#### **X. Language Used must be Prejudicial to Warrant a Reversal.**

Before an improper remark of counsel will be ground for a reversal of judgment, it must appear that such remark was prejudicial to the losing party; and where the same verdict would have been reached if the language complained of had not been used, the judgment will stand: *Burdick v. Haggart*, 4 Dak. 13, 22 N. W. 589; *Lee v. State*, 116 Ga. 563, 42 S. E. 759; *Daniels v. Weeks*, 90 Mich. 190, 51 N. W. 273; *Mason v. Fourteen Min. Co.*, 82 Mo. App. 367; *Kinna v. Horn*, 1 Mont. 597; *Barr v. Post*, 56 Neb. 698, 77 N. W. 123; *Guerlin v. Town of Hudson*, 71 N. H. 505, 53 Atl. 736; *State v. Greenleaf*, 71 N. H. 606, 54 Atl. 38.

It has been held not sufficient to warrant granting a new trial in a criminal case, where counsel for the prosecution demanded the arrest of a witness for the defense for corrupt perjury, upon his coming off the stand: *People v. Biles*, 2 Idaho, 114, 6 Pac. 120; nor where, in a negligence case, plaintiff's attorney remarked to a physician: "Remembering that you told us that you expected your expert fee in this case, I hope you won't charge the poor railroad anything extra," it not appearing that great injustice was done: *Chicago etc. R. Co. v. Sullivan* (Ill.), 17 N. E. 460.



In *Gould v. Gregory* (Mich.), 95 N. W. 414, it transpired on cross-examination that, though the defendant had owned a farm for many years, he did not know how many acres it contained, whereupon plaintiff's counsel said: "The idea that a man has owned a farm thirty years, and don't know how many acres there is!" Immediately thereafter defendant testified that the farm lay upon a lake; that a good deal was fractional; that his son owned a part of it; and that he had not figured it up. The court held that though the remark of counsel was improper, it could not have harmed the defendant, by reason of the subsequent explanation which he gave.

Where, on the trial of an action for personal injuries, it appeared that a fireman, although he knew that a boy's legs were cut off, did not go to his assistance, but remained on the engine, and plaintiff's counsel said: "You wouldn't have known any more about it, if he had got his head cut off," and upon the court's sustaining an objection to the remark, counsel retorted: "It would only be a difference in the offense committed by him," it was held that, though improper, these remarks alone were not sufficient to demand a reversal of the judgment: *Cleveland etc. Ry. Co. v. Davis*, 56 Ill. App. 41.

Where the fact that the defendant was insured in an accident insurance company was first brought out by the insured's own attorney, no damage is done by frequent references thereto by the other side: *McTague v. Dowst*, 51 App. Div. 206, 64 N. Y. Supp. 949. Where no request was made that the jury be instructed to disregard a certain improper remark, and it appears to have passed from their minds, the making thereof is nonprejudicial error: *Kirchner v. Detroit City Ry. Co.*, 91 Mich. 400, 51 N. W. 1059.

That it is not improper for a solicitor general to suggest to a witness under examination what is necessary in order to claim the privilege of not criminating himself, see *Ramsey v. State*, 92 Ga. 53, 17 S. E. 613.

For other cases in which improper remarks of counsel were held not sufficient cause for reversal, see *Allington etc. Mfg. Co. v. Detroit Reduction Co.* (Mich.), 95 N. W. 562; *Bagley v. Mason*, 69 Vt. 175, 37 Atl. 287; *Knopke v. Germantown etc. Ins. Co.*, 99 Wis. 289, 74 N. W. 795, where it is said: "We cannot reverse a judgment for every improper chance remark made by counsel in the course of a heated trial—especially when made under the provocation offered by a too willing witness."

### XI. Granting New Trial for Misconduct.

Courts should grant a new trial if the verdict was obtained by unfair means, such as remarks outside the evidence. Granting a new trial for such cause, however, rests in the sound discretion of the trial court, and should be acted upon by it, rather than by the appellate court: *Spiro v. Nitkin*, 72 Conn. 202, 44 Atl. 13; *West Chi-*

cago St. R. Co. v. Annis, 165 Ill. 475, 46 N. E. 264; George v. Swafford, 75 Iowa, 491, 39 N. W. 804.

In *City of Chicago v. Leseth*, 142 Ill. 642, 32 N. E. 428, it is said: "It is but natural that attorneys, however cautious and fair they endeavor to be, should at times make improper remarks in the presence of the jury; but it is well known that in such cases all injurious effects can generally be avoided by the court correcting it at once, or by instructions. It is only where counsel persist in attempting to mislead and prejudice the jury by unprofessional conduct, and where the court has refused to interfere, or where a court of review can see that, notwithstanding the efforts of the judge presiding at the trial to remove the prejudicial effects of misconduct, an injury may have resulted to the other party, that a judgment will be reversed on that ground alone."

## **XII. Duty of Court to Instruct Jury to Disregard Improper Remarks.**

Where the jury are cautioned and instructed to disregard improper statements, the judgment will ordinarily not be reversed: *Munroe v. Godkin*, 111 Mich. 183, 69 N. W. 244; *Greenfield v. Detroit etc. Ry. Co.* (Mich.), 95 N. W. 546; *McLamb v. Wilmington etc. R. Co.*, 122 N. C. 862, 29 S. E. 894; *International etc. R. Co. v. Anchonda* (Tex. Civ. App.), 75 S. W. 557.

It is the duty of the court to charge the jury to disregard improper remarks or statements: *Nalley v. State*, 28 Tex. App. 387, 13 S. W. 670. A mere ruling out of the statement is not sufficient, but the jury should be told to disregard it, or a mistrial declared, if the impropriety is so serious as to require it: *Collins Park etc. R. Co. v. Ware*, 112 Ga. 663, 37 S. E. 975.

A direction by the court to disregard improper matter does not always accomplish that end: *Rudiger v. Chicago etc. Ry. Co.*, 101 Wis. 292, 77 N. W. 169: "It does not always follow that a direction by the court to disregard certain improper matters, to which attention has been called during the trial, has the desired effect. The juror may honestly endeavor to keep the improper matter out of sight, and believe that he has done so, and yet unconsciously it may enter as an element into the composition of his verdict. If we expect to retain the benefits of our jury system, great care must be taken not only by the court, but by attorneys as well, to see to it that only matters proper for their consideration are brought to the attention of jurors. Of course, attorneys cannot be expected to always anticipate correctly in advance what will be the rulings of the court as to the materiality or relevancy of the evidence they expect to offer. But such does not come within the principle we are considering.

"Where it appears that attorneys have gone so far beyond bounds as to introduce to the minds of the jury matters which are not only irrelevant and immaterial, but are highly improper, they must ex-

pect that the record will be subjected to greater scrutiny by the court because of such violation of the rule": *Sullivan v. Chicago etc. Ry. Co.*, 119 Iowa, 464, 93 N. W. 367.

### **XIII. Duty of Court to Reprimand Offending Counsel.**

Not only should the trial court sustain objections to improper conduct and charge the jury to disregard it, but should rebuke and reprimand offending counsel as well, in order to stop its repetition: *Illinois Cent. R. Co. v. Souders*, 79 Ill. App. 41; *Provost v. Brueck*, 110 Mich. 136, 67 N. W. 1114; *Coan v. Brownstown Tp.*, 126 Mich. 626, 86 N. W. 130; *Atherton v. Defreeze*, 129 Mich. 364, 88 N. W. 886; *Sullivan v. Collins*, 107 Wis. 291, 83 N. W. 310. In the case last mentioned, counsel injected into the case, by statement or insinuation, charges of lying, theft, and perjury. The court reversed the judgment, saying: "The trial court should at the outset have decisively called counsel to order, and stopped such remarks, and it distinctly fails in its duty when it does not do so at once and effectively. The mere sustaining of objections, without fitting rebuke, is no adequate remedy for the evil. The least that a self-respecting court can do under such circumstances is to stop such practice in the presence of the jury, and not allow it to proceed with simply a perfunctory sustaining of objections."

Where an attorney, in examining a witness, made an improper remark, and, upon being reproved by the court therefor, apologized, it was held that no harm was done, and a new trial was denied: *Wheelless v. State*, 92 Ga. 19, 18 S. E. 303. That the consequences of an improper statement by counsel tending to influence the jury cannot be averted by his saying that he "takes it back," see *Baker v. City of Madison*, 62 Wis. 137, 22 N. W. 141, 583.

### **XIV. Means of Stopping Misconduct.**

It has been said that the trial court should forbid counsel to persist in misconduct, and should immediately stop a gross abuse of privilege: *Metropolitan St. R. Co. v. Johnson*, 90 Ga. 500, 16 S. E. 49; *Jenkins v. North Carolina etc. Co.*, 65 N. C. 563; for a judge has power to stop an attorney who abuses his privilege in his comments on a witness and his testimony before the jury: *State v. Williams*, 65 N. C. 505.

How far the court may go in forcing counsel to desist from prejudicial remarks, statements, and the like, does not seem to be well settled. In *West Chicago St. R. Co. v. Groshon*, 51 Ill. App. 463, it is said: "In this state the courts have so little control of the proceedings before them, that really no other way is left to enforce decorum toward witnesses and in the addresses to juries, than to grant new trials for breaches of it."

No case has been found in which an attorney has been punished for contempt in persisting in misconduct, after being admonished

by the court to desist. In *Atherton v. Defreeze*, 129 Mich. 364, 88 N. W. 886, where an attorney was guilty of gross misconduct, it was said: "A severe reprimand, if nothing more severe, should have been administered"; but of what that additional severity might have consisted is not set forth.

In *Heller v. People*, 22 Colo. 11, 43 Pac. 124, in spite of interference by the court, a district attorney persisted in making unwarranted statements and improper insinuations. The true rule in regard to stopping such behavior, and of making an order to that end effective is well stated there in the following words: "The court does not seem to have made any attempt to punish counsel in any way for these improprieties or to have reprimanded him for his unprofessional conduct. In this connection the language of this court in the case of *Smith v. People*, 8 Colo. 457, 8 Pac. 920, is directly in point: 'The criticism on the action of the court is that the judge failed to assert and maintain the authority and dignity of the court, by reason whereof a prisoner upon trial was prejudiced. The law places at the command of all judicial tribunals ample power and means to enforce obedience to their lawful orders in such cases, by the way of fines, and, if necessary, imprisonment. It is the duty of courts to require their proceedings to be conducted according to the rules of law, and to protect the rights of litigants.' "

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## RHEINSTROM v. STEINER.

[69 Ohio St. 452, 69 N. E. 745.]

**APPEAL AND ERROR—Judgment of Reversal, When Presumed not to be on the Weight of the Evidence.**—Where a statute makes it the duty of the appellate court to pass on all errors assigned, and when the judgment is reversed and the cause remanded for a new trial, that mandate shall state the errors found in the record on which the judgment is founded, it will be presumed that if the reversal was on the weight of the evidence that the mandate would have so declared. (pp. 700, 701.)

**APPEAL AND ERROR—Judgment of Reversal, When may be Reviewed, Though Declared to be on the Weight of the Evidence.**—If the entry of a judgment of reversal declares that it is because the judgment reversed is contrary to the evidence on the question of acceptance, this means that, giving proper construction to the evidence on the question of the acceptance and retention of goods, the rule of law applied in the trial court was erroneous. Such judgment of reversal may therefore be reviewed by the supreme court without departing from the rule which forbids the weighing of evidence. (p. 701.)

**VENDOR AND PURCHASER.—The Burden of Proof is on the Vendor to show an acceptance of the goods by the purchaser, where the right to recover is dependent on such acceptance.** (pp. 702, 703.)



**VENDOR AND PURCHASER—Acceptance of Goods, When not Inferable from Their Retention.**—Where one who has ordered labels, on their arrival, writes to the vendor that the work has not been properly carried out, and in subsequent interviews declares that the labels are worthless to him, and that the best the vendor can do is to burn them, cannot be held to have accepted such goods, on the ground that he did not return them, or, in more express words, offer to return them to the vendor. (pp. 703, 704.)

Action commenced before a justice of the peace to recover a sum alleged to have been the agreed price of certain labels sold and delivered by the plaintiff to the defendants Rheinstrom. The cause was appealed to the court of common pleas, where a general denial was filed. A jury was waived and a trial had in that court, resulting in findings and judgment in favor of the defendants. The plaintiffs, Steiner & Co. then took the case in error to the circuit court, which finding "that there is manifest error upon the face of the record to the prejudice of the plaintiffs in error in this case, to wit, said judgment rendered in this case was contrary to law on the evidence on the question of the acceptance and retention of the goods by the defendants below," reversed the judgment of the court of common pleas. The defendants brought error.

J. Shroder, for the plaintiffs in error.

Galvin & Bauer, for the defendants in error.

455 SPEAR, J. 1. The first question is one of practice. Does the entry of the circuit court show that the common pleas was reversed on the weight of the evidence, or was it upon that which, in the last analysis, is a question of law? If upon the former ground then this court will not review the judgment. A number of grounds of error are set forth in the petition in error to the circuit court. Among them that the "judgment is against the weight of the evidence," and another that "the judgment is contrary to law." By section 6709 of the Revised Statutes, it is made the duty of the circuit court to pass upon all the errors assigned in the petition in error, and where the judgment below is reversed and the cause remanded for new trial the mandate shall state the errors found in the record upon which the judgment is founded. Now, as all presumptions are to be indulged in favor of the judgment under review, we assume that the circuit court did its duty in this respect, and that, if it had, on the weight of the evidence, found error it would have so stated in its mandate. In the absence of such statement we assume that that

claim of error was overruled and the reversal based wholly on the other proposition, viz., that the judgment is contrary to law, notwithstanding that the entry adds that it is contrary to the evidence on the question of acceptance. In legal effect it means that, giving proper construction to the evidence on the question of the acceptance and retention of the goods by the defendants below, the rule of law applied to it by the trial court was erroneous. The judgment, therefore, may properly be reviewed by this court without departing from our rule which forbids the weighing of evidence: *Wetzell v. Richcreek*, 53 Ohio St. 62, 40 N. E. 1004; *Gamble v. Akron etc. R. R. Co.*, 63 Ohio St. 352, 59 N. E. 99.

<sup>456</sup> 2. Did the trial court apply the wrong rule of law to the evidence respecting the acceptance and retention of the goods? Without question the burden was upon the defendants in error to establish acceptance. To determine this with fairness to them it is proper to recite the evidence adduced by them to support that contention. Not that the evidence is to be weighed, but, taken all together, does the evidence tend to show such acceptance, or does it show the contrary?

On the day the goods were received by defendants below, they acknowledged receipt under date of January 31, 1900, by the following letter, viz.:

"Dear Sirs: We received to-day the shipment of Jed Clayton labels, but regret to find that the work is not properly carried out. Please return to us the original sketch and we will point out to you in detail the defects.

"Yours truly,

"RHEINSTROM BROTHERS."

To this the plaintiff below responded under date of February 2, 1900, as follows:

"Gentlemen: We beg to acknowledge receipt of your favor of the 31st ult. in regard to 'Jed Clayton' labels, that same have reached you but that the work is not properly carried out.

"We are again very sorry to hear your complaint, and herein inclose the sketch which was submitted to you, with one of the labels, and no doubt our Mr. Steiner will be in your city by the time these few lines reach you, and you can explain matters to him personally.

"We remain your very truly,

"WM. STEINER SONS & CO."

Some time after the above date Mr. Isadore Steiner, <sup>457</sup> one of the plaintiffs below, called at the office of Rheinstrom Broth-

ers, and his account of the conversation then had is in substance that Mr. Rheinstrom then told me that he received our labels, but will not use them. I asked him why, and he said they were too far away in color from his original label, and in answer to that I told him we made them like the sketch which he furnished. He told me something regarding his attorneys telling him that he had a copyright on his label and that by changing off to a different color that his copyright was no good, as anybody could infringe upon his label. I pleaded with him saying the labels are no earthly good to me. He said he couldn't help that; the best thing you can do is to put them in the fire and burn them up while you wait here. I said you cannot burn them; they are my property until they are paid for. Then I tried to get him to accept them. He said he would not accept them labels for any price—not for ten cents a thousand. I put on my hat and coat and walked out.

There is no other evidence by plaintiffs below bearing on the question of acceptance than the foregoing, and no evidence at all of use by defendants below of any of the labels.

Mr. Abraham Rheinstrom testified in substance that the labels were defective in drawing, color, and workmanship. We could not use them at any price. We never accepted these labels, but wrote immediately rejecting them. (Letter of January 31, 1900, heretofore given.) They replied by letter. (Letter of February 2, 1900, heretofore given.) The labels were put in charge of one of our employes, in the original packages, to be held until called for. We heard nothing more until Mr. Steiner came to our office.

The burden was upon plaintiffs below to prove a <sup>458</sup> compliance with their contract. The effect of the finding and judgment of the common pleas on the issues is that the goods furnished were not the goods ordered. The finding and judgment in this respect not having been found erroneous by the circuit court, but the judgment in respect thereto having been affirmed, the only ground on which a recovery could have been predicated was that the goods had been accepted by the buyers, and hence they were liable for the price. Here, too, the burden was on the sellers. Their own evidence shows conclusively that the buyers did not accept unless a failure to manually return the rejected goods is in law an acceptance. Is it? From the standpoint of ordinary fairness how is it? The buyers had ordered labels of a specified kind. The sell-

ers had delivered labels of a different kind, not conforming to the agreement, of which facts the sellers were at once by letter fully apprised, to which they responded that by the time their letter should reach the buyers one of their firm would call and matters could be explained. He did call and was distinctly notified that the labels were wholly useless to the buyers, and as distinctly informed that they were rejected. On what principle of commercial dealing could they ask the buyers to take further trouble in the matter at the peril of being compelled to pay for a wholly useless article and one which they had not purchased? We can conceive of no rule of business comity which would justify such a claim. If maintainable at all it must be by force of some rigid rule of law.

Numerous authorities are cited by counsel for defendants in error which bear on the subject of sales and afford general rules which should govern the conduct of the buyer where the goods are not satisfactory. Without doubt the rule is well settled that the buyer's <sup>459</sup> retention of the goods beyond a reasonable time for examination and communication with the seller, standing alone, will be regarded as warranting the conclusion that he has accepted and thus become liable, especially if the delay has worked prejudice to the seller. But we find no case, either among those cited or elsewhere, analogous to the case at bar on its facts, and none in which the mere failure to make manual return of the goods, after a timely and explicit rejection of them, and where it appears that no prejudice to the seller has been caused by the delay is held to make the buyer liable under the contract. On the contrary there is abundant authority for the proposition that unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he informs the seller that he refuses to accept them. Of many, we cite Benjamin on Sales, Bennett's seventh edition, 975. The familiar rule, held in one of the cases relied upon, that there must be an offer to return on the part of one who seeks to rescind a contract is not applicable to the facts of this case. There was no completed contract because there had been no delivery of the goods agreed to be furnished on the part of the sellers and no acceptance by the buyer of those which had been delivered, and hence there was no contract to be rescinded. That the goods should be as ordered was a condition of the contract, and that condition had not been performed by the seller. And,



as held by Mr. Justice Woods, in *Pope v. Allis*, 115 U. S. 363, 6 Sup. Ct. Rep. 69, 29 L. ed. 393: "When the subject matter of a sale is not in existence, or not ascertained at the time of the contract, a contract that it shall, when existing or ascertained, possess certain qualities, is not a mere warranty but a condition, the performance <sup>460</sup> of which is precedent to any obligation on the vendee under the contract; because the existence of those qualities being part of the description of the thing sold becomes essential to the identity, and the vendee cannot be obliged to receive and pay for a thing different from that for which he contracted."

We fail to find any fast rule of law which would make the defendants below liable simply because they did not manually return the labels. In fact, as shown by uncontradicted testimony, these labels were not used at all by them, but were kept in the original packages, to be held until called for, and this fact was fully made known to Mr. Steiner by the conversation at the time of his call, in connection with previous correspondence. True it does not appear that it was stated to him in words that the goods were held subject to his order, but any intelligent business man could not fail to draw the conclusion that such was the fact, and his own declarations show that he regarded the labels as still the property of his firm. And such indeed was the law of the situation, the rule being that where there is a contract for sale of specific goods, and the seller is bound to do something to put them in a deliverable state, the property does not pass until that is done, and the buyer has notice: *Bonham v. Hamilton*, 66 Ohio St. 82, 63 N. E. 597. No prejudice of any kind resulted to the sellers by the nondelivery, because, as stated by Isadore Steiner, the labels were of no use to them, and we are clear that they have made no case warranting a recovery for the goods. To have shipped the goods to the Steiners, without direct orders to do so would have made the Rheinstrom Brothers liable in the first instance for drayage and freight, and this burden the Steiners had no right either in morals or in law to place upon them: *Grimoldby v. Wells*, L. R. 10 Com. P. 391; *Lucy v. Mouflet*, 5 Hurl. & N. 228; *Barton v. Kane*, 17 Wis. 37, 84 Am. Dec. 728; *Landesman v. Gumersall*, 16 Mo. App. 459.

Another ground urged by counsel for plaintiffs in error as supporting the judgment of the common pleas is that there was a delivery of a large quantity of labels in excess of the number ordered. The point is somewhat technical inasmuch

as it does not appear that this fact was stated as a ground for rejection, and as it is unnecessary to a decision we do not care to consider it.

We are of opinion that the court of common pleas applied the correct rule of law to the evidence on the question of acceptance and retention of the goods, and that the reversal of its judgment by the circuit court was erroneous. Its judgment will, therefore, be reversed and that of the common pleas affirmed.

Reversed.

Burket, C. J., Davis, Shauck, Price and Crew, JJ., concur.

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A *Sale* is not consummated until delivery and acceptance: *Greenleaf v. Gallagher*, 93 Me. 549, 74 Am. St. Rep. 371, 45 Atl. 829; *McCormick Harvesting Machine Co. v. Balfany*, 78 Minn. 370, 79 Am. St. Rep. 393, 81 N. W. 10. As to what amounts to acceptance, see *Courtney v. William Knabe & Co. Mfg. Co.*, 97 Md. 499, 99 Am. St. Rep. 456, 55 Atl. 614; *Pierson v. Crooks*, 115 N. Y. 539, 12 Am. St. Rep. 831, 12 N. E. 349; *Blackwood v. Cutting Packing Co.*, 76 Cal. 212, 9 Am. St. Rep. 199, 18 Pac. 348. A purchaser is not bound to accept goods of a different quality from those ordered, but may, within a reasonable time, give notice that he declines to receive them, and thereby avoid liability: *Diversy v. Kellogg*, 44 Ill. 114, 92 Am. Dec. 154; *Jones v. Mechanics' Bank*, 29 Md. 287, 96 Am. Dec. 533. But the right to rescind must be exercised promptly and in good faith: *Walber v. Talbot*, 167 N. Y. 48, 82 Am. St. Rep. 712, 60 N. E. 288. For authorities holding that, to rescind a contract of sale, the vendee must return the goods: See *Perley v. Balch*, 23 Pick. 383, 34 Am. Dec. 56; *Ware v. Houghton*, 41 Miss. 370, 93 Am. Dec. 258. Compare *Boorman v. Jenkins*, 12 Wend. 566, 27 Am. Dec. 158; *Phenix Iron Works Co. v. McEvony*, 47 Neb. 228, 53 Am. St. Rep. 527, 66 N. W. 290.

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KELLY ISLAND LIME AND TRANSPORT COMPANY v.  
PACHUTA.

[69 Ohio St. 462, 69 N. E. 988.]

**MASTER AND SERVANT—Fellow-servants.**—A master is not liable to his servant for injuries resulting from the negligence of a fellow-servant. (p. 707.)

**MASTER AND SERVANT—Fellow-servants, Tests to Determine Who Are.**—The test to determine whether a particular servant is a vice-principal or fellow-servant, where the rule has not been modified by statute, is whether or not he has been placed by his employer in a position of control or authority over his coemployé. This, rather than the nature and character of the work being done, is the controlling and governing test. (p. 709.)

**MASTER AND SERVANT—Fellow-servants, Who are.**—A workman employed in manual labor in a stone quarry and whose duty it was to superintend the preparation and firing of blasts and to give warning to other workmen when a blast was to be fired, and an assistant of the latter, being under and subject to the instructions of the general foreman, are fellow-servants, and the first named cannot recover of the common master for injuries received through the negligence of the assistant in failing to give warning that a blast was to be fired. (p. 710.)

**MASTER AND SERVANT—Safe Place in Which to Work.**—Though the work is of a dangerous character, as where it is an open quarry, and the workmen, unless properly warned, are in peril from the firing of blasts, the duty of the master is not so imperative and absolute that he is liable to one servant for injuries received from the negligence of another in failing to give notice of such firing. (p. 711.)

Squire, Sanders & Dempsey and S. P. Alexander, for the plaintiff in error.

William Gordon and John F. McCrystal, for the defendant in error.

**464** CREW, J. At the time of the injury to John Pachuta which resulted in his death, and gave rise to this action, he was employed by the plaintiff in error as a quarryman in its limestone quarry at Marblehead, in Ottawa county, Ohio. He had been in the employ of, and had worked for said company for about twenty years, and for about nine years had been employed **465** in the company's quarry at Marblehead. There were in this quarry two ledges of rock, an upper ledge known and designated in the evidence as the "flux ledge" and a lower ledge known as the "limestone ledge" or "lower rock ledge." These ledges were from nine to twelve feet in height and the upper or flux ledge, which was farthest south, was about five

hundred feet distant from the lower or limestone ledge. At the time he was injured, the deceased, John Pachuta, with other workmen, was working upon this lower or limestone ledge and was engaged in quarrying and breaking up and removing stone from said quarry. The method employed in this quarry for loosening and getting out the stone was that of blasting—holes were drilled short distances apart along these ledges of rock, these holes were loaded or charged with powder or dynamite and the charge was then exploded by means of an electric battery. This was called “battery blasting,” and the usual effect of such blast was to sever the edge of the ledge of rock along which the blast was placed, from the main body, after which the rock so severed or blown off was broken up by the workmen into smaller pieces, and when so broken up and prepared it was then taken to the kiln for burning, or to railroad cars for shipment. The blasting at this quarry was, and for several years had been, in the immediate charge of one John Schaffer, whose duty it was to superintend the preparation and firing of these “battery blasts” and to give warning and notice to the other workmen in the quarry when a blast was about to be fired that they might seek a place of safety before such blast should be discharged. Schaffer had as an assistant in the preparation and firing of these battery blasts a man by the name of Onko, and in obedience to instructions issued by the <sup>466</sup> general quarry foreman, Mr. Fillabaum, it was usual for one or the other of these two men—Schaffer or Onko—after a blast had been prepared and was ready to be discharged, to give notice to the other workmen in the quarry that a blast was about to be fired, and this they did, according to the custom of the quarry by going near to such other workmen and calling out the word “fire,” after which sufficient time was allowed them to get under cover or to withdraw to a place of safety before the blast was discharged. Schaffer, who in the language of the quarry was known as the “powder man,” had no authority or control over Pachuta or the other workmen employed in said quarry; but Schaffer, Onko, and Pachuta were each and all of them directly and immediately under the same foreman, Mr. Frank W. Fillabaum. On the day of, and immediately prior to, the injury received by Pachuta, which resulted in his death, a number of holes had been drilled in the upper or flux ledge of said quarry and these holes had been loaded with dynamite. After the blast had been so prepared, Schaffer sent Onko to the lower ledge to notify the men then working there, one of whom was Pachuta.



that a blast was about to be discharged. Onko went along the lower ledge and gave the usual warning by calling out, "fire"; several of the workmen heard the warning and withdrew to a place of safety; others claimed they did not hear it. Pachuta, who is not shown to have heard the warning, remained where he was then at work, and when the blast was discharged he was struck by a stone thrown out by said blast and received injuries, from the effects of which, four days later, he died. To recover damages for causing his death, this action was brought by his administratrix against the plaintiff in error, the Kelly Island <sup>467</sup> Lime and Transport Company, she alleging in her petition that his death was caused by, and resulted from, negligence on the part of said company. While acts of negligence other than that of a failure to give notice were charged by defendant in error, in her petition, no claim was made that the company did not exercise due care in the selection of its servants, nor is there any charge that such servants were incompetent, and upon the undisputed facts of this case no right of recovery exists in her favor, and no liability on the part of plaintiff in error is shown, unless such right exists and such liability arises from a failure to give notice or warning to Pachuta that a battery blast was about to be exploded. Assuming then, as we do in this case, that from the evidence the jury was authorized to find that no such notice was given him and that the death of Pachuta resulted from, and was in consequence of, the failure of Schaffer to give, or cause to be given, proper notice of the intended discharge of said blast, the only question we have thought it necessary to consider upon this record is whether such neglect and failure upon the part of Schaffer is in law imputable to the plaintiff in error, the Kelly Island Lime and Transport Company, who was the common employer of Schaffer, Onko and Pachuta, and whether such company is liable for, and legally chargeable with, the results of such negligence. The determination of this question involves a consideration of the question as to whether or not Schaffer, Onko, and the deceased, John Pachuta, were fellow-servants. The general rule that a common master cannot be made responsible for injuries resulting to a servant from the negligence of a fellow-servant, is a principle now well established in almost all jurisdictions. This rule in Ohio was recognized and announced by this court almost <sup>468</sup> half a century ago in the case of *Cleveland etc. R. R. Co. v. Keary*, 3 Ohio St. 201, and has since been followed by a long and uninterrupted line of decisions to the same effect.

It remains then only to determine whether under the rule in Ohio, defining and prescribing who shall be deemed and held to be fellow-servants, John Pachuta was a fellow-servant, engaged in a common employment, with the parties Schaffer and Onko, who had charge of the battery blast at the time Pachuta was injured.

At the time of the accident these persons were all engaged in the common employment of getting out stone from this quarry—Schaffer and Onko in blasting the stone off from the ledges, and Pachuta after it was so blown off, in breaking it up into smaller pieces and thus preparing and making it ready for the kiln, or for shipment. Although working in different parts of the same quarry their work was in connection with each other and had relation to the same common end, that of getting out the stone, and their co-operation was necessary to bring about that result. They were all employed by, and were serving the same master, neither was in a position of subordination to, or subject to the order and control of the other, but they were each and all of them under the immediate control and authority of the same foreman, Frank W. Fillabaum, and were all engaged in the same general work. In Ohio the test to be applied in determining whether a particular servant is a vice-principal or a fellow-servant, except in certain cases where the rule has been modified by statute, is whether or not he has been placed by his employer in a position of control or authority over his coemployé. That this, rather than the nature and character of the work being done, <sup>469</sup> is the controlling and governing test in this state, would seem to be well settled by the following authorities: *Cleveland etc. R. R. Co. v. Keary*, 3 Ohio St. 201; *Pittsburgh etc. Ry. Co. v. Lewis*, 33 Ohio St. 196; *Railway Co. v. Ranney*, 37 Ohio St. 665. In *Cleveland etc. R. R. Co. v. Keary*, 3 Ohio St. 201, we find the following syllabus:

“But a principal is not liable to one servant in his employ for injuries resulting from the carelessness of another servant, when both are engaged in a common service, and no power or control is given to the one over the other. They stand as equals to each other, and are alone liable for the injuries they may occasion.

“But when the failure occurs in that branch of the service committed by the principal to the subordinate servants, it is their fault, and not that of their employer, and a breach of their obligations, and not his; and where they enter the service with a knowledge that several are to be engaged, each takes

upon himself the hazards of the employment including that of negligence by fellow-servants, and public policy requires that they should be interested in exercising supervision over each other."

In *Railway Co. v. Lewis*, 33 Ohio St. 196, Day, J., in the opinion, says, at page 199: "A master, whether an individual or a corporation, is responsible to his servants for his own negligence, but not for that of their fellow-servants. This is the general rule, subject, however, to the modification recognized in the jurisprudence of this state, that where one servant is placed in a position of subordination to, and subject to, the orders and control of another servant of a common master, and the subordinate servant, without his fault, is injured through the negligence of the superior servant while both are acting in the common service, the master is liable therefor: *Pittsburg etc. Ry. Co. v. Devinney*, 17 Ohio St. 197; *Berea Stone Co. v. Kraft*, 31 Ohio St. 287, 27 Am. Rep. 510."

Again, in the case of *Railroad Co. v. Margrat*, 51 Ohio St. 130, 37 N. E. 11, Judge Bradbury, in discussing the question of who are fellow-servants, at page 141 of 51 Ohio St., says: "Was the engineer in charge of this locomotive a fellow-servant of Margrat for the consequences of whose negligence the company was not liable to the latter? Margrat and the engineer in charge of the locomotive that struck him were in the employment of the same master. The former was a brakeman on one train, while the latter was an engineer on another train of the same company. Neither had been clothed with authority over the other, therefore the relation of superior and subordinate between them had not existed in fact. In the absence of such relation, their common employer would not be liable to either for injuries received through the negligence of the other, unless the rules of law upon the subject heretofore announced by this court have been abrogated."

In the light of these authorities, upon the undisputed facts in this case, the conclusion that Schaffer, Onko and Pachuta were fellow-servants is inevitable. It is, however, contended in this case, by counsel for defendant in error, that because of the nature of the work, a duty was by law imposed upon the master, the Kelly Island Lime and Transport Company, in respect to furnishing a safe place for its workmen, and that the duty so imposed included the duty and obligation to give notice and warning to such workmen, whenever a blast was about to be discharged in said quarry. That this duty on the

part of the master was an absolute duty and that it could not be delegated by the master so as to absolve him from liability in case of the failure to perform such duty by the person to <sup>471</sup> whom the same might be delegated. We need not here enter upon a discussion of the rule as to the liability of an employer for failure to furnish a "safe place," inasmuch as such rule can have no application to a case such as we are now considering. In this case the deceased, John Pachuta, at the time he was injured was working in an open quarry, engaged with other workmen in getting out, quarrying and removing stone therefrom. The quarry itself was not an unsafe place, and if it became so it was only by reason of the negligence of a fellow-servant engaged in a common employment with decedent and during the progress, and while performing a part of, the work incident to such common employment. To such condition of facts the rule of "safe place" can in Ohio have no application: *Columbus etc. R. R. Co. v. Webb*, 12 Ohio St. 475; *Coal etc. Co. v. Clay*, 51 Ohio St. 542, 38 N. E. 610, 25 L. R. A. 848; *Cullen v. Norton*, 126 N. Y. 1, 26 N. E. 905. In support of the claim that the dangerous character of the work and the obligation of the master to maintain a safe place imposed upon the plaintiff in error the absolute duty of giving actual notice to the workmen in the quarry before the discharge of each battery blast, counsel for defendant in error cite us to the case of *Mooney v. Belleville Stone Co.*, 61 N. J. L. 253, 39 Atl. 764, 39 L. R. A. 834, found also in *American Negligence Reports*, 195, where it is held upon a state of facts very similar to those in the case at bar, that the giving of warning was a duty owed by the employer to the employes, and the failure of the foreman of a gang of workmen to perform this duty carefully was imputable to the defendant as employer. This case is directly in point. But the rule therein laid down cannot, we think, be taken and accepted as the law in Ohio. In holding the master liable in this case, the New Jersey court of <sup>472</sup> appeals does so upon the theory that the duty of the master to maintain a "safe place" is imperative and absolute; and that such duty is violated and the master made liable if through the negligence of a fellow-servant, because of his failure to give proper warning, the place is made temporarily dangerous and unsafe, by the doing of that which in the prosecution of the particular business was usual and necessary to be done, and the doing of which was but a part of, and incidental to, the proper con-



duct and management of such business itself. In other words, the court in effect holds that the obligation and duty of the master is that of a guarantor or insurer. Such is not the law in Ohio. Hence the doctrine of this case can have no application in this state: *Columbus etc. R. R. Co. v. Webb*, 12 Ohio St. 475; *Railroad Co. v. Fitzpatrick*, 42 Ohio St. 318. Further, the New Jersey rule for determining the liability of a master, and as to who are fellow-servants, is not the same as the rule in Ohio. In New Jersey, the character of the work being performed is the governing test—*Knutter v. New York etc. Teleph. Co.*, 67 N. J. L. 646, 52 Atl. 565—while in Ohio the question of control is the test to be applied.

In the case at bar, the only negligence shown being the negligence of a fellow-servant of the decedent, John Pachuta, the master, the Kelly Island Lime and Transport Company, cannot be held liable for the results of such negligence. The plaintiff in error was, upon the record, entitled to have judgment in its favor, and its motion to arrest the case from the jury, and for judgment, should have been sustained.

Judgment reversed and judgment for plaintiff in error.

Spear, Davis, Shauck and Price, JJ., concur.

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*The Subject of Fellow-servants* is discussed in the monographic notes to *Fox v. Sanford*, 67 Am. Dec. 588-597; *Fisk v. Central Pac. R. R. Co.*, 1 Am. St. Rep. 32, 33. The tests for determining who is a fellow-servant are stated in *Chicago City Ry. Co. v. Leach*, 208 Ill. 198, ante, p. 216, 70 N. E. 222; *Grant v. Keystone Lumber Co.*, 119 Wis. 229, post, p. 883, 96 N. W. 535; *McLaine v. Head*, 71 N. H. 294, 93 Am. St. Rep. 522, 52 Atl. 545, 58 L. R. A. 462; *Wiskie v. Montello Granite Co.*, 111 Wis. 443, 87 Am. St. Rep. 885, 87 N. W. 461; *Mogridge v. Providence Tel. Co.*, 20 R. I. 386, 78 Am. St. Rep. 879, 39 Atl. 328; note to *Mast v. Kern*, 75 Am. St. Rep. 587-589. It has been held that the foreman in a blasting quarry is a fellow-servant with those assisting him: *Wiskie v. Montello Granite Co.*, 111 Wis. 443, 87 Am. St. Rep. 885, 87 N. W. 461; *Donovan v. Ferris*, 128 Cal. 48, 79 Am. St. Rep. 25, 60 Pac. 519. Compare the monographic note to *Mast v. Kern*, 75 Am. St. Rep. 618, and see *Downey v. Gemini Min. Co.*, 24 Utah, 431, 91 Am. St. Rep. 798, 68 Pac. 414. The duty of mine owners to prevent injury to their employes is considered in the monographic note to *Wellston Coal Co. v. Smith*, 87 Am. St. Rep. 557-595, and the right of recovery by employes accepting extrahazardous duties is considered in the monographic note to *Houston etc. Ry. Co. v. De Walt*, 97 Am. St. Rep. 884-900.

CASES  
IN THE  
SUPREME COURT  
OF  
SOUTH CAROLINA.

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EX PARTE HIERS.

[67 S. C. 108, 45 S. E. 146.]

**JUDGMENTS—Setoff—Practice.**—Motion on a rule to show cause is the proper proceeding to have one judgment set off against another. (pp. 717, 718.)

**TORTS—Assignment of Claim for Damages.**—Torts which cause injury strictly personal furnish no claim for assignable damages. (p. 718.)

**TORTS—Assignment—Usury.**—A right to recover a statutory penalty for taking usurious interest is not assignable before judgment. (p. 718.)

**JUDGMENTS—Setoff of.**—Though an assignment of a right to recover a statutory penalty for taking usurious interest is invalid, if assigned before judgment, yet if a wife has, on the faith of such assignment, advanced money to enable her husband to prosecute such right to judgment, equity will not deprive her of the fruits of her financial assistance to her husband, by permitting the defendant in such judgment to set off other judgments against such husband, against it. (p. 720.)

**CHAMPERTY—Husband and Wife.**—A wife who renders her husband financial aid in securing a judgment is not guilty of champerty. (pp. 720, 721.)

I. L. Tobin, for the appellant.

Bellinger & Townsend, for the appellee.

**109** GARY, J. This is a petition by C. M. Hiers to have certain judgments set off against each other. The petition is as follows:

“1. That heretofore, to wit, on the twenty-eighth day of March, 1894, one Charles Ellis, as plaintiff, in an action in this court between himself, as plaintiff, and one Jones H. C. All,

as defendant recovered a judgment against the said Jones H. C. All as defendant therein, for the sum of fifteen hundred and forty-six dollars and six cents, which judgment was entered in the office of the clerk of this court on said twenty-eighth day of March, 1894, and enrolled in bundle 241, roll 5, reference to which it is prayed may be had by this honorable court. That thereafter, on the fourteenth day of September, 1899, the said Charles Ellis, for valuable consideration, assigned, transferred and set over unto one J. M. Hiers, the said judgment; and thereafter, on the 5th day of June, 1901, the said J. M. Hiers assigned, transferred and <sup>110</sup> set over said judgment, for valuable consideration, to this petitioner, C. M. Hiers. That an execution was issued out of this court on the said judgment on the twenty-eighth day of March, 1894, to the sheriff of said county, against the property of the said Jones H. C. All, and the said sheriff, on the third day of April, 1894, made a return on said execution, that after a diligent search for property of said defendant, Jones H. C. All, he could find nothing on which to make a levy as in said execution commanded, and the same was returned unsatisfied. That thereafter, on October 7, 1899, a second execution was issued out of this court on said judgment, upon which execution there was paid on October 10, 1899, the sum of seven hundred and four dollars and seventy-five cents; that nothing further has been paid on said execution and judgment, and there remains due and unpaid on the same the sum of fourteen hundred and seventy-four dollars and fifty cents, with interest from the said tenth day of October, as by reference to said record will more fully appear.

"2. That thereafter, on the twenty-seventh day of February, 1900, the said Jones H. C. All, as plaintiff, in an action in this court between himself, as plaintiff, and this petitioner, C. M. Hiers, as defendant, recovered a judgment against this petitioner, as defendant therein, for three hundred and ten dollars and twenty cents; which judgment was entered in the office of the clerk of this court on the 2d day of April, 1900, and enrolled in bundle 339, roll 10, reference to which it is prayed may be had by this honorable court. That an appeal was taken from said judgment to the supreme court of this state by the said Jones H. C. All, the plaintiff in said action, which appeal was disposed of in said supreme court during the month of March, 1901, and on the fifth day of April, 1901, the remittitur in said action from the supreme court

was filed in the office of the clerk of this court, certifying that the judgment of the supreme court in this action was that the appeal be dismissed. That the costs on said appeal have not yet been taxed by the clerk of this court. But that said Jones H. C. All, as plaintiff therein, has caused an execution to be issued out of this court against the property of this petitioner, to enforce the <sup>111</sup> payment of the said judgment for three hundred and ten dollars and twenty cents, with interest thereon, which execution is now in the hands of the sheriff of said county.

"Wherefore, this petitioner prays that the judgment recovered against him by the said Jones H. C. All, in the first above-mentioned action, for three hundred and ten dollars and twenty cents, with the interest due thereon, be set off and deducted from the judgment recovered by Charles Ellis, in the second above-mentioned action, against the said Jones H. C. All, now the property of this petitioner, upon which the sum of ——— dollars is now due, and that the clerk of this court make proper correction on the docket of the said judgments, and for such other relief as may be just and proper."

In answer to the rule to show cause, Jones H. C. All made return as follows: "Now comes the said Jones H. C. All, respondent, and for cause shows to this honorable court, that heretofore this respondent became largely indebted to his wife, T. Gertrude All, for money belonging to her and used by him in his mercantile business. That having failed in business, this respondent was unable to repay any portion of the said sum, amounting to over two thousand dollars, and interest for several years. That on the 16th of August, 1899, the action first above mentioned was commenced by this respondent against the said C. M. Hiers, defendant, the object of which action will appear by reference to the complaint therein. That the respondent, for the purpose of repaying the said T. Gertrude All as far as possible the money obtained from her as aforesaid, agreed to give her the benefit of any judgment which he might obtain in the said action, she, the said T. Gertrude All, agreeing to pay the costs of said action. That pursuant to said agreement the instrument of writing marked Exhibit 'A,' hereto annexed, was executed and delivered to said T. Gertrude All. That during the pendency of said action and after notice in writing of the transfer and agreement above mentioned, the said C. M. Hiers bought up several judgments against this respondent, which he attempted to use to pay the



claim of the plaintiff under the provisions <sup>112</sup> of section 313 of the Code of Procedure of this state, by setting up the plea of payment in his answer. That the Honorable Judge Hudson, acting judge, refused to sustain the said plea of payment, the said C. M. Hiers now seeks to set off the said judgment against the judgment obtained by the plaintiff in said cause, as set forth in his petition herein. That an appeal was taken by the plaintiff to the supreme court from the judgment mentioned, which appeal, on account of a defect in the record, was dismissed by the supreme court, and the judgment for three hundred and ten dollars, and interest, has been duly entered of record. That subsequently to the recovery of the said judgment and after notice of appeal, the said T. Gertrude All agreed to pay and did pay the expenses of printing papers and other necessary expenses incident to the said appeal, upon the express understanding and intention of the parties that she was the owner of the said judgment and entitled to all the benefit and advantage to be derived therefrom. That this respondent, at the time mentioned, was the head of a family residing in this state, and entitled to a homestead exemption under the laws of this state; and neither the said C. M. Hiers nor any judgment creditor of the said Jones H. C. All was prejudiced by the said transfer or agreement, for the reason that the said judgment, even if it had not been transferred, would constitute the only personal estate of this respondent, and is less in value than the personal exemption allowed him by law."

T. Gertrude All filed a petition substantially setting forth the foregoing facts, in which she asked to be allowed to intervene and interpose her rights in the premises. It does not appear that a formal order was made granting her application.

Exhibit "A," mentioned, is as follows: "The state of South Carolina, county of Barnwell. Jones H. C. All, plaintiff, v. C. M. Hiers, defendant. Whereas, on the 16th of August, A. D. 1899, the above-named plaintiff commenced an action against the above-named defendant in the courts of Barnwell, county and state aforesaid, to recover from the said <sup>113</sup> C. M. Hiers two thousand six hundred and eighty dollars, for a penalty or forfeiture under the laws of said state for violating the usury law of the said state—which said action is now pending in the said court. Know all men by these presents, that I, Jones H. C. All, plaintiff in said

action, for value received, do hereby transfer, assign and set over to T. Gertrude All the said cause of action, and all benefit or advantage which may grow out of the said pending action, and the judgment which may be recovered thereon, in the event that the judgment is rendered for the plaintiff in the same. Witness my hand and seal, this 2d of September, 1899. Jones H. C. All. [Seal.] In the presence of I. L. Tobin."

His honor, the circuit judge, filed a decree granting the prayer of C. M. Hiers' petition. The decree concludes as follows: "I do not think there was any assignable interest in the right to recover the penalty for charging usury. It may be said, in a general way, that the whole right to recover for or to set up usury is largely, if not entirely, personal. The consideration expressed, as indicated in the return of Jones H. C. All, was prior indebtedness, and the return further says, 'the said T. Gertrude All agreeing to pay the costs of the said action.' 2 Chitty on Contracts, section 187, page 1364, says: 'No assignment will, however, be upheld which involves a violation of the principles of law respecting champerty and maintenance.' In speaking of an assignment of a contract or security or other property, which is in litigation, he adds, page 1365: 'Provided, he does not undertake to pay any costs, or make any advances beyond the mere support of the — interest which he has so acquired': See, also, Wait's Actions and Defenses, 369. The right of Jones H. C. All was sought to be assigned while the suit of All v. Hiers was pending and before judgment was obtained, and at time of said judgment, Hiers was the owner of the judgment of Ellis v. All, and is now the owner thereof. There was no lawful assignment by All at the time Hiers bought the judgment of Ellis v. All. I think the relief prayed for by Hiers in his petition should be allowed and permitted; <sup>114</sup> and it is ordered, adjudged and decreed that it be allowed to offset and deduct the judgment as requested. This permission and order, however, does not extend to the matter of costs of the various officers, which in cases of this character are not to be offset."

Before proceeding to consider the questions raised by the exceptions, it may be well to state in a general way the nature of such a proceeding. In *Simmons v. Reid*, 31 S. C. 389, 17 Am. St. Rep. 36, 9 S. E. 1058, that great expounder of the law, Chief Justice McIver, uses this language: "There can be no doubt that the court of common pleas has jurisdiction in a proper case and upon a proper showing to require a judg-

ment previously obtained by a defendant against a plaintiff to be set off pro tanto against a judgment subsequently obtained by the plaintiff against the defendant, and there is as little doubt that this may be done by motion on a rule to show cause: *Williams v. Evans*, 2 McCord, 203; *Duncan v. Bloomstock*, 2 McCord, 318, 13 Am. Dec. 728. But it is equally well settled that this is a common-law power not derived from or regulated by the statutes of setoff or discount. The jurisdiction for this purpose is equitable in its nature and the application is addressed to the sound judicial discretion of the court. In addition to the cases above cited, see *Tolbert v. Harrison*, 1 Bail. 599; *Low v. Duncan*, 3 Strob. 195, and *Meador v. Rhyne*, 11 Rich. 631, in which last cited case it is said that the court in exercising this jurisdiction will always regard the equitable rights of persons not parties to the suit." The right of setting off judgments against each other is also fully discussed in *Ex parte Wells*, 43 S. C. 477, 21 S. E. 334.

The first ground upon which the decree rests is that the interest of Jones H. C. All in the claim and in the judgment which might be recovered thereon in the action then pending was not assignable. In the case of *Miller v. Newell*, 20 S. C. 123, 47 Am. Rep. 833, the court says: "Can choses in action on torts be assigned? Torts in their effects may be divided into two classes, to wit, those which affect injuriously <sup>115</sup> the estate, real or personal, of a party, and those which cause injuries strictly personal; those which survive to the administrator, and those which die with the party injured. It appears that those which affect the estate may be assigned, but those of a personal character cannot. Neither can a contract in which the personal acts and qualities of one of the contracting parties form a material ingredient in general be assigned: 2 Chitty on Contracts, 1364. In reference to torts, Mr. Chitty says: 'A distinction has, however, been taken between different classes of torts; those which cause injury strictly personal being regarded as furnishing no claim for assignable damages, while the contrary is held as to those from which special loss has risen to the estate of the assignor,' " citing authorities.

We find in Bliss on Code Pleading, section 38, the following: "That not even in equity was an assignment allowed of a right of action arising from a mere personal wrong, as libel, slander and injuries to the person. The injury must be to the

estate, otherwise there is nothing assigned. A mere personal wrong will entitle the sufferer to redress, but his right to redress is not deemed property so as to survive." Again, at section 44, he says: "A judgment upon whatever founded is everywhere regarded as a debt, which does not abate by death and which is transferable like an ordinary contract. But the character of the demand is not changed until judgment, and an action based upon a cause of action which would not survive, will abate by death during any step of the proceeding, and the demand cannot be assigned after verdict merely." These sections are quoted with approval in the case last mentioned. In Pomeroy's Code Remedies, section 153, the author says: "The right given to the debtor by a statute to have bills, notes and other securities avoided or canceled on the ground of usury, cannot be assigned." The reason for the rule that actions which do not survive are not assignable, is thus stated in section 146 of Pomeroy's Code Remedies: "Since the title of an executor or administrator is regarded by our law as a title by assignment, it was very natural that the courts <sup>116</sup> should consider these statutes as furnishing the criterion by which to determine what things in action are assignable and what are not assignable between living parties." While we are clearly of the opinion that the claim was not assignable until it was reduced to judgment, it by no means follows that the petitioner is entitled to have the judgments set off against each other.

In considering an agreement which was void under the statute of frauds, the court, in the case of *Carter v. Brown*, 3 S. C. 298, thus states the rule correctly: "The statute does not prevent the contract from being looked into as matter of evidence for any other purpose than that of supporting an action founded upon it." This case is cited with approval in *Jacobs v. Mutual Ins. Co.*, 56 S. C. 558, 35 S. E. 221, and *Turnipseed v. Sirrine*, 57 S. C. 559, 76 Am. St. Rep. 580, 35 S. E. 757. So in this case, although the agreement between Jones H. C. All and T. Gertrude All cannot be enforced according to its terms, the court may nevertheless, resort to it for the purpose of determining whether it would be just and equitable to grant the relief for which the petitioner prays, especially as this is a case addressed to the sound judicial discretion of the court. By agreement of counsel, the petition of T. Gertrude All was admitted in evidence. In her petition, among other things, she says: "That your petitioner is the



daughter of one Giles Bowers, late of this county, who departed this life leaving his several children, including your petitioner, a sum of money in the hands of a trustee, from which fund your petitioner received the sum of three thousand dollars, which constituted the entire estate which she received from her deceased father's estate. That her husband, the said Jones H. C. All, used the fund mentioned in a mercantile business in which he was engaged, and having failed in business, the said sum of money was absolutely lost to your petitioner. That on or about the 16th of August, 1889, the action above, entitled Jones H. C. All, plaintiff, v. C. M. Hiers, defendant, was commenced in this court, and the said Jones H. C. All, plaintiff, entered into an agreement with your petitioner, by which <sup>117</sup> agreement your petitioner was to pay the expenses of the said litigation, and the fruits of the same should be applied to the reimbursement of your petitioner for the large sum of money due to her by her said husband, as hereinbefore mentioned. He, the said husband, being absolutely without means to defray the expenses thereof, and pursuant to said agreement, the said Jones H. C. All executed and delivered to your petitioner the instrument of writing, a copy of which is hereto annexed as a part of this petition, and marked Exhibit 'A.' That your petitioner fully complied with the conditions of the said agreement, and with her own money paid the expenses of this litigation until a judgment was rendered in the said case upon the verdict of a jury for the sum of three hundred and ten dollars and twenty cents, in favor of the plaintiff."

It will be observed that the assignment was made upon valuable consideration, a portion of which consisted of money advanced to her husband to enable him to prosecute the said action to judgment, out of which she expected to be reimbursed. It would be against good conscience and equity to deprive her now of the fruits of her financial assistance, without which perhaps the judgment would not have been recovered. Under such circumstances, the court in the exercise of its equitable jurisdiction should not lend its aid, but leave the parties where it found them.

The circuit judge held that the assignment was also invalid on the ground that the agreement between All and his wife was champertous. In many respects, the husband and wife are still regarded as one in law. It would be against public policy for the courts to hold that when a dutiful and confiding

wife renders her husband financial aid in securing those rights accorded to him by law, she should be held to be guilty of champerty. We do not deem it necessary to cite authorities to sustain this ruling.

It is the judgment of this court, that the judgment of the circuit court be reversed.

Pope, C. J., concurs in the result.

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*Demands Which may be the Subject of a Setoff* are considered in the monographic note to Gregg v. James, 12 Am. Dec. 152-157. See, also, Drennen v. Gilmore, 132 Ala. 246, 90 Am. St. Rep. 902, 31 South. 90. And setoff after insolvency is discussed in the monographic note to St. Paul etc. Trust Co. v. Leek, 47 Am. St. Rep. 578-595. An assigned chose in action may be used as a setoff: Nix v. Ellis, 118 Ga. 345, 98 Am. St. Rep. 111, 45 S. E. 404.

*As to the Assignability of a Right of Action* for a tort, see Blanchard v. Ely, 21 Wend. 342, 34 Am. Dec. 250; Brown v. Metz, 33 Ill. 339, 85 Am. Dec. 277; Murray v. Buell, 76 Wis. 657, 20 Am. St. Rep. 92, 45 N. W. 667; Sanborn v. Doe, 92 Cal. 152, 27 Am. St. Rep. 101, 28 Pac. 105; Farwell Co. v. Wolf, 96 Wis. 10, 65 Am. St. Rep. 22, 70 N. W. 289, 71 N. W. 109, 37 L. R. A. 138.

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## ROGERS v. ROGERS.

[67 S. C. 168, 45 S. E. 176.]

**LEGACIES.**—Specific legacies are bequests of a specified part of a testator's personal estate, distinguished from all others of the same kind. (p. 723.)

**LEGACIES.**—To Constitute Pecuniary Demonstrative Legacies it is necessary that there be a gift of a certain sum of money, and such gift must be given with reference to a particular fund, as a primary but not exclusive source of payment. (p. 725.)

**LEGACIES**—Specific—Ademption.—Specific legacies are adeemed when the thing bequeathed is, in the lifetime of the testator, lost, disposed of, or so substantially changed or altered as not to exist in specie when the will takes effect. (p. 725.)

**LEGACIES.**—Ademption applies only to specific legacies. (p. 725.)

**LEGACIES**—Specific—Ademption.—A legacy of all claims held by a testator against his father and of all his interest in his estate is a specific legacy, and the collection thereof by the testator during his lifetime adeems the legacy, and parol evidence is not admissible to show an intent by the testator to substitute as such legacy other property, not mentioned in the will, in lieu of such claims. (p. 726.)

J. H. Hudson, for the appellants.

J. M. Johnson and T. W. Bouchier, for the appellee.

**169** JONES, J. This appeal comes from an order sustaining a demurrer to the complaint for insufficiency, and involves inquiry whether the circuit court erred in holding that the legacy claimed is specific and has been adeemed under the allegations of the complaint. The complaint alleges that Frank B. Rogers, late of Marlboro county, died September 4, 1893, leaving his last will and testament, and that the defendant, Minnie B. Rogers, his wife, duly qualified as executrix thereof, that plaintiffs are sisters of the testator, and that said will contained the following clause with respect to them: "I will, devise and bequeath unto my three sisters, Sarah Elizabeth Rogers, Minnie Rogers and Annie L. Rogers, and their heirs and assigns forever, the claims of every kind and description which I hold against the estate of my father, Henry J. Rogers, deceased, together with all interest I have in said estate as heir at law of my said father."

The complaint further alleges: "4. The will of the said testator, F. B. Rogers, was executed on the eighteenth day of March, 1891, and at that time the estate of his said father, Henry J. Rogers, was indebted to the said testator in the sum of seven hundred and seventy-five dollars and sixty-eight cents, with interest from January 1, 1890, by note of hand, and in the sum of three hundred and two dollars and ninety-two cents, with interest from November 1, 1890, by note of hand, and in the further sum of one hundred and fifty-three dollars and ninety cents, by open account.

**170** "5. On the twentieth day of December, A. D. 1890, Henry J. Rogers died intestate, leaving but a very small personal estate, but seised and possessed of a tract of about fourteen hundred acres of land, and owing perhaps fifteen hundred dollars, the greater part of which was due to F. B. Rogers upon an open account and notes aforesaid. Under proceedings instituted to settle the estate of Henry J. Rogers, it was by agreement of the family arranged that a tract of land containing two hundred and seventy-two acres should be sold for cash to pay the aforesaid indebtedness to F. B. Rogers and the other small debts of the estate. Accordingly, the said land was sold by the clerk of this court on November, 1891, and bid off by Julius E. Rogers, at and for the sum of two thousand dollars, which sum was paid to the clerk by F. B. Rogers by receipting to the clerk for the amount of the claims he held against his father, H. J. Rogers, and which had been duly established before said clerk under an order calling in creditors,

and the difference was paid by said F. B. Rogers in cash to the other distributees and creditors. Then the said F. B. Rogers took from the purchaser, Julius E. Rogers, his bond for two thousand dollars, payable in equal annual installments, with interest on the whole payable annually, and in this way he invested in this bond and mortgage the indebtedness of his father, which he had bequeathed to these plaintiffs, and during his life held the same for them as and for and in full substitution of the said indebtedness, and as representing said bequest.

"6. That the said indebtedness was never, in fact, collected by F. B. Rogers in his lifetime, but the form of the security was changed as aforesaid in the winding up and settlement of the estate of his father—a change rendered necessary by that contingency, and made by F. B. Rogers with a special view of securing to and reserving for these plaintiffs the legacy given them in his will, and ever thereafter during his life so stated and acknowledged."

Upon demurrer the circuit court held the alleged legacy to be specific, and that the complaint shows that it has been adeemed. The contention of appellants' counsel is (1) that <sup>171</sup> the legacy is not specific, but is a pecuniary demonstrative legacy; (2) that if specific, it has not been adeemed under the facts stated. General, specific and demonstrative legacies are thus defined in 18 Encyclopedia of Law, 711, 714, 721: "A general legacy is one which is payable out of the general assets of the testator's estate, being a gift of money or other thing in quantity, and not in any way separated or distinguished from other things of like kind. . . . A specific legacy is a gift by will of a specific article or part of the testator's estate which is identified and distinguished from all other things of the same kind, and which may be satisfied only by delivery of the particular thing. . . . A demonstrative legacy is a gift of money or other fundable goods charged as a particular fund in such a way as not to amount to a gift of the corpus of the fund, or to evince an intent to relieve the general estate from liability in case the fund fails."

The following statement by the court of appeals of New York, in *Crawford v. McCarthy*, 159 N. Y. 514, 54 N. E. 278, is worth reproducing: "A general legacy is a gift of personal property by a last will and testament not amounting to a bequest of a particular thing, or money, or of a particular fund, designated from all others of the same kind. A specific legacy



is a bequest of a specified part of a testator's personal estate distinguished from all others of the same kind. A demonstrative legacy is a bequest of a certain sum of money, stock, or the like, payable out of a particular fund or security. For example, the bequest to an individual of the sum of fifteen hundred dollars is a general legacy. A bequest to an individual of the proceeds of a bond or mortgage particularly describing it is a specific legacy. A bequest of the sum of fifteen hundred dollars payable out of the proceeds of a specified bond or mortgage is a demonstrative legacy. A demonstrative legacy partakes of the nature of a general legacy by bequeathing a specific amount, and also of the nature of a specific legacy by pointing out the fund from which the payment is to be made, but differs from a specific legacy in the particular that if the fund pointed out for the payment of <sup>172</sup> the legacy fails, resort may be had to the general assets of the estate: Willard's Equity Jurisprudence, 502, 503; 2 Bouvier's Law Dictionary, Rawles' ed., 161.

In *Pell v. Ball*, Speer Eq. 48, it is said: "Whether a legacy is specific or not must necessarily depend upon the nature of the thing referred to and described in the will. If the thing be capable of individuality, as a ring or picture, or if it be an assemblage of things, as a library or cabinet, or something capable of being separated by sensible distinctions, as the property on a particular estate, in all such cases the descriptions in the will set forth with distinctness the subject of bequest and make it specific. . . . It may be safely affirmed. I think, that whether a bequest couched in general terms is specific or otherwise depends on this: if the things falling within the terms when enumerated (or if they had been enumerated by the testator) are in their nature specific, then the legacy is specific, otherwise it is not." In that case, the testator gave and bequeathed to his wife, "all property, personal and real, that I received or may receive hereafter from her father's estate, or from any of her relations and sources owing to my marriage with her," was held to be a pecuniary legacy and not a specific legacy, because the testimony, which was competent for that purpose, showed that every dollar received from the sources mentioned was in money. In the case of *McFadden v. Hefley*, 28 S. C. 317, 13 Am. St. Rep. 675, 5 S. E. 812, the court, quoting with approval the foregoing language taken from *Pell v. Ball*, Speer Eq. 48, held that a bequest of "all horses, mules, cows, hogs, wagons, farming im-

plements, household and kitchen furniture on said plantation" whereon testator resided, was a specific legacy. In that case there was a gift of things, other than money, in their nature specific, and so located as to be capable of identification. That is certain which may be rendered certain. On the other hand, in *Boykin v. Boykin*, 21 S. C. 513, a legacy of "two thousand dollars in six per cent stocks of the state of South Carolina," was held to be a demonstrative legacy. The court saying: "The gift was in dollars; not in any particular dollars, earmarked <sup>173</sup> and identified, but such a number of dollars; and that makes what is called a demonstrative legacy."

From the foregoing it appears that in order to constitute a pecuniary demonstrative legacy, two things are necessary: 1. There must be a gift of a certain sum of money; 2. With reference to a particular fund as a primary but not exclusive source of payment. The legacy in question is specific, because the debts or claims given, whether considered with reference to the evidences thereof or with reference to the money that may be received thereon, are particularly distinguished and separate from all other property of the testator. The claims are designated as those which the testator holds against the estate of his father, things easily identifiable and, in fact, particularly described in the complaint. In the event such claims were in the hands of the executor of testator, the bequest could have been fully carried out by a transfer of the notes and accounts to the legatees, or in the event these claims had been collected by the executor, by a delivery of the proceeds to the legatees. The legacy is not demonstrative, because no definite sum of money is given, with designation of a particular fund as primary source of payment. It is true, a source of payment is designated, the estate of testator's father, but only in the sense of being the exclusive source of payment; whereas, to make a legacy demonstrative, the gift must be chargeable upon a particular fund in such a way as not to be a gift of the specific fund. Every legacy of a debt is in a sense a gift of whatever money may be realized therefrom, but in such case the gift is of the specific fund or proceeds, and is not a mere designation of the fund as primary source of payment, with right in case of failure of such fund to fall back upon the general assets of the testator.

The doctrine of ademption only applies to specific legacies. Specific legacies are adeemed when the thing bequeathed is, in the lifetime of the testator, lost, disposed of, or so substan-

tially changed or altered as not to exist in specie when the will takes effect: *Goddard v. Wagner*, 2 Strob. Eq. 1; 1 <sup>174</sup> Ency. of Law, 2d ed., 623, 627, and authorities cited in the notes. In the case of a legacy of a debt or claim, if the specific thing is disposed of or extinguished, the legacy is adeemed. The complaint shows that in the lifetime of the testator the claims which he held against the estate of his father which were bequeathed to the plaintiffs, were absolutely extinguished as claims against his father's estate by settlement with an officer of the court selling lands of his father for the payment of such claims. The settlement between F. B. Rogers, the testator, and the clerk of the court as to the "claims" which were bequeathed, was not a mere renewal of the original obligations, not even a substitution of a new form of security for the same debt, but was an actual collection of the claims by the testator in his lifetime, so as to discharge them completely. The bond and mortgage which the testator took from Julius E. Rogers was a wholly different thing from that which was specifically bequeathed to plaintiffs.

The case of *Pell v. Ball*, 1 Speer Eq., at page 78, shows that while evidence intended to ascertain the thing actually described in the will is admissible, it is not permissible to show by extrinsic evidence that the testator intended by his will to refer to a thing which his will does not describe, the effect of the latter evidence being to set aside the will and substitute extrinsic evidence in its place. Under this principle, it could not avail plaintiffs that the testator believed and declared that the Julius E. Rogers bond and mortgage was held in substitution of the claims against the estate of his father, which were specifically bequeathed, as this would be equivalent to making a new will by parol, in conflict with the statute requiring a will to be in writing, with other formalities.

The judgment of the circuit court is, therefore, affirmed.

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*The Ademption of legacies* is the subject of an extended note to *Miller v. Malone*, 95 Am. St. Rep. 342-370. The ademption of specific legacies is discussed at pages 356-363 of this note.

## MORRIS STREET BAPTIST CHURCH v. DART.

[67 S. C. 338, 45 S. E. 753.]

**JURISDICTION of Courts Over Church Controversies.**—Civil courts will not enter into the consideration of church doctrine or church discipline, nor will they inquire into the regularity of the proceedings of the church judicatories having cognizance of such matters. (p. 730.)

**CHURCHES—Effect of Action by.**—The action of church authorities in the deposition of pastors and the expulsion of members is final. (p. 730.)

**JURISDICTION of Courts Over Church Controversies.**—If a church controversy necessarily involves rights growing out of a contract recognized by the civil law, or the right to the possession of property, civil courts will adjudicate such rights. (p. 730.)

**CHURCH CONTROVERSIES—Jurisdiction of Courts.**—A court will not undertake to determine whether a resolution directing expulsion or exclusion of a pastor from a church or church property, was passed in accordance with the canon law of the church, except in so far as it may be necessary to do so in determining whether it was in fact the church that acted as a congregation. (pp. 730, 731.)

**CHURCH CONTROVERSIES—Jurisdiction of Courts—Church Trials.**—A civil court has no power to require a church court to observe the usual incidents of trial, such as the formulation of charges and notice. (p. 732.)

**CHURCH CONTROVERSIES—Deposition of Pastor—Salary.**—While a church is liable to suit by a pastor for arrears of salary which it has contracted to pay, it is not a condition precedent to his deposition that he should be paid in full. (p. 734.)

**CHURCH CONTROVERSIES—Pastor's Salary—Costs—Setoff.** If the amount of salary due a deposed pastor of a church is not involved in any issue in a suit between the pastor and his church, costs adjudged against him therein cannot be set off against salary due him. (p. 734.)

W. St. Julien Jervey and J. S. Mitchell, for the appellant.

J. G. Capers and L. D. Melton, for the appellee.

**338** WOODS, J. This action was instituted on May 28, 1902, by "The Morris Street Baptist Church," a body <sup>339</sup> corporate, having its principal place of worship in the city of Charleston, against John L. Dart. The prayer of the plaintiff was that the defendant be perpetually enjoined and restrained "from exercising or attempting to exercise his alleged functions as alleged pastor" of the said church, and from entering the pulpit thereof or attempting to preach therein. The complaint alleges that at a duly authorized meeting of the church, held on April 10, 1902, resolutions in accordance with the policy



of the church, and the laws, rules and regulations governing the same, were adopted by the vote of a large majority of the total membership, requesting the resignation within thirty days of the defendant, John L. Dart, as pastor of the church. It is further alleged that Dart was present at the meeting, and knew the purport and object of the resolution and request, and was also duly notified in writing of the action of the congregation, but that he refused to recognize the authority of the meeting, and although warned to desist therefrom, entered the church building on several occasions with force and violence, and continued to exercise, or attempted to exercise, the functions of pastor of the church, in violation of the resolution; and threatened a continuation of such conduct, thus preventing the plaintiff from carrying on the usual religious exercise and worship.

Upon hearing the complaint, his honor, Judge Dantzler, on May 28, 1902, granted a temporary restraining order against the defendant, requiring him to show cause on June 2d next thereafter why an injunction should not issue pending the hearing of the case on its merits. This rule came on to be heard June 19, 1902, before his honor, Judge Gage, who, after hearing the return of the defendant and argument of counsel for both sides, ordered:

"That the Morris Street Baptist Church building be closed and remain closed until the further order of this court, none of the officers and members of said church of either faction being permitted to enter or use the same for any purpose.

"It is further ordered that the return herein filed be taken **340** as an answer, leave being given to the defendant to amend same in such particulars as he may be advised. And that it be referred to G. H. Sass, Esq., master, to take testimony and determine whether or not the defendant has been regularly tried and dismissed from the office of pastor of said church, according to the rules and regulations thereof, and that if he finds this issue in the affirmative, he report the same to this court for such further order as may be proper; and that if he find said issue in the negative, he dismiss the complaint. And that he have leave to report special matters."

The return of the defendant, which, under the order of the court, is to be taken as his answer, denies that any regular authorized meeting of the church was held on April 10, 1902; and alleges that on April 17, 1902, there was a meeting specially called, which repudiated the action of the former meeting,

which is characterized as a mob. The defendant also alleges that he is supported by a great majority of the regular, bona fide communicants of the church, and denies the right of the complainants to bring this action in the corporate name. It is further alleged that over nine hundred dollars is due the defendant as arrears of salary, and that under these circumstances he should not be enjoined from exercising and performing his duties as pastor of the church.

After holding numerous references and taking a large amount of testimony, the master on August 9, 1902, filed his report, finding the issue referred to him in the affirmative; holding that John L. Dart has been regularly dismissed from the office of pastor of Morris Street Baptist Church, according to the rules and regulations thereof, as the same are interpreted and set forth in the report.

Counsel for defendant filed exceptions to this report, and the cause was heard by his honor, Judge Ernest Gary, who, in a decree dated February 3, 1903, overruled the exceptions, and confirmed the master's report in all particulars, ordering that the complainants be allowed to re-enter the church and use the same, as had been their custom, as a <sup>341</sup> place of public worship, "unmolested and unrestrained by the said J. L. Dart or parties codefendant with him." It was also ordered that all costs be taxed up against the defendant, and that if the same be not paid within thirty days from the filing of the decree, that execution be issued against him therefor. From the judgment of Judge Gary defendant appeals.

Before entering upon the consideration of the questions of fact involved in the appeal, it is necessary to determine the extent to which **this** court, as a civil tribunal, can interfere in this unfortunate church controversy. The generally accepted doctrine is **nowhere** better stated than in the case of *Harmon v. Dreher*, 1 Speer Eq. 87, which is thus referred to in *Watson v. Jones*, 13 Wall. 679, 20 L. ed. 666:

"One of the most careful and well-considered judgments on the subject is that of the court of appeals of South Carolina, delivered by Chancellor Johnstone, in the case of *Harmon v. Dreher*, 1 Speer Eq. 87. The case turned upon certain rights in the use of the church property claimed by the minister, notwithstanding his expulsion from the synod as one of its members. 'He stands,' says the Chancellor, 'convicted of the offenses alleged against him, by the sentence of the spiritual body of which he was a voluntary member, and whose proceedings

he had bound himself to abide. It belongs not to the civil power to enter into or review the proceedings of a spiritual court. The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority. The judgments, therefore, of religious associations, bearing on their own members, are not examinable here, and I am not to inquire whether the doctrines attributed to Mr. Dreher were held by him, or whether, if held, were anti-Lutheran; or whether his conduct was or was not in accordance with the duty he owed to the synod or to his denomination. . . . When a civil right depends upon an ecclesiastical matter, it is the civil court, <sup>342</sup> and not the ecclesiastical, which is to decide. But the civil tribunal tries the civil right, and no more, taking the ecclesiastical decisions out of which the civil right arises, as it finds them'": See, also, *John's Island Church*, 2 Rich. Eq. 215, and extended note, 49 L. R. A. 384.

The civil courts will not enter into the consideration of church doctrine or church discipline, nor will they inquire into the regularity of the proceedings of the church judicatories having cognizance of such matters. To assume such jurisdiction would not only be an attempt by the civil courts to deal with matters of which they have no special knowledge, but it would be inconsistent with complete religious liberty untrammelled by state authority. On this principle, the action of church authorities in the deposition of pastors and the expulsion of members is final. Where, however, a church controversy necessarily involves rights growing out of a contract recognized by the civil law, or the right to the possession of property, civil tribunals cannot avoid adjudicating these rights, under the law of the land, having in view, nevertheless, the implied obligations imputed to those parties to the controversy who have voluntarily submitted themselves to the authority of the church by connecting themselves with it. Therefore, where it is admitted, as in this case, that property belongs to a particular church, and the only question is whether the defendant claiming to be pastor should be excluded from its use, this court will only consider whether the church has ordered his exclusion, not whether it was right in doing so. Neither will the court, as a civil tribunal, undertake to determine whether the resolution directing exclusion was passed in accordance with the canon law of the church, except in so far as it may be neces-

sary to do so in determining whether it was, in fact, the church that acted.

The Morris Street Baptist Church being organized under the Baptist polity, its congregation is its governing body, and acts in entire independence of any other ecclesiastical authority. The congregation may, for its own convenience, <sup>343</sup> adopt such rules as it deems expedient, but a civil tribunal cannot in anywise hold it bound to follow these rules, except where the civil rights of other persons have become involved by such persons being led to deal with the church as a corporation, on the faith of its rules. Whenever the congregation meets as a church, it may expel members, depose its pastor, and dispose of its property in any way that it sees fit; and when a congregation has acted, the civil courts will not inquire whether in doing so it violated any of its own rules. The congregation being the sole legislative and judicial body of the Baptist Church, those who connect themselves with it voluntarily assume the risk of the propriety and justice of congregational action, just as those who become Presbyterians or Episcopalians subject themselves in church affairs to the authority of synods and councils.

The only questions, then, we have power to consider are, Did the congregation meet, and did it depose the defendant as pastor? If these questions are answered in the affirmative, then the defendant was properly enjoined from interfering with the church property. The action of the church is controlled by the vote of the majority of the congregation, assembled as a church, and it is quite obvious a civil tribunal cannot regard the sentiment of the majority expressed in any other way.

The rules regularly adopted by this church contemplate that business affairs should be submitted to the congregation by a committee composed of eleven members, called the advisory board. These rules provided for a regular business meeting of the congregation on Thursday evening after the first Sunday of each month, but the advisory board or the pastor were authorized to call special meetings at other times. At the time this controversy arose, this board consisted of only nine members, two vacancies having occurred, and the church having taken no steps to fill them. On March 26, 1902, six members of the board met, and, by a vote of four to two, passed a resolution to be submitted to the congregation, asking for the resignation of the defendant as <sup>344</sup> pastor within thirty days. We think the finding of the master and the circuit judge, that



notice was given of the board meeting, and that announcement was made at a regular church service that a business meeting of the congregation would be held on Thursday, April 10th, is well supported by the evidence. But these matters are of no consequence, because the evening of Thursday, April 10th, was the regular time for the business meeting of the congregation, and when it assembled at that time, it represented the entire church. There was much disorder on this occasion, as might have been expected from the people of a highly emotional race, especially when the pastor unwarrantably undertook to interfere with their right to hold a church meeting; but there can be no doubt that the congregation at this regular meeting, by a majority vote of those present, passed the resolution requesting the resignation of the defendant after thirty days, which we think should be regarded as equivalent to his formal dismissal at the expiration of that time.

The appellant contends, however, that to hold this dismissal valid is to sanction conviction without the right of trial. As to this, it is only necessary to say that this was not a church trial, but simply a dismissal of a pastor; and even if it had been, a civil court has no power to require a church court to observe the usual incidents of trial, such as the formulation of charges and notice.

In view of the law on the subject as we have stated it, it seems unnecessary to decide which of the church directories discussed in argument was referred to as a church authority in the rules adopted by the Morris Street Baptist Church. Three editions of Hiscox's Directory were introduced in evidence. The plaintiff contends that the rules refer to the oldest edition, published in 1850, which states that a pastor may be dismissed by the congregation without notice. The defendant insists reference is made to another and smaller edition, published in 1890, which provides for three months' notice before dismissal. Under the polity of the Baptist <sup>345</sup> Church, as stated in these manuals themselves, they cannot be regarded authority to control the congregation, but only as guides suggesting the usual and most approved course to pursue. But even if the manuals could be regarded binding on the church as constituting an element in a civil contract with the defendant as pastor, it will be observed the one in use when he assumed that relation to the church sixteen years ago, does not provide for notice, and the last, published in 1900, mentions the giving three months' notice, as we understand it, merely as an almost

universal custom. In any view there was, therefore, no legal obligation to give this notice before dismissal.

The defendant claims that even if it be conceded he was dismissed by the congregation on April 10, 1902, this action was revoked at a meeting of the congregation held on April 17th, a week later. While it is true, as the master states, the rules specifically adopted by the church do not contemplate appeal from one church meeting to another, yet the congregation could waive or disregard this rule, and reverse its former action; and hence, if there was a meeting for business purposes on April 17th, and the congregation annulled its former action and reinstated the defendant as pastor, he would still have a right to exercise such control of the church property as the nature of the office conferred upon him. The evening of the seventeenth day of April was the regular time of meeting for devotional service, but not for the transaction of business; and after a very careful review of much conflicting evidence, we are constrained to hold that no notice as given to the congregation that a business meeting would be held on that date. Some witnesses testify no notice was given; others say notice was given from the pulpit on the Sunday before of a meeting, but do not say the notice indicated a business meeting. Of the witnesses before the master, the defendant alone says explicitly he gave notice from the pulpit that the meeting would be for the transaction of business of the church. The defendant himself presided at this meeting and had charge of it, and the **346** preponderance of the evidence indicates that there was no real ascertainment by vote of the sentiment of those who were present.

We conclude that the defendant was deposed by a majority vote at a regular meeting of the congregation of the Morris Street Baptist Church, held on April 10, 1902; that this action has not been revoked, and that defendant had no right to use or interfere with any of the church property.

In the report of the master, which is confirmed by the circuit judge, it is found: "The plaintiffs have possession of the charter, the records and the keys of the church. Among their number are the clerk, the sexton and the treasurer of the church and a large majority of the advisory board." This finding of fact is not drawn in question by the exceptions. Taking these facts in connection with the conclusion we have reached, that the defendant was excluded from the pastorate of the church by the vote of the congregation, it follows that

this action was properly instituted, without any direct instruction from the congregation, by officers and members in behalf of, and in the name of, the church, to prevent violent and illegal interference with its property: 6 Thompson on Corporations, sec. 7374.

The church did not make the dismissal conditional on payment of arrears of salary. While a church is liable to suit by a pastor for arrears of salary it contracted to pay, it is not a condition precedent to his deposition that he should be paid in full. The amount due the defendant not being in anywise involved in this action, the circuit court could not properly direct the costs of this suit to be set off against his salary.

The judgment of this court is, that the judgment of the circuit court be affirmed.

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## **JURISDICTION OF CIVIL COURTS OVER CHURCH CONTROVERSIES.\***

- I. Jurisdiction in Matters of Doctrine or Discipline.**
  - a. Expulsion of Members.
  - b. Expulsion of Pastor.
- II. Jurisdiction When Property or Civil Rights Involved.**
  - a. Jurisdiction of Equity Over Church Trusts.
  - b. Jurisdiction Over Church Trustees.

### **I. Jurisdiction in Matters of Doctrine or Discipline.**

We apprehend that the rule is universal and uniformly applied that civil courts have no jurisdiction to review the judgments or acts of the governing body or authorities of a religious organization with reference to its internal affairs, for the purpose of ascertaining their regularity or accordance with the discipline and usages of such organization. In other words, civil courts have no jurisdiction to review or revise the proceedings during trial by, or judgments of, church tribunals, constituted by the organic laws of the church organization, where they involve solely questions of the church organization, doctrine, or discipline, or infractions of the laws and ordinances enacted by the ruling body of the church for the government of its officers and members: *Trustees v. Halvorson*, 42 Minn. 503, 44 N. W. 663; *Rottmann v. Bartling*, 22 Neb. 375, 35 N. W. 126; *Pounder v. Ashe*, 44 Neb. 672, 63 N. W. 48; *Powers v. Budy*, 45 Neb. 208, 63 N. W. 476; *McGuire v. Trustees*, 54 Hun, 207, 7 N. Y. Supp. 345; *Henderson v. Hunter*, 59 Pa. St. 335; *Irvine v. Elliott*, 206 Pa. St. 152, 55 Atl. 859; *Travers v. Abbey*, 104 Tenn. 665, 58 S. W. 247, 51 L. R. A. 260. If there is a schism in a religious society a civil court has no jurisdiction to attempt to enforce the peculiar faith or doctrine of

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\*REFERENCE TO MONOGRAPHIC NOTE.

Jurisdiction of equity over religious societies: 68 Am. St. Rep. 864-868.

either party, though their existence and nature may incidentally be involved in an inquiry relative to the rights of such society: *Rottmann v. Bartling*, 22 Neb. 375, 35 N. W. 126. All questions of doctrine, practice and jurisdiction within a church must be determined by the court judicatories, and the secular courts have no authority to adjudicate upon them: *Kuns v. Robertson*, 154 Ill. 394, 40 N. E. 343. Whether a case is regularly or irregularly before a proper church tribunal is a subject for it to determine for itself, and no civil court can revise, modify, or impair its action in a matter of merely ecclesiastical concern: *State v. Farris*, 45 Mo. 183. From this rule another naturally follows, which is, that the decision of an ecclesiastical judicatory as to its own jurisdiction in ecclesiastical matters, unless there is a clear absence of jurisdiction, should receive great weight in the civil courts, and if such tribunal has jurisdiction, civil courts cannot inquire whether it has proceeded according to the laws or usages of the church, or whether it has decided correctly; and its decision is final and binding on the courts and the parties: *Connitt v. Reformed Dutch Church*, 54 N. Y. 551. The decisions of the highest ecclesiastical tribunals in matters of church discipline, law and practice are binding upon ministers, members, and the civil courts in so far as they are applicable to causes pending in the latter, and must be accepted therein as final and conclusive: *Trustees of Trinity Church v. Harris*, 73 Conn. 216, 47 Atl. 116; *Kuns v. Robertson*, 154 Ill. 394, 40 N. E. 343; *Gaff v. Greer*, 88 Ind. 122, 45 Am. Rep. 449; *Bird v. St. Mark's Church*, 62 Iowa, 567, 17 N. W. 747; *Robertson v. Bullions*, 9 Barb. 64; *Baxter v. McDonnell*, 155 N. Y. 84, 49 N. E. 667, 40 L. R. A. 670; *Philomath College v. Wyatt*, 27 Or. 390, 31 Pac. 206, 37 Pac. 1022, 26 L. R. A. 68. If a local church congregation is a member of a general organization having general rules for the government and conduct of all of its adherents, congregations, and officers, the orders and judgments of the general organization through its governing body, so far as they relate exclusively to church affairs and church government, are binding on the local associations and on the civil courts, and will not be re-examined or reviewed by the latter: *Schweiker v. Heusser*, 146 Ill. 401, 34 N. E. 1022; *Pounder v. Ashe*, 44 Neb. 672, 63 N. W. 48; *Wehmer v. Fokenga*, 57 Neb. 510, 78 N. W. 28; *Bonacum v. Harrington*, 65 Neb. 831, 91 N. W. 886; *Brundage v. Deardorf*, 92 Fed. 214. As to civil courts the decision of a spiritual court in a spiritual matter is final and will be accepted as conclusive, unless there has been a usurpation of power: *Hatfield v. De Long*, 156 Ind. 207, 83 Am. St. Rep. 194, 59 N. E. 483, 51 L. R. A. 751. The Presbytery, as an ecclesiastical court, has the power to deal with the Presbyterian church as an ecclesiastical body in all matters ecclesiastical, and to dissolve and disband the church, and to divide it into two new and independent organizations, and its orders and decrees pertaining to the church as an ecclesiastical body are not only binding



upon that body, but also binding and conclusive upon the civil courts, whenever and wherever material to any pending litigation in the latter: *Wheelock v. First Presbyterian Church*, 119 Cal. 478, 51 Pac. 841.

Upon questions arising under the discipline, and upon those arising under the articles of faith, the decisions of the ecclesiastical body are ordinarily final, and must be respected and enforced by the courts of law. But if such decisions plainly violate the law of the land which they profess to administer, they will not be followed by the secular courts: *Kreeker v. Shirey*, 163 Pa. St. 534, 30 Atl. 440, 29 L. R. A. 476. If public policy or the positive law of the land is not contravened, the orders and decisions of a religious society, when made in conformity with its polity, must have the same effect in civil courts as the society intended should be awarded to them when pronounced by its own judicatories: *Harrison v. Hoyle*, 24 Ohio St. 254. When questions of faith or of ecclesiastical law have been decided by the highest judicial tribunal provided for in the church organization, the civil courts are bound by, and will follow, such decisions, but the regularity and legality of legislative acts of church bodies are always open to investigation in the civil courts: *Philomath College v. Wyatt*, 27 Or. 390, 31 Pac. 206, 37 Pac. 1022, 26 L. R. A. 68.

The only dissent from the doctrine above enunciated which we have been able to discover is announced in *Smith v. Nelson*, 18 Vt. 511, where it was held that, although religious denominations may form constitutions, enact canons, laws, ordinances, establish courts, or make decisions, decrees, or judgments, yet they can have only a voluntary obedience thereto, and cannot affect any civil rights or immunities, or alter or dissolve any relations or obligations arising out of any contract. Obedience to their requirements may be exacted under penalty of spiritual censure, but whether one submits to or defies their proceedings depends on his conviction of their regularity or irregularity, they can only affect his conscience, and when their proceedings are to be examined by ordinary civil tribunals of justice, they can receive no other consideration than the regulations of any other voluntary association. While this decision may be right so far as it refers to ecclesiastical decisions affecting property or contract civil rights, it is clearly wrong in so far as it refers to purely ecclesiastical matters decided by church tribunals, and erroneous in holding that a Presbyterian synod has no power to finally dissolve a Presbytery against its consent, or to suspend or depose a minister upon a proper hearing, as such matters, according to all the other authorities, are within the exclusive jurisdiction of the ecclesiastical court, whose decision the civil court will not interfere with nor in any manner review or revise.

As has already been stated, we believe the rule to be almost universal that civil courts will not review the judgments or acts of the

governing authority of a religious organization with reference to its internal affairs for the purpose of ascertaining their regularity or accordance with the discipline and usages of such organization, but they will inquire into and determine whether or not a church tribunal which undertakes to decide a purely church matter has been organized in conformity with the constitution of the church, and whether a member of such tribunal is disqualified, under the rules and canons of the church, from sitting as a judge in the case. Such questions are not purely ecclesiastical, nor within the exclusive jurisdiction of the ecclesiastical tribunal, although the decision of such tribunal, if properly and legally constituted, is binding on the civil courts on all matters properly before it for trial: *Bonacum v. Murphy* (Neb.), 98 N. W. 1030. The court of civil justice may always inquire into the regularity of the organization of the church tribunal, and decide whether it acted within the scope of its constitutional authority: *Perry v. Wheeler*, 12 Bush, 542; and if such tribunal has transcended its authority and attempted to adjudicate a matter over which it has no jurisdiction, its judgment is not binding nor conclusive on a civil court: *Watson v. Avery*, 2 Bush, 332.

The judgments of ecclesiastical tribunals are not conclusive on the courts when they are in open and avowed defiance, and in express violation of the constitution which governs such tribunal: *Brundage v. Deardorf*, 55 Fed. 839. Judgments of church tribunals must be reached in accordance with the rules and regulations which are authorized and prescribed by the laws of the organization. Otherwise they are not binding on the civil courts which have jurisdiction to pronounce them void if such rules are not followed: *Meyers v. First Presbyterian Church*, 11 Okla. 544, 69 Pac. 874; *Dayton v. Carter*, 206 Pa. St. 491, 56 Atl. 30; *Alexander v. Bowers* (Tex. Civ. App.), 79 S. W. 342.

a. **Expulsion of Members.**—All questions of faith, doctrine and discipline belong exclusively to the church and its spiritual officers. The civil courts are without jurisdiction, either to review their determination on the facts or the finality of their decision, and the question of church membership is purely ecclesiastical, and no civil right is involved in the claim of right to be regarded as a member or communicant of a particular church: *Waller v. Howell*, 20 Misc. Rep. (N. Y.) 236, 45 N. Y. Supp. 790. Every person entering into a church organization impliedly, if not expressly, covenants to conform to its rules and to submit to its authority and discipline, and such church organization has a right to deal with its defaulting members for breach of its discipline, and the civil courts are without jurisdiction to supervise or control such jurisdiction: *Shannon v. Frost*, 3 B. Mon. 258; *Lucas v. Case*, 9 Bush, 297; *State v. Hebrew Congregation*, 31 La. Ann. 205, 33 Am. Rep. 217; *Harmon v. Dreher*, Speer Eq. 87. The excommunication or expulsion of members of a church or religious association, done in the exercise of its powers of discipline, is valid

and effectual, when questioned in the civil courts, to exclude the expelled ones from membership and consequently from any right of property, and it is not, it has been held, material that the proceedings were irregular, and the expulsion made without giving notice and opportunity of hearing, as such church is the sole judge of its method of procedure, and its proceedings and decisions are binding and conclusive on the civil courts: *Nance v. Busby*, 91 Tenn. 303, 18 S. W. 874, 15 L. R. A. 801. Thus, where the highest tribunal of a church to which a question of church law or discipline is carried decides it, having jurisdiction according to the usages of the church, the decision binds the civil courts, and they are without jurisdiction to review it. Hence, if the proper tribunal of a church has decided that certain members of a local church under its jurisdiction have seceded, that fact must be regarded as fixed, and it results as a consequence that they lose all right to the property of the body, though they constituted a majority of its members, and in such case the remaining members retain its ownership, control and management: *Gaff v. Greer*, 82 Ind. 122, 45 Am. Rep. 449. In such case the civil court is without jurisdiction to determine whether or not the opinions and doctrines of the expelled members were in fact inconsistent with the established belief of the particular society or church organization: *Grosvenor v. United Society of Believers*, 118 Mass. 78. The action of a religious society empowered to expel members acting against its interest in expelling members for such reason upon proper notice and hearing, is not reviewable by a civil court on the ground that the expulsion was based upon insufficient evidence: *Canadian Religious Assn. v. Parmerter*, 180 Mass. 415, 62 N. E. 740.

Although the civil courts will not, in case of expulsion or excommunication of members by competent church authorities, go behind such authority and inquire whether such members have or have not been regularly expelled, such courts have jurisdiction to inquire whether the expulsion was the act of the church or of persons who were not in the church, and who, for that reason, had no power to expel anyone: *Bouldin v. Alexander*, 15 Wall. 131. And while civil courts have no jurisdiction to review the action of ecclesiastical bodies in matters relating purely to the faith and discipline of the church, yet for the purpose of determining the property rights of members threatened with expulsion, they will pass upon questions somewhat ecclesiastical in their nature: *Fulbright v. Higginbotham*, 133 Mo. 668, 34 S. W. 875.

Church organizations may make rules by which the admission and expulsion of its members are to be regulated, and the members must conform to such rules; and expulsions must be made according to such rules else civil courts will pronounce them void: *Jennings v. Scarborough*, 56 N. J. L. 401, 28 Atl. 559. And if it has no rules on the subject, those of the common law must prevail, and before a member can be expelled notice must be given him to answer and opportunity

offered to make defense, otherwise an order of expulsion is void: *Jones v. State*, 28 Neb. 495, 44 N. W. 658, 7 L. R. A. 325. While a secular court will not assume jurisdiction over spiritual offenses, but will accept as conclusive the regular decision of the final church tribunal, yet if such tribunal is not organized in conformity with the church laws, a secular court may enjoin it from expelling a member of the church on the charge of a spiritual offense: *Hatfield v. De Long*, 156 Ind. 207, 83 Am. St. Rep. 194, 59 N. E. 483, 51 L. R. A. 571. If no property or civil rights are involved mandamus will not lie against a church society to restore to membership one claiming to have been wrongfully expelled and removed from church membership: *Hundley v. Collins*, 131 Ala. 234, 90 Am. St. Rep. 33, 32 South. 574; *Sale v. First Regular Baptist Church*, 62 Iowa, 26, 49 Am. Rep. 136, 17 N. W. 143. If a church society under its rules of organization and control, has a right to use a church building, and a majority thereof have no right to secede and form another church of different denomination and exclude the minority from such use, the minority may enjoin the seceding majority from using the church property: *Cape v. Plymouth Church*, 117 Wis. 150, 93 N. W. 449. In *Watson v. Garvin*, 54 Mo. 378, a rule was laid down not altogether harmonious with the current and weight of authority. It was there recognized that a deposed minister or an excommunicated or expelled member of a church cannot appeal to the civil courts for redress when the matter involved is purely one of doctrine or discipline. "They can look alone to their own judicatories for relief, and must abide the judgment of their highest courts as final and conclusive. But when property rights are concerned, the ecclesiastical courts have no power whatever to pass on them so as to bind the civil courts. If they expel a member from their church, and he feels aggrieved in his rights of property by such expulsion, he may resort to the civil courts, and they will not consider themselves precluded by the judgment of expulsion, but will examine into the case to see if it has been regularly made, upon due notice, and if they find it to have been duly made, they will let it stand. Otherwise they will disregard it, and give the proper relief. In most cases, no doubt, the judgment will be found sufficiently regular to fix the status of the expelled member and to warrant the civil courts in denying the desired relief": *Watson v. Garvin*, 54 Mo. 378. Civil courts possess no jurisdiction to expel or disfranchise a member of a church. This power rests exclusively in ecclesiastical courts: *Robertson v. Bullions*, 9 Barb. 64, 11 N. Y. 243. Nor can civil courts interfere to compel an individual to attend worship at any place, to remain connected with any particular church organization, to receive anyone as his pastor: *Feizel v. Trustees of First German Society*, 9 Kan. 592. Neither has equity jurisdiction to compel a church faction to cease worshiping in its church, because of an abandonment by it of the faith, laws, and usages of such church: *Smith v. Charles* (Miss.), 24 South. 968.



**b. Expulsion of Pastor.**—Following the general rule that civil courts have no ecclesiastical jurisdiction to review or revise the proceedings during trial by, or judgment of, church tribunals constituted by the organic laws of the church organization, and having jurisdiction, where they involve solely questions of church organization and discipline or an infraction of the laws and ordinances enacted by its ruling body for the government of its officers and members, the action of the church judicatory in disposing or expelling the minister of the church is not subject to review in civil courts. It is only when such judicatory has exceeded its jurisdiction, or when property rights of the expelled pastor are involved that the civil court will entertain jurisdiction of the question of expulsion. When the judgment of the church tribunal appears regular on its face, it is binding and conclusive on the civil courts, no matter how unjust or unfair it may seem. If such judgment appears regular, the utter impolicy of the civil courts attempting to interfere in determining matters which have been passed upon by church tribunals, arising out of purely ecclesiastical concerns, is apparent. It would involve them in difficulties and impose upon them duties which are not in the least in harmony with their proper functions. Before a court could give an enlightened judgment, it would be necessary for it to explore the whole range of the doctrine and discipline of the given church and survey the entire and vast field of the divine world. Whether a church tribunal acted right or wrong in deposing its minister, where no property rights are involved, a civil court cannot approach its precincts to inquire, because the minister, by becoming such has subjected himself to the ecclesiastical power of the church and no civil court can supervise or control its rightful jurisdiction. The judgment of such church tribunal is final and conclusive on the courts. The cases are so numerous and uniform in establishing this rule, that a portion of them only need be cited: *O'Donovan v. Chatard*, 97 Ind. 421, 49 Am. Rep. 462; *State v. Hebrew Congregation*, 31 La. Ann. 205, 33 Am. Rep. 217; *Watson v. Garvin*, 54 Mo. 354; *Pounder v. Ashe*, 44 Neb. 672, 63 N. W. 48; *Den v. Bolton*, 12 N. J. L. 206; *Dieffendorf v. Trustees*, 20 Johns. 12; *Connitt v. Reformed Church*, 54 N. Y. 551; *Isham v. Fullager*, 14 Abb. N. C. 363; *Rector etc. of St. James Church v. Huntington*, 82 Hun. 125, 31 N. Y. Supp. 91; *Harmon v. Dreher*, *Speer Eq.* 87; *Nance v. Busby*, 91 Tenn. 303, 15 L. R. A. 801, 18 S. W. 847.

What acts or omissions of the incumbent create a forfeiture of the pastoral office, and thereby incapacitate him for the performance of pastoral duties, is a question not within the province of a civil court to determine, it being exclusively within the cognizance of an ecclesiastical tribunal: *Whitney v. First Ecclesiastical Society*, 5 Conn. 405; *Gibbs v. Gilead Ecclesiastical Society*, 38 Conn. 153; *Shannon v. Frost*, 3 B. Mon. 253. And if charges have been preferred against a minister of the gospel, and he has been adjudged guilty by the highest tribunal of the church organization before which the matter has been presented, and deposed from the ministry and expelled from

membership in the church, civil courts will recognize such judgment of the church tribunal and enforce its observance when regularly brought to their notice, and in an action for the purpose, will enjoin such minister from further acting in that capacity or enjoying the rights of a member of such church or interfering with other members or the church property: *Pounder v. Ashe*, 44 Neb. 672, 63 N. W. 48; *Bonacum v. Harrington*, 65 Neb. 831, 91 N. W. 886.

It is well settled that a priest or minister of any church by assuming that relation necessarily subjects his conduct in that capacity to the laws and customs of the ecclesiastical body from which he derives his office, and in whose name he exercises his functions, and when he submits questions concerning his rights, duties or obligations, as such officer to the proper church judicatory, and they have been heard and decided according to forms prescribed by such church, the decision is binding upon him and upon the civil courts. While such priest or minister may always insist that his property rights as an individual or citizen shall be determined according to the law of the land in the civil courts, his relations, rights and obligations as pastor of the church must be determined by its tribunal according to its laws and procedure: *Baxter v. McDonnell*, 155 N. Y. 84, 49 N. E. 667, 40 L. R. A. 670. Hence the rule must necessarily follow that courts have no jurisdiction to review the judgments or acts of the governing authorities of a religious organization with reference to its internal affairs alone, in expelling a minister for the purpose of ascertaining their regularity or accordance with the discipline and usages of such organization: *Bonacum v. Harrington*, 65 Neb. 831, 91 N. W. 886. The only ground upon which a civil court can exercise any jurisdiction to restrain the proper authority from prosecuting a sentence of an ecclesiastical tribunal against a clergyman by pronouncing a judgment of displacement from the ministry, is that such threatened action may affect his civil and property rights, for the protection of which he has a right to resort to the civil courts; but if jurisdiction is entertained on such ground the only cognizance the court will take of the case is, to inquire whether there is want of jurisdiction in the church tribunal to do the act complained of, and the court will not review any act of discretion on the part of the ecclesiastical tribunal, nor inquire whether its judgment is justified by the truth of the case: *Walker v. Wainwright*, 16 Barb. 486. Civil courts never interfere with the decrees of ecclesiastical where no property rights are involved, because the civil courts have no jurisdiction in such matters and cannot take cognizance of them at all, whether they have been adjudicated by those tribunals or not. If, however, property rights are involved, the ecclesiastical courts have no power to pass on them so as to bind the civil courts, and if a minister of a church feels himself aggrieved in his property rights by the action of his church tribunal he may resort to the civil courts and they will adjust his rights, notwithstanding the decision by the

ecclesiastical tribunal: *Watson v. Garvin*, 54 Mo. 354. But the civil courts **have no jurisdiction** of ecclesiastical controversies involving no property rights, such as the removal of a pastor of a church under color of ecclesiastical authority. In such matters the tribunals of the church have exclusive jurisdiction without interference of the civil courts to determine finally all such controversies, and ordinarily the deposed pastor has no such property right in his salary as entitles him to appeal to the civil courts from his expulsion under ecclesiastical authority: *Travers v. Abbey*, 104 Tenn. 665, 58 S. W. 247, 51 L. R. A. 260. In *Jennings v. Scarborough*, 56 N. J. L. 401, 23 Atl. 559, the rule is recognized that courts of law will not interpose to control the proceedings of ecclesiastical bodies in spiritual matters, which do not affect the civil rights of individuals, but if such civil rights are involved such courts have jurisdiction, and the call of a pastor by the vestry and acceptance of such call, it is held creates a contract for the payment of the stipulated salary so long as the pastoral relation continues and such contract is a civil right which courts of law will protect and enforce. Courts of law, however, have no jurisdiction, even in such case, to investigate the causes leading to the dismissal of the pastor, and determining their weight and sufficiency: *Helbig v. Rosenberg*, 86 Iowa, 159, 53 N. W. 111.

A civil court has no jurisdiction to restore a minister to his clerical rights and functions where he has been wrongfully excluded therefrom by church authorities, if he has no temporal right in such office, and there are no fees or emoluments attached thereto and dependent on its exercise other than voluntary contributions: *Union Church v. Sanders*, 1 Houst. 100, 63 Am. Dec. 187. Every endowed minister, however, of any sect, who has been wrongfully dispossessed of his office, is entitled to a writ of mandamus to restore him to his function and temporal rights with which he has been endowed: *Runkel v. Winemiller*, 4 Har. & McH. 429, 1 Am. Dec. 411. The rule is stated in *State v. Bibb Street Church*, 84 Ala. 23, 4 South. 40, to be, that the civil courts have jurisdiction by mandamus, to restore a minister to an ecclesiastical office, from which he has been wrongfully removed, when temporal rights, such as an agreed salary, stipends, or emoluments are annexed to the office and belong to the incumbent, but, when no temporal rights are involved, the courts decline to interfere, and leave the parties to settle their disputes by the constitution and rules of their particular church or ecclesiastical organization.

A church tribunal in expelling a minister, where his civil rights are involved, must follow the rules and methods of procedure prescribed by that particular sect or denomination or its judgment will be null and void: *Wallace v. Trustees*, 201 Pa. St. 292, 50 Atl. 762; and the profession of a priest is his property, and a prohibition of the exercise of that profession by his bishop without any accusation or hearing is contrary to the law of the land and a court of equity will

interfere in his behalf: *O'Hara v. Stack*, 90 Pa. St. 477. If the organic law of the church, or ecclesiastical tribunal, has provided rules and regulations for the settlement of disputes between a minister and his congregation, or the church trustees who have control of the property, the civil courts will not interfere in behalf of an expelled minister by mandamus until there has been a final decision by the highest and proper church authorities: *State v. Bibb Street Church*, 84 Ala. 23, 4 South. 40; *German Reformed Church v. Commonwealth*, 3 Pa. St. 282.

A court of equity has no power to remove a pastor from his church and exclude him from his office; and it will not interfere by injunction to eject him from his church and forbid his preaching therein, when he has been placed in the office of clergyman of the church regularly and he is not interfering with the rights of another minister, or creating a disturbance: *Robertson v. Bullions*, 9 Barb. 64; *Youngs v. Ransom*, 31 Barb. 49. Nor will equity interfere to prevent a church tribunal from trying charges against a minister for alleged misconduct, and the fact that the commission issued by the bishop appointing a person was irregularly issued does not affect the jurisdiction of the ecclesiastical court, as it has exclusive jurisdiction of such matters. Nor is such court bound by the rules of law regarding the challenge of jurors, and if there is no right of property involved except clerical office or salary, the spiritual court is the exclusive judge of its own jurisdiction: *Chase v. Cheney*, 58 Ill. 509, 11 Am. Rep. 95.

## II. Jurisdiction When Property or Civil Rights Involved.

In considering whether or not civil courts will entertain jurisdiction over church matters or church disputes and as between warring factions, it must always be borne in mind that if no property rights are involved a civil court has no jurisdiction to interfere to quell religious disturbances. Over the church as such the legal tribunals do not have, nor profess to have, any jurisdiction whatever except when rights of property or civil rights are involved: *Ferraria v. Vasconcellos*, 31 Ill. 25; *Papalio v. Manusos*, 108 Ill. App. 272; *Grimes v. Harmon*, 35 Ind. 201, 9 Am. Rep. 690; *Bird v. St. Mark's Church*, 62 Iowa, 568, 17 N. W. 747; *Watson v. Garvin*, 54 Mo. 354. The rules which generally govern in such cases are clearly stated in *White Lick Friends v. White Lick Friends*, 89 Ind. 136, to be that civil courts in this country have no ecclesiastical jurisdiction. They cannot revise or question ordinary acts of church discipline and can only interfere in church controversies when civil rights or rights of property are involved. Civil courts act upon the theory that the ecclesiastical courts are the best judges of merely ecclesiastical questions, and of all matters which concern the doctrines and discipline of the respective denominations to which they belong, and that when a person becomes a member of a church, he becomes so upon condition of submission to its ecclesiastical jurisdiction, and however



much he may be dissatisfied with the exercise of that jurisdiction, he has no right to revoke the supervisory power of a civil court so long as none of his civil rights are involved. When a civil right depends upon some matter pertaining to ecclesiastical affairs the civil tribunal tries the civil right, and nothing more, taking the ecclesiastical decision out of which the civil right has arisen as it finds it, and accepts that decision as a matter adjudicated by another jurisdiction. Thus, if a schism occurs in an ecclesiastical organization, which leads to a separation into distinct and conflicting bodies, the respective claims of such bodies to the control of the property belonging to the organization must be determined by the ecclesiastical law, usages, customs, principles and practices accepted and adopted by the organization before the division took place: *White Lick Friends v. White Lick Friends*, 89 Ind. 136. The courts of this country have no ecclesiastical jurisdiction, and do not decide questions of ecclesiastical law, except when such law becomes a fact upon which the property rights of religious societies, corporations, or churches depend: *Smith v. Pedigo*, 145 Ind. 362, 33 N. E. 777, 44 N. E. 363, 19 L. R. A. 433; *Fullbright v. Higginbotham*, 133 Mo. 668, 34 S. W. 875. Civil courts never assume to determine the abstract truth or falsity of any religious doctrine. The most they can do is, when property rights are dependent on adherence to, or the teaching of, a particular doctrine, to examine what as a fact such doctrine is, and whether as a fact, the particular person or persons adhere to or teach it: *Trustees of Lutheran Church v. Halvorson*, 42 Minn. 503, 44 N. W. 663. The power of the civil courts to adjudicate property disputes between warring church factions is limited to an examination of the rules of the church organization for the purpose of ascertaining the church law, and if that is not in conflict with the law of the land, all they can do is to protect the rights of the parties under the law which they have made for themselves: *Long v. Harvey*, 177 Pa. St. 473, 55 Am. St. Rep. 733, 35 Atl. 869, 34 L. R. A. 169. And it is a general rule that if the right of property in the civil court is dependent on the question of doctrine, discipline, ecclesiastical law, or church government, and that question has been decided by the highest church tribunal within the organization to which it belongs, the civil court will adopt such decision as conclusive, and be governed by it in its application to the case before it: *Watson v. Jones*, 13 Wall. 680; *Gaff v. Greer*, 88 Ind. 122, 45 Am. Rep. 449; *Trustees of Lutheran Church v. Halvorson*, 42 Minn. 503, 44 N. W. 663. In the ascertainment of the rights of property devoted to church purposes as between contending factions, the civil courts will give effect to the usages and regulations of the church itself, if not inconsistent with the constitution and laws of the land: *Prickett v. Wells*, 117 Mo. 502, 24 S. W. 52; and if the membership of a church is divided into factions, each claiming to be the true church, civil courts have jurisdiction to determine that the title to the church property is in that faction, even though it be the minority,

which is acting in harmony with the doctrine and practices which were accepted and adopted by the church before the division took place: *Ferraria v. Vasconcellos*, 31 Ill. 25; *Smith v. Pedigo*, 145 Ind. 362, 33 N. E. 777, 44 N. E. 363, 19 L. R. A. 433; *Gibson v. Armstrong*, 7 B. Mon. 491; *Canadian Assn. v. Parmenter*, 180 Mass. 415, 62 N. E. 740; *Mount Helm Baptist Church v. Jones*, 79 Miss. 488, 30 South. 714; *Hendrickson v. Shotwell*, 1 N. J. Eq. 577; *Schlichter v. Keiter*, 156 Pa. St. 119, 27 Atl. 45, 22 L. R. A. 161; *Kisor's Appeal*, 62 Pa. St. 428; *Gipson v. Morris*, 28 Tex. Civ. App. 555, 67 S. W. 433. Civil courts have jurisdiction over controverted claims to the use of church property and while the general desire of such courts is to avoid ecclesiastical or spiritual questions, they find it impossible wholly to do so. If a body of men have wrongful possession of a church or of a sum of money, on the pretense for example, that they are the religious body to which the building or the money belongs and was destined, their opponents have no way of redressing the wrong and vindicating their own rights, except by appealing to the civil tribunals of the country, and such tribunals have no means of doing justice except by investigating into the differences of doctrine, discipline, or practice, which, to the litigants, may be religious differences, but to the judge are mere matters of fact bearing upon a civil right: *Gartin v. Penick*, 5 Bush, 110. If the members of a church organization are nearly equally divided by irreconcilable differences in matters of faith and doctrine regarded vitally essential to each faction, and neither has forfeited the right to the church property under the constitution of the church, a court of equity may decree a sale of the church property and a division of the proceeds among the members of the church composing the opposing factions: *Immanuel Gemeinde v. Keil*, 61 Kan. 65, 58 Pac. 973. When rights of property are in question, civil courts will inquire whether or not the organic rules and forms of proceeding prescribed by the ecclesiastical body have been followed, and if it is found that the proceedings of the ecclesiastical tribunal were without jurisdiction, they must be held void in so far as they necessarily and directly involve property rights: *Pounder v. Ashe*, 36 Neb. 564, 54 N. W. 847.

In a contest between different church factions to determine which has the title or is entitled to possession of church property, if it appears that the title thereto was acquired by trustees for the use of the church, and not dedicated to the propagation of any particular religious dogma, and such church is an independent organization not subject to superior supervision or control, the court has no right to determine that the faction adhering to the doctrine of faith adopted at the time of the establishment of the church is "the church, and entitled to the property. Courts should not, in such cases, attempt to adjudicate ecclesiastical questions, but should award the possession of the property to the legal board of trustees in whom the title is vested": *Fork v. First Baptist Church* (Tex. Civ. App.), 55 S. W. 402.

If the rights of a faction of a church to control its property or records are mainly dependent upon matters of religious doctrine, as to which the disputing factions entertain adverse views, civil courts should generally decline to interfere: *Moseman v. Heitshusen*, 50 Neb. 420, 69 N. W. 957; and civil courts have no right to institute an inquiry into the doctrines or modes of worship of any religious society, except when such inquiry becomes absolutely necessary for the protection of the property rights of the members of the regular church: *German Lutheran Church v. Maschop*, 10 N. J. Eq. 57; *Livingston v. Rector of Trinity Church*, 45 N. J. L. 230; *Field v. Field*, 9 Wend. 394. It is not within the province of civil courts to determine mere questions of faith, doctrine, or schism, not necessarily involved in the enforcement of an ascertained trust, and, to call for equitable interference, there must be such a real and substantial departure from the designated faith or doctrine as will be in contravention of such trust or the rights to church property: *Fadness v. Braunborg*, 73 Wis. 258, 41 N. W. 84. In case of a disagreement and factional fight between members of the same church, both parties must first exhaust all remedies afforded by the ecclesiastical body before the courts of civil justice will consider the property questions involved: *Buettner v. Frazer*, 100 Mich. 179, 58 N. W. 834. The question of the jurisdiction of the civil courts over the affairs of religious societies when property rights are involved, is treated extensively and thoroughly in the note to *Kearus v. Howley*, 68 Am. St. Rep. 864-868.

a. **Jurisdiction of Equity Over Church Trusts.**—Equity has complete jurisdiction to prevent an abuse or misapplication of a trust of a religious nature, and will always protect religious organizations in what they hold, in order to sustain trusts, because of their charitable uses which would otherwise be held void; and the remedy by injunction is peculiarly adapted to this purpose: *Hundley v. Collins*, 151 Ala. 234, 90 Am. St. Rep. 33, 32 South. 575; *Perry v. McEwen*, 22 Ind. 440; *Tomlin v. Blunt*, 31 Ill. App. 234; *Mt. Zion Baptist Church v. Whitmore*, 83 Iowa, 138, 49 N. W. 81, 13 L. R. A. 198; *Fisher v. Ellis*, 3 Pick. 322; *Weld v. May*, 9 Cush. 181; *Curd v. Wallace*, 7 Dana, 190, 32 Am. Dec. 85. Courts of equity will exert their powers to prevent a misuse or abuse of a trust of a religious nature by trustees or by a majority of a society having possession of the trust property; but in all cases the trust and the abuse of it must be clearly established in accordance with the rules by which courts are governed in administering justice: *Happy v. Morton*, 33 Ill. 398. There must be a real substantial departure from the purposes of the trust, such a one as amounts to a perversion of it, to authorize the exercise of equitable jurisdiction in granting relief: *Lawson v. Kolbenson*, 61 Ill. 407. Church property vested in a religious body or in its trustees, is held under a trust, and a court of equity will enforce it and hold the trust property to the uses for which it was originally given, but it will not lend its aid to divert the property

from the original uses and purposes to which it was devoted: *Nelson v. Benson*, 69 Ill. 28. It is not in the province of courts of justice to decide or to inquire what system of religious faith is most consistent, or what religious doctrines are true or what false, in any case, and it seldom becomes necessary for courts to discuss or to examine the creeds, or confessions, or systems of faith of the different religious sects, in determining questions of law, except in cases where they are called upon to see that a trust or charity is administered according to the intention of the original founders: *Hale v. Everett*, 53 N. H. 11, 16 Am. Rep. 82. A court of chancery has jurisdiction to prevent a diversion of the temporalities of a church from the purposes for which they were devoted by the donors or the founders of that particular church, and to require them to be appropriated to the support of that form of worship, and to the teaching of those doctrines for which they were originally intended. The intervention of the court for this purpose may be invoked by a faithful minority against a heretical majority, or the reverse: *Whitecar v. Michenor*, 37 N. J. Eq. 6; *Gable v. Miller*, 10 Paige, 627; *Gass' Appeal*, 73 Pa. St. 39, 13 Am. Rep. 726; *Nance v. Busby*, 91 Tenn. 303, 18 S. W. 874, 15 L. R. A. 801. Those members of a church which have adhered to its original doctrines, who have continued their ecclesiastical connection with the church and who have kept up a proper corporate organization, are entitled to the temporalities of the church, as against seceders: *Gable v. Miller*, 10 Paige, 627; and to settle the rights of contending factions of an unincorporated church society to the use of the church property, an injunction will lie at the instance of the faction showing itself to be entitled to the property, by its recognition of the authority of the regular organization: *Fulbright v. Higginbotham*, 133 Mo. 668, 34 S. W. 875; *Brundage v. Deardorf*, 92 Fed. 214. The majority of the whole members of a particular church cannot divert the use of its property to the promulgation of doctrines different from the faith for the advancement of which the church was organized; and a court of equity will interfere, by injunction, to protect the minority, in having the trust property applied in accord with the original intent: *Mt. Zion Baptist Church v. Whitmore*, 83 Iowa, 138, 49 N. W. 81, 15 L. R. A. 198; *Kuiskern v. Lutheran Churches*, 1 Sand. Ch. 439; *Miller v. Gable*, 2 Denio, 492; *Bowden v. McLeod*, 1 Edw. Ch. 588. A "schism" or "faction" in a church society which will justify the intervention of a court of equity over property rights, means a division or separation of the members of the body, occasioned by a diversity of opinion on religious subjects, into separate bodies, and there must be a separate organization on the part of one faction in order to claim the intervention of equity, and this cannot be claimed by the faction which seeks to divert the church property from the uses for which it was originally intended. Hence, a difficulty growing out of an illegal election of trustees by a majority, and then excluding the minority from the use of the church, is not such a "schism" as



justifies a court of equity in interfering with the church property: *Nelson v. Benson*, 69 Ill. 28. Controversies in the civil courts concerning property rights of religious societies are generally to be decided by reference to one or more of three propositions, namely, Was the property or fund which is in question, devoted by the express terms of the gift, grant, or sale, by which it was acquired, to the support of any specific religious doctrine or belief, or was it acquired for the general use of the society for religious purposes with no other limitation? Or is the society owning it of the strictly congregational or independent form of church government, owing no submission to any organization outside the congregation? Or is it one of a number of such societies, united to form a more general body of churches, with ecclesiastical control in the general association over the members and societies of which it is composed? In the first class of cases the court will, when necessary to protect the trust to which the property has been devoted, inquire into the religious belief, faith, or practice of the parties claiming its use and control, and will see that it shall not be diverted from that trust. If the property was acquired in the ordinary way of purchase or gift, for the use of a religious society, the court will inquire who constitute the society, or its legitimate successors, and award to them the use of the property. In case of the independent order of the congregation, this is to be determined by the majority of the society, or by such organization of the society as by its own rules constitute its government. In the class of cases in which property has been acquired in the same way by a society which constitutes a subordinate part of a general religious organization with established tribunals for ecclesiastical government, these tribunals must decide all questions of faith, discipline, etc., and such decision, as made by its highest tribunal, is conclusive on the court and governs it in its application to the case before it: *Watson v. Jones*, 13 Wall. 680.

**b. Jurisdiction Over Church Trustees.**—The discretion of church trustees as to the distribution of a trust fund for their church, so long as it is honestly exercised, will not be interfered with by the courts of equity, but if there is a positive transgression, or if the fund is continually applied in such manner as to lead to the conviction that the selfishness of the trustees, rather than the design of the founder of the charity, has become the rule of appropriation, or if it is manifest that their discretion is not honestly exercised, it becomes the duty of the court to interfere and correct the abuse: *Pulpress v. African Methodist Church*, 48 Pa. St. 204. If a fund is in the hands of a trustee for the benefit of a church, a bill will lie to compel such trustee to apply the fund to the purpose for which the trust was created: *Miller v. Gable*, 2 Denio, 492; *Wilson v. Presbyterian Church*, 2 Rich. Eq. 192. And it is no defense to such bill that the deviation from the faith and doctrine to which the property was devoted by the donor is sanctioned by a majority of the church or congregation, who through trustees chosen by them are

administering the trust according to their views. Such bill, in a case of a clear violation of the trust, may be maintained by the minority remaining in the faith against the majority who are seceders: *Miller v. Gable*, 2 Denio, 492.

If the trustees of a religious society perform any act which obstructs the enjoyment of the property for the purposes and in the mode authorized by the donation or the usages of the church as an organization, they are guilty of a violation of trust, warranting equitable interference, and a trust of this character is not distinguishable in this respect from any other trust over which courts of chancery exercise a supervisory power: *Brunnenmeyer v. Buhre*, 32 Ill. 185; *Isham v. Fullager*, 14 Abb. N. C. 363. Equity will not permit a perversion of trust property given to a church for the support of some particular creed or dogma, so long as there are agencies within the dedication to carry out the uses intended, and if church trustees holding its property are claimed to have been illegally elected by a withdrawing faction of the church and to be holding such property in perversion of the trust, equity has jurisdiction of a suit by trustees claiming to be the legal representatives of the church to enjoin the other trustees from exercising further authority over the property: *Brundage v. Deardorf*, 92 Fed. 214. Trustees of a religious society may be restrained by a court of equity from wasting the property of the society, and from such management of it as unreasonably and unconscientiously deprives the society or some part of it, of the enjoyment thereof, and they may also be restrained from applying such property to the promotion of tenets clearly opposed to the fundamental principles of the faith and doctrines professed by such society, at the time it acquired the property. The exercise of such jurisdiction should be, however, restrictive and not mandatory: *Robertson v. Bullions*, 9 Barb. 64.

If a society of a particular sect or denomination is formed, the trustees having control of the property held in trust for the benefit of such society may be restrained from applying the property, or the use of it, to the promotion of religious tenets and doctrines clearly opposed and adverse to the fundamental doctrines and faith of such sect or denomination, at the time, and immediately after such trust was formed: *Hale v. Everett*, 53 N. H. 11, 16 Am. Rep. 82. Equity will resort to original and long-continued application of a religious charity by the trustees for aid in giving construction to doubtful terms in the instrument creating the trust, and if the original trustees appointed by the founder of the trust applied the fund to the support of certain religious doctrines, and that application has been long continued, and acquiesced in by the founder of the trust, a court of equity will not allow such application to be changed or interfered with, unless such change is clearly required by the plainly expressed intention of the donor: *Attorney General v. Town of Dublin*, 38 N. H. 459; *Hale v. Everett*, 53 N. H. 11, 16 Am. Rep. 82. A minority of the trustees of a religious association may main-

tain suit to enjoin the majority of the trustees from diverting the church property from the uses of the trust for which it was created: *First Presbyterian Church v. Bowden*, 10 Abb. N. C. 1. Although the title of rival claimants to the office of trustee of a religious society cannot be determined in an equitable action brought by one set of claimants against another, yet an equitable action may be brought by persons claiming to be the legal trustees, and so recognized by the society, to restrain persons claiming to be the elected trustees, from forcibly divesting the plaintiffs of their possession of the church property, and from interfering with them while acting as trustees, and also restraining the defendants from acting as trustees: *Reis v. Rohde*, 34 Hun, 161; *Trustees of German Evangelical Congregation v. Hoessli*, 13 Wis. 389; *Lutheran etc. Church v. Gristgan*, 34 Wis. 328.

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## POLATTY v. CHARLESTON AND WESTERN CAROLINA RAILWAY COMPANY.

[67 S. C. 391, 45 S. E. 932.]

**MASTER AND SERVANT.**—A Master is Responsible for Willful Acts of His Employé within the scope of his duty or the line of his employment. (p. 752.)

**PRINCIPAL AND AGENT.**—Presumption as to Power of Agent.—Third persons have the right to assume that when they find an agent in possession of the principal's property, managing it, that such possession and management by the agent are by permission of the principal, and in case of injury, need only show his tortious act, but not his authority to act. (pp. 752, 753.)

**RAILROADS.**—Ejection of Trespassers.—A trespasser can be lawfully ejected from a railroad train only after such train is brought to a standstill. (p. 753.)

**RAILROADS.**—Liability for Injury to Trespasser.—A railway company is liable to a trespasser upon its passenger train stricken with such force by its agents thereon with rocks, pieces of coal, or sticks, as to cause such trespasser to fall from its moving cars, thereby receiving great bodily hurt. (p. 754.)

**RAILWAYS.**—Trespassers—Authority of Engineer—Liability for His Tort.—An engineer on a railroad train is deemed to have been invested by the company with power to preserve order and expel intruders and trespassers from his engine, cow-catcher, tender and the platform adjoining it, with a view actually to protect the property confided to him by such company; and it is liable for his tort in unlawfully expelling such trespasser. (p. 754.)

**MASTER AND SERVANT.**—Questions of fact must be solved by the jury, under proper instructions, as to what in law is meant by the expression, acting "within the scope or line of his employment," as applied to a servant. (p. 755.)

Simpson & Cooper, for the appellant.

Evans & Finley and Ferguson & Featherstone, for the appellee.

**393** POPE, C. J. This was an action for damages for personal injuries. At the conclusion of plaintiff's testimony, defendant moved for a nonsuit, which motion was denied by the circuit judge. Upon the testimony and the charge of the judge, the jury returned a verdict in favor of plaintiff. After judgment, defendant appealed upon the ground of alleged error of the circuit judge in refusing motion for nonsuit. It becomes necessary, therefore, to direct our inquiry to this alleged error. The grounds of appeal are as follows:

"1. Because the circuit judge erred in not holding on the motion for nonsuit at the conclusion of the plaintiff's case that there was no evidence tending to show that the acts of which the plaintiff complained were within the scope of duty of the engineer of the defendant company, and that the defendant was not bound thereby, and in not, therefore, granting the motion for nonsuit.

"2. Because the circuit judge erred in not holding that the evidence adduced by the plaintiff shows 'that the act or acts of the engineer of the defendant company of which the plaintiff complained were outside of and beyond the scope of the authority and employment of such engineer, and that defendant was not bound thereby, and in not, therefore, granting the motion for nonsuit.'"

It is proper at this juncture to state in brief the facts underlying plaintiff's action, and as stated by the respondent in his argument, they are as follows: "This was an action brought by Everett Polatty, through his guardian ad litem, W. M. Polatty, for damages against the Charleston and **394** Western Carolina Railroad Company, for willful and wanton assault upon his person while on its train, under the following circumstances: Polatty was a young man, an operative in the cotton-mill at Gaffney, South Carolina. He received information that his mother was ill, and, being out of funds, attempted to travel from Gaffney to Warrentonville, in Aiken county, where his father, postmaster at that place, and sick mother were living. He succeeded in getting as far as Laurens through the kindness of the railway conductor, who allowed him to ride from Enoree to Laurens free of charge, at which point the train of the generous conductor stopped. He boarded at Laurens the regular passenger train bound for Augusta, Georgia. He got as far as Waterloo, the next station beyond Laurens, where he got off the train. He boarded the same train again, getting on the platform on the front end, or blind end, as it is called, of the mail-car, next



to the engine. The mail-car had no door at this end, hence its name, 'blind end.' The engineer and fireman saw him standing on the platform just in the rear of the tender of the engine, and while the train was running at the rate of about ten miles an hour, commenced hollering at him to get off; upon his failure to do so, the engineer commenced throwing coal at him. He struck him with a lump of coal in the small of the back, causing him to loose his hold and fall from the car to the ground, thereby dislocating his ankle, and requiring the expenditure of money in doctor's bills for a period of nearly six months. His escape from death was miraculous, and it was through no fault of the engineer or servants of the railway company that he was not killed. The case was tried at Laurens, before Judge Buchanan and a jury. The jury promptly rendered a verdict for fifteen hundred dollars in favor of plaintiff, from which the defendant appeals to this court."

We have been saved reproducing in this opinion very many citations of authority in order to establish the principle of law that the master is responsible for willful acts of his employé when such are within the scope of his duty or the line of his employment, by the following <sup>395</sup> admission of the appellant: "Whatever the rule may have heretofore been in this state, it is now established law that the master is responsible for willful acts of his employé when such acts are within the line of his employment"; but along with that admission the appellant contends that it was the duty of the plaintiff to have offered testimony going to show that defendant's servant, the engineer, was authorized by his principal to do the act complained of, or that the act complained of was in the line of duty of the servant, the engineer. It is necessary to draw the distinction as to the law governing the relation between the principal and the agent as between themselves and that of the principal and his agent on the one hand, and third persons on the other. Of the latter class of cases, it must be remembered that third persons have the right to assume that when they find an agent in possession of the principal's property, managing the same, such possession and management by the agent or servant is by permission of the principal or master. For instance, a passenger finding a man in the uniform of the conductor in possession and control of a passenger coach on a railway would have the right to assume that he was such conductor, and in the event such conductor was guilty of a tortious act to the injury of a passenger, such passenger would have a right of action against such railway,

because of the tortious act of said conductor while in charge of such train, and that to sustain such passenger's action, he would be required to prove the conduct of such conductor, and not to prove the conductor's authority to control the train on which the passenger was riding, when he was assaulted by the conductor. It would devolve upon the railway to give proofs that the conductor was not in fact in his employ, or any other defense that such railway might have. Not so would be the consequences by a servant against its master. The presumption in such case would be in favor of a master, that his servants were properly selected and his machinery sufficient. In other words, the servant would have to allege and prove *prima facie* that the servants of the master were illy chosen <sup>396</sup> or that his machinery was defective. It may be replied, however, that we have illustrated our meaning by the case of a passenger as a third person, but this need not give any concern, for a railway owes to everyone on its moving passenger trains, whether passenger or trespasser, a duty. A railway can only properly discharge a passenger after its train is brought to a standstill, and it can only properly discharge a trespasser upon its train when the same is brought to a standstill. Certain it is that it is not in the power of a railway to have trespassers upon its passenger trains so stricken by its agents with rocks, or pieces of coal, or sticks—stricken with such force that they (the trespassers) shall fall from the cars, receiving thereby grievous bodily hurt, If it was made necessary that a trespasser who was stricken by a servant of the railway, which engaged in the performance of his duties on a passenger train, and while actually so employed on said train should, by testimony, show that the servant who struck him was commissioned by the railway to do specific duties, and that amongst his duties was included that which authorized him to strike him, it would be a sad day to persons who had lost all means of travel on the railroads.

However, it is contended here that only a conductor would have the duty of removing trespassers from passenger trains—that it was not in the line of employment of an engineer to throw rocks or stones at a trespasser, or, to place it more mildly, that an engineer would not find it in the line of his employment to require a trespasser upon his cowcatcher, or in his cab, or in the tender to his engine, or on the platform at the blind end of a mail coach, after coming to a full stop, to leave the same. Such is not the law. In one of the authorities cited by appellant, *Carter v. Louisville etc. R. R. Co.*, 98 Ind. 552, 49 Am.

Rep. 780, it is decided that the master—the railroad company—would be liable if his engineer, while on his engine, threw off a trespasser while on the engine, and injured such trespasser thereby. Must an engineer stop and think what his <sup>397</sup> powers of interference may be with trespassers riding on the cowcatcher of his engine, his tender, or the platform near his engine, who were engaged or may be engaged in doing an injury to the machinery of the master, which machinery is placed by the master under his charge? The case last cited held that the engineer could throw out and off of his engine a trespasser while on the engine. The cowcatcher is a part of the engine, the tender thereto attached is a part thereto, and no great care will be taken to differentiate the case of a trespasser upon the platform next to the tender of the engine and a trespasser upon the engine itself. We must not be understood as holding that an engineer is invested by the railway company with powers coextensive with those intrusted to a conductor, or that the powers of an engineer collide with those of a conductor. What we do hold is that, ex necessitate, an engineer must be intended to have been clothed by his principal—the railway company—with power to preserve order and expel intruders and trespassers from his engine, cowcatcher, tender and the platform adjoining the same, with a view actually to protect the property confided to him by his principal.

Then, if this be so, how far does this power extend as to trespassers? We answer: Coequal with that of his principal in this matter. When, therefore, a tort is committed by an engineer while in the employment of a railway company, as we have just announced them as affecting trespassers, the principal of the engineer is liable for such torts. If, therefore, such engineer should have thrown coal so as to strike the person of a trespasser with such violence as to cause such trespasser to fall from a moving train, whereby such trespasser received such grievous bodily hurt, then the master would be held liable therefor.

Other reasons why the circuit judge could not have properly granted the motion for a nonsuit in this action was this: (a) Defendant went to trial upon the plaintiff's complaint in the form presented by him. Then, testimony was admissible to prove the allegations of the complaint, <sup>398</sup> without any objection as to the relevancy of such testimony. There was some testimony, therefore, upon such allegations of the complaint, and it was not in his power to grant a nonsuit; (b) and this:

When it was proved in the testimony offered by the plaintiff that the engineer, as the servant of the railway company, was in charge of the engine propelling this train, and that while in the discharge of his duties as such engineer he threw the three pieces of coal from his engine at the plaintiff, one of which struck the plaintiff, causing him to fall off said train and thereby injuring him grievously, there arose this question of fact: Was the conduct of such engineer within the scope of his employment as such engineer? Questions of fact must be solved by the jury, under the instructions by the court, as to what in law was meant by the expression, "within the scope or line of his employment." This question was solved by this court in the case of *Redding v. South Carolina R. R. Co.*, 3 S. C. 9, 16 Am. Rep. 681, where it was said: "When, however, the circuit judge assumed to decide that 'Wollen was not acting within the scope of any engagement or agency, direct or indirect, when he excluded the plaintiff' (Mrs. Redding) 'from the saloon, but was acting without authority, beyond his legitimate employment, and in violation of the instructions and wishes of the defendant, extended to its proper agents, and that upon the testimony the act was the tort of Charles Wollen, for which he is responsible, and not the company,' he undertook to decide an issue which properly belonged to the jury."

We have not deemed it necessary to reproduce by citation the many authorities quoted by the attorneys of the respective litigants here. We have considered them all. Our views are intended to cover all the questions therein discussed. Both grounds of appeal are overruled.

It is the judgment of this court, that the judgment of the circuit court is hereby affirmed.

WOODS, J., concurring. The question whether <sup>399</sup> a railroad company, as a matter of law, must bring its train to a standstill before ejecting a trespasser, is not necessarily involved in this case, and we express no opinion regarding it. For this reason, we concur in the result only.

JONES, J., concurring. I concur in the result, for the reason herein stated by Mr. Justice Woods.

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*A Railroad Company* is liable for damages sustained by a trespasser in being expelled in a reckless or wanton manner from a train: *McKeon v. New York etc. R. R. Co.*, 183 Mass. 271, 97 Am. St. Rep. 437, 67 N. E. 329. For the application of this rule to cases where an engineer expels trespassers from his locomotive, see *Carter v. Louisville etc. Ry. Co.*, 98 Ind. 552, 49 Am. Rep. 780; *Galveston*



etc. Ry. Co. v. Zantzinger, 92 Tex. 365, 71 Am. St. Rep. 859, 48 S. W. 563; 93 Tex. 64, 77 Am. St. Rep. 829, 53 S. W. 379, 47 L. R. A. 282. If a trespassing child, frightened by the threatening acts of a brakeman, jumps from a rapidly moving train, he may recover for injuries thereby sustained: Enright v. Pittsburg etc. R. R. Co., 198 Pa. St. 166, 82 Am. St. Rep. 795, 47 Atl. 938, 53 L. R. A. 330. But it is not necessary, according to Bolin v. Chicago etc. Ry. Co., 108 Wis. 333, 81 Am. St. Rep. 911, 84 N. W. 446, under all circumstances, for a railway company to stop its train before ridding it of willful trespassers.

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## BROWN v. CAROLINA MIDLAND RAILWAY.

[67 S. C. 481, 46 S. E. 283.]

**RAILROADS—Pleadings—Communicated Fires.**—A complaint alleging that the defendant railroad company, "whose depot was situated on its right of way, allowed fire to remain in or so near to such depot building that the same caught or took fire," and it was thereby communicated to plaintiff's property, states a cause of action in compliance with statutory requirements. (p. 759.)

**RAILROADS—Liability for Fires.**—A railroad company heating its depot building for the comfort of its agents is liable to a third person for fire communicated to his property and arising from such heating. (p. 760.)

**RAILROADS—Liability for Fires—Constitutional Law.**—A statute making railroad companies liable for communicated fires, as construed to apply to a fire communicated and arising from heating a depot building by a railroad company for the comfort of its agents, is not unconstitutional as depriving such company of the equal protection of the law. (p. 760.)

**RAILROADS—Communicated Fires—Evidence.**—Under an allegation that a fire on the property of a third person was caused and communicated by a fire in a railroad depot building, it is competent to show that the fire was caused by a defective stove or heater used in such depot. (p. 761.)

**RAILROADS—Communicated Fires—Evidence as to Right of Way.**—In an action against a railroad company to recover for injury from a fire arising on and communicated from its right of way, parol evidence is admissible to show that certain lands constituted such right of way. (p. 761.)

**EVIDENCE—Admission of.**—Defendant cannot complain of error in admitting evidence, when he subsequently introduces the same kind of testimony which he insists should have been introduced by the plaintiff. (p. 761.)

**RAILROADS—Communicated Fires—Construction of Statute.** The words "right of way" used in a statute making railroads liable for fires communicated from their right of way, have no reference to the title of the railroad company to the land, but simply designates the locality where the fire must originate to make the company liable. (p. 762.)

**APPEAL.**—Judgments Resting on Correct Conclusions will not be reversed because based on erroneous reasons. (p. 763.)

R. Aldrich, Izlar Brothers and Bellinger & Townsend, for the appellant.

Davis & Best, R. C. Holman, J. C. Patterson and W. A. Holman, for the appellee.

**482** GARY, J. The nature of this action being in dispute, it will be necessary to refer to the complaint.

Paragraph 1 of the complaint alleges the corporate existence of the defendant.

Paragraph 2 alleges that as such corporation it owns cars and engines, and operates its said railroad through the county of Barnwell.

The other allegations of the complaint are as follows:

"3. That on or about the ninth day of January, A. D. 1899, the plaintiff was the owner of valuable buildings, known as the Brown Cotton and Manufacturing Company, . . . in the aggregate value of ten thousand dollars.

"4. That on the night of the 10th or the early morning of the 11th (about 1 o'clock A. M.) of January, A. D. 1899, as hereinbefore alleged, the defendant corporation, whose depot was situated on its right of way, near its line of road, and the plaintiff's buildings and other property, as aforesaid, **483** being situated a like distance therefrom (to wit, five or six feet), allowed fire to remain in or so near said depot building that the same caught or took fire, communicating same to plaintiff's buildings, as hereinbefore alleged, completely destroying them, together with the corn-mill outfit, cylindrical cotton-press outfit, cotton-ginnery, gins, feeders, condensers, fans shaftings, conveyers and pulleys. That said fire also destroyed the cotton, corn, cotton-seed, cans and cases, engines and boilers, shaftings and pulleys, and each and every article as enumerated in the third paragraph of this complaint.

"5. That among other things it was the duty of the defendant company to retain a night watchman at and around said depot (at night), to prevent such conflagrations as herein complained of, which they failed (negligently) so to do.

"6. That said fire would not have occurred but for defendant's carelessness and negligence in allowing the same to remain in their stove or heater in said depot, and other fire to remain near or about said depot; and the plaintiff further charges that said defendant allowed a box-car to stand between their depot and plaintiff's buildings in a dangerous condition, to wit, a hot box being thereto attached; all of which facts were

well known, or should have been known, to said defendant, and, by reason of the aforesaid facts, the defendant has damaged the plaintiff (\$10,000) ten thousand dollars."

The answer of the defendant denied the allegations of the complaint, and set up the defense of contributory negligence.

The jury rendered a verdict in favor of the plaintiff.

The defendant appealed upon exceptions which will be considered in their regular order.

The first exception is as follows: "1. That his honor, the circuit judge, erred in holding that the amended complaint stated a cause of action under the statute (Gen. Stats. 1882, sec. 1511; Rev. Stats. 1893, sec. 484 1688; Code of Laws of 1902, sec. 2135): (a) In that the said complaint does not allege that the fire originated within the limits of the right of way of the defendant corporation. The allegations merely being that the defendant 'allowed fire to remain in or near (its) depot building.' (b) In that said complaint does not allege that the fire 'originated in consequence of the act of any of the defendant's authorized agents or employes.' (c) In that the statute does not render railroad corporations liable, without regard to negligence, for fires originating in depot buildings situate on their right of way, from fire allowed to remain therein, unless such fire was used in such building for a purpose peculiar to the business of a railroad, and other than for ordinary heating purposes. (d) In that the said complaint does not allege that fire was allowed to remain within the limits of the right of way other than in the depot building which was situate thereon, and in holding that under the statute a cause of action is stated by the allegation that defendant allowed fire to remain in a depot building, on its right of way, which became communicated to plaintiff's buildings, his honor, the circuit judge, deprived the defendant of the equal protection of the laws, and held it to an unconditional liability for the use of property in a manner similar or identical with such use by other persons, without regard to negligence or care, in violation of section 1 of article 14 of amendments to the constitution of the United States, and of section 5 of article 1 of the constitution of this state, and of section 12 of article 1 of the constitution of 1868. (e) In that the construction placed by the circuit judge on the statute deprives the defendant of equal protection under the laws, and subjects them to an unconditional liability, without regard to negligence or care, for the use of property in a manner similar or identical with such use

by other persons, and subjects defendant to other restraints in regard to their use of their property than such as are laid upon others under like circumstances, in violation of section 1 of article 14 of amendments to the constitution of the <sup>485</sup> United States, and of section 5 of article 1 of the constitution of this state, and of section 12 of article 1 of the constitution of 1868; whereas, such statute should have been construed in conformity with said provisions of the United States constitution, and of the constitution of this state, to apply only to fires 'communicated by its locomotive engine, or originating within the limits of the right of way of said road, in consequence of the act of any of its authorized agents or employes' in the use of fire, for the purposes peculiar to a railroad."

The first assignment of error on the part of his honor, the circuit judge, in ruling that the complaint stated a cause of action under the statute, is set out in "(a)." The statute is as follows: "Every railroad corporation shall be responsible in damage to any person or corporation whose buildings or other property may be injured by fire communicated by its locomotive engines, or originating within the limits of the right of way of said road in consequence of the act of any of its authorized agents or employes, except in any case where property shall have been placed on the right of way of such corporation unlawfully or without its consent, and shall have an insurable interest in the property upon its route for which it may be so held responsible and may procure insurance thereon in its own behalf": Code of Laws, sec. 2135. The right to bring an action at common law founded upon negligence was not superseded by the statute: *Hunter v. Columbia etc. R. R.*, 41 S. C. 90, 19 S. E. 197; *Dent v. South-bound R. R.*, 61 S. C. 329, 39 S. E. 527. The allegations appropriate to an action under the statutes are set out in the fourth paragraph of the complaint, and those appropriate to an action at common law are alleged in the sixth paragraph. It is true the complaint does not follow the exact language of the statute, but it does not allege that the defendant, whose depot was situated on its right of way, allowed fire to remain in or so near said depot building that the same caught or took fire. The allegations of the complaint <sup>486</sup> were in this respect a substantial compliance with the requirements of the statute.

The second assignment of errors will be found in "(b)." While again the complaint does not use the very words of the statute, it nevertheless alleges that the fire originated in



consequence of the act of the defendant, and this is equivalent to alleging that the fire "originated in consequence of the act of any of the defendant's authorized agents or employés." The act of an authorized agent or employé is the act of the principal, *qui facit per alium facit per se*.

The third assignment of error is contained in "(c)." In the first place, the statute makes no such exception as that for which the appellant contends, and very properly so, for the use of a depot building on the right of way is as strictly a purpose peculiar to the business of a railroad, as the locomotive that draws its cars. Furthermore, the heating of a depot building may be as necessary for the health and comfort of those working within the building as the heating of a passenger car for those traveling on the train. It may properly be said that both are railroad purposes. A depot building and its proper equipment are incidental and essential to the orderly operation of a railroad.

The other assignments of error are in "(d)" and "(e)." We do not regard the constitutionality of this statute as an open question either in this state or under the decisions of the United States supreme court: *McCandless v. Richmond etc. R. R.*, 38 S. C. 103, 16 S. E. 429, 18 L. R. A. 440; *St. Louis etc. Ry. Co. v. Mathews*, 165 U. S. 1, 17 Sup. Ct. Rep. 243, 41 L. ed. 611, in which this question is ably and elaborately discussed. This last case cites the case of *McCandless v. Richmond etc. R. R.*, 38 S. C. 103, and the case of *St. Louis etc. Ry. Co. v. Mathews*, 165 U. S. 1, 17 Sup. Ct. Rep. 243, 41 L. ed. 611, is cited with approval in *Atchison etc. R. R. Co. v. Matthews*, 174 U. S. 96, 19 Sup. Ct. Rep. 609, 43 L. ed. 909.

The second exception is as follows: "2. That his honor, the circuit judge, erred in admitting testimony to show that the stove or heater, or flues leading therefrom, were <sup>487</sup> defective, no such defect being alleged in the complaint." The complaint alleged that the "fire was communicated," but does not set forth in what manner. The testimony was explanatory of this fact, and was responsive to the allegation of the complaint.

The third exception is as follows: "3. That the plaintiff having specifically alleged in the sixth paragraph of the complaint, 'that the fire would not have occurred but for defendant's allowing (1) fire to remain in the stove or heater in said depot, and (2) other fire to remain near or about said depot, and (3) a box-car to stand between the depot and plaintiff's

buildings, in a dangerous condition, to wit, a hot box being thereto attached'—he confined the issue as to the origin of the fire to the three facts alleged, and the circuit judge erred in admitting testimony to show that the stove or heater was defective, or left in a defective condition, such defect not being alleged in the pleading." In the first place, these specifications of negligence are only appropriate to an action at common law. And in the second place, this exception is disposed of by what was said in considering the second exception.

The fourth exception is as follows: "4. That his honor, the circuit judge erred in admitting parol testimony to show that the lands on which the fire occurred was a right of way of defendant's company, inasmuch as the best evidence of right of way is the record evidence of same." After a lengthy discussion of this question, the presiding judge concluded as follows: "The Court: I think, in a case like this, where the railroad company is defendant, and the allegation is that the fire occurred on the right of way, that it is competent to prove the distance of the building from the track, the manner in which the building was used, and every other relationship of it to the railroad company, and leave it to the jury to say whether or not it is on the right of way. Mr. Aldrich: Your honor rules he can prove orally the right of way? The Court: I will define to the jury what a right of way is, and leave them to say <sup>488</sup> whether or not this place, called a right of way, is a right of way. He can prove all the circumstances in connection with the use of the depot, its location, etc." In this we see no error.

But apart from this, the defendant afterward introduced in evidence the deed of the plaintiff conveying the right of way to the defendant. In the case of *Taylor v. Dominick*, 36 S. C. 368, 15 S. E. 591, the court ruled that it "is not sufficient ground to reverse the judgment, when it appears that the testimony, though erroneously ruled out at one stage of the trial, was, in fact, received and went before the jury." For a stronger reason, the judgment should not be reversed, when the defendant furnishes the kind of testimony which it insisted should have been introduced by the plaintiff, especially as the plaintiff did not dispute the accuracy of the description mentioned in the deed.

The fifth exception is as follows: "5. That his honor, the circuit judge, erred in admitting parol testimony as to the limits of the defendant's right of way, in order to show that

the fire originated within such limits." This exception is disposed of by what was said in considering the fourth exception.

The sixth exception is as follows: "6. That his honor, the circuit judge, erred in construing the deed by which Mrs. Brown conveyed the right of way to the railroad company (Exhibit 'C') in his charge to the jury, in which he gave no effect to, but ignored the portion of said deed conveying the land on which the depot was situated; whereas, he should have construed said deed to exclude said lands on which the depot was situated from the limits of the right of way." The use of the words "right of way," in this statute, has no reference to the title of the railroad company—whether having a mere easement or a greater estate—but they were intended to designate the locality within which the corporation would be liable under the statute.

The seventh exception is as follows: "7. That his honor, <sup>489</sup> the circuit judge, erred in refusing to charge, as requested by the defendant, 'that if the jury find from the evidence that the fire originated in the depot building, mentioned in the complaint, then the statute cannot apply, whether such building be on the right of way or not, and the defendant cannot recover without proving negligence.' Inasmuch as the statute (Gen. Stats. 1511; Rev. Stats. 1688; Code of Laws 1902, 2135) cannot be construed to apply to fires originating in buildings on the right of way, without denying to the defendant corporation the equal protection of the laws guaranteed it by section 1 of article 14 of amendments to the constitution of the United States, and by section 5 of article 1 of the constitution of this state, and by section 12 of article 1 of the constitution of 1868; and where a statute can be given construction consistent with the constitution of the United States and of the state, it should not be so construed as to conflict with either of them." This question has already been discussed.

The eighth exception is as follows: "8. That his honor, the circuit judge, erred in refusing to charge, as requested by the defendant, 'that if the jury find that the fire originated in a building, then whether such building be on the right of way or not, the liability of the defendant for damages to the property of others to which the fire might extend, is no greater than the liability of any other person owning or occupying the building, situate otherwise, in which a fire originates under similar circumstances,' in that he thereby gave the statute (Gen. Stats. 1511; Rev. Stats. 1688; Code of Laws, 2135) a construction

inconsistent with, and in violation of, section 1 of article 14 of amendments to the constitution of the United States, section 5 of article 1 of the constitution of this state, and section 12 of article 1 of the constitution of 1868, guaranteeing the defendants equal protection under the laws." This question has likewise been considered.

The ninth exception is as follows: "9. That his honor, the presiding judge, erred in holding, and charging the jury, <sup>490</sup> that the language of the statute (Gen. Stats. 1511; Rev. Stats. 1688 Code of Laws, 2135) is broad enough to cover fires originating in the buildings of a railroad company; inasmuch as such construction of the statute subjects railroad corporations to other restraints in regard to personal rights than such as are laid upon other persons under like circumstances; and impose a burden upon railroad companies, which is not imposed upon other persons owning houses, in violation of section 1 of article 14 of amendments to the constitution of the United States, section 5 of article 1 of the constitution of this state, and section 12 of article 1 of the constitution of 1868, securing to the defendant equal protection under the laws." This question has also been disposed of.

The tenth exception is as follows: "10. That his honor, the circuit judge, having no doubt that the legislature, when it passed the act in question, never contemplated a case like this, erred in holding that the language of the act is broad enough to cover a case like this; inasmuch as the intention of the legislature should govern in the construction of the act." When a circuit judge errs as to his power to decide a question, his ruling will be reversed: *State v. David*, 14 S. C. 428. The rule in cases where his conclusion is correct, but his reason erroneous, is thus stated in *Taylor v. Dominick*, 36 S. C. 368, 15 S. E. 591: "It is well settled that this court confines itself to a consideration of the question determined by the court below, without regard to the correctness of the reasons which may be given for the conclusion that may there be reached, and that if the conclusion reached is correct, the fact that erroneous reasons are given for such conclusion will not warrant this court in reversing the judgment appealed from."

The eleventh exception is as follows: "11. That his honor the circuit judge, erred in not passing on the constitutional question, as to the constitutionality of the statute (Gen. Stats. 1511; Rev. Stats. 1688; Code of Laws, 2135), under his construction that it <sup>491</sup> applies to fires originating in the building of



a railroad company, and thereby imposes a burden upon a railroad company owning houses, which it does not impose upon other people owning houses. Such construction being clearly in violation of section 1 of article 14 of amendments to the constitution of the United States, of section 5 of article 1 of the constitution of this state, and of section 12 of article 1 of the constitution of 1868." We have already considered the constitutional question which his honor declined to consider just as if he had ruled upon it adversely to the defendant.

The twelfth exception is as follows: "12. That his honor, the circuit judge, having concluded, and held, that the statute (Gen. Stats. 1511; Rev. Stats. 1688; Code of Laws, 2135) imposed a burden upon railroad companies owning houses, not imposed on other persons owning houses, erred in not concluding that this was a denial to the defendant railroad company of the equal protection of the law, in violation of the constitutions of the United States and of this state." This question is disposed of by what was said in considering other exceptions.

It is the judgment of this court, that the judgment of the circuit court be affirmed.

The petition for a rehearing in this case having been withdrawn, it is ordered that the order heretofore granted staying the remittitur be revoked.

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*The Liability of Railroad Companies for Fires* communicated by its locomotives is considered in the monographic note to *Burroughs v. Housatonic R. R. Co.*, 38 Am. Dec. 70-79; *Hoffman v. King*, 160 N. Y. 618, 73 Am. St. Rep. 715, 55 N. E. 401, 46 L. R. A. 672; *Louisville etc. R. R. Co. v. Marbury Lumber Co.*, 132 Ala. 520, 32 South. 745, 90 Am. St. Rep. 917, and cases cited in the cross-reference note thereto. Generally, one who negligently sets out or manages a fire on his premises is liable in case it spreads to neighboring property: *Brummit v. Furness*, 1 Ind. App. 401, 50 Am. St. Rep. 215, 27 N. E. 656.

*A Statute Making Every Person and Corporation* responsible for property injured by fire communicated directly or indirectly by locomotives in use upon railroads, without proof of negligence, is constitutional: *Campbell v. Missouri Pac. Ry. Co.*, 121 Mo. 340, 42 Am. St. Rep. 530, 25 S. W. 936, 25 L. R. A. 175. For the interpretation and construction of statutes of this kind, see *Laird v. Railroad*, 62 N. H. 254, 13 Am. St. Rep. 564; *Union Pac. Ry. Co. v. De Busk*, 12 Colo. 294, 13 Am. St. Rep. 221, 20 Pac. 752, 3 L. R. A. 350; *Grissell v. Housatonic R. R. Co.*, 54 Conn. 447, 1 Am. St. Rep. 138, 54 Atl. 137; *Basnett v. Connecticut River R. R. Co.*, 145 Mass. 129, 1 Am. St. Rep. 443, 13 N. E. 370.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**TENNESSEE.**

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**FIRST NATIONAL BANK v. FIDELITY AND GUAR-  
ANTY COMPANY.**

[110 Tenn. 10, 75 S. W. 1076.]

**FIDELITY INSURANCE—Warranties and Representations.**—**A Statute** declaring that no misrepresentation or warranty by an insured shall be deemed material or affect the contract of insurance, unless made with an intent to deceive, or unless the matter represented increases the risk, applies to fidelity insurance contracts. (p. 770.)

**FIDELITY INSURANCE—Representations.**—**Findings** by the Tennessee court of chancery appeals as to the truth and materiality of statements made in negotiating a contract of fidelity insurance are conclusive upon the supreme court. (p. 771.)

**FIDELITY INSURANCE—Renewal not a Separate Bond.**—When a bond guaranteeing the fidelity of an employé is renewed, there is still only one contract and one penalty, the renewal certificate being a new bond only in extending the indemnity provided by the original bond to a new period of time. (pp. 773, 774.)

Stokes & Stokes, for the appellant.

Boyd & McNeilly, for the appellee.

**12** McALISTER, J. This bill was preferred by complainant bank against the guaranty company to recover the penalty of a bond executed by the guaranty company to the bank as indemnity against all or any pecuniary loss sustained by the bank, occasioned by the fraud or dishonesty of one W. W. Lea, an individual bookkeeper in said bank, and occurring during the continuance of the bond or of any renewal thereof, and discovered during such continuance or renewal, or any time thereafter.

The bond was in the penalty of seven thousand dollars, and covered any losses occurring between May 1, 1898, and May 1, 1899. This bond was renewed on the 4th of May, 1899, so as to guarantee the fidelity of said W. W. Lea in the sum of seven thousand dollars from the 1st of May, 1899, to May 1, 1900, subject to all the amounts and conditions set forth and expressed in the original bond.

The court of chancery appeals finds that during the period from May 1, 1898, to May 1, 1899, and during the currency of the original bond, complainant bank sustained a pecuniary loss of seven thousand two hundred and seventeen dollars and fifty cents, occasioned by the fraud and dishonesty of the said W. W. Lea while acting as individual bookkeeper for the bank, and that during the currency of the renewal bond, from May 1, 1899, to May 1, 1900, the bank sustained a pecuniary loss of thirteen thousand one hundred and fifty-seven dollars and twenty cents.

Proofs of loss were furnished the Fidelity and Guaranty <sup>13</sup> Company as required by the bond, but the defendant company declined to pay upon the following grounds set up in its answer, namely: First, that at the time the bond was executed and delivered by the defendant guaranty company to the bank, and as a condition precedent to the execution of the bond, the defendant sent the complainant bank, for proper execution, an employer's statement, in which, among other questions propounded to the bank, were the following, viz.: 1. Whether Mr. Lea's accounts had been audited, and, if so, when, and by whom; 2. Whether all the accounts of his office were found in every respect correct; 3. Whether he had been or was then in arrears, default or with unsettled balance. The cashier of the bank replied to these questions, viz.: "When last examined or audited by complainant, on the 22d of April, 1898, all the accounts of his office [referring to W. W. Lea] were found in every respect correct up to April 22, 1898."

It is further averred in the answer that when the renewal bond was executed, May 4, 1899, a similar statement was made by the bank's cashier in reply to the defendant's question, viz.: "This is to certify that on the — day of —, the books and accounts of Mr. Lea, in our employ as —, were examined by us, and we found them correct in every respect, and all moneys handled by him accounted for. He has performed his duties in an acceptable and satisfactory manner, and we know of no reason why the guaranty bond should not be continued."

<sup>14</sup> The answer then proceeds to aver that these statements were untrue and false, and that the defendant's officers and agents knew them to be untrue and false, or with the least diligence could have ascertained them to be untrue.

It is then averred that, as a matter of fact, at the date of the execution of the first bond, and at the time said statement was made, to wit, on the 28th of May, 1898, the defendant Lea was a defaulter to the complainant bank in a sum not less than seven hundred dollars, and that said defalcation had existed for a long time prior to May 1, 1898.

It is further averred that at the time of the renewal of the bond on the 4th of May, 1899, said Lea was a defaulter in a sum not less than eight hundred dollars, and that these facts were known to the bank, or by the exercise of ordinary diligence could have been known.

The answer further avers that the statements made by the officers of the bank in respect of the correctness of the accounts of W. W. Lea were warranties to the defendant and inducements for making such bonds, and that said bonds were therefore void because of the breach of said warranties, and because of these untrue and false statements.

The court of chancery appeals finds that there is no controversy in respect of the execution of the bonds, and it is conceded that the premiums were paid. That court further finds there is no question as to the default of the defendant, Lea. It also finds that Mr. Watts, <sup>15</sup> cashier of the bank, in reply to questions asked by the guaranty company, made the following statement, viz.: "The replies of the applicant herein are, to the best of my knowledge and belief, correct. He has been in the service of the undersigned employer since March, 1875, filling positions of various —, and has continuously filled the position for which this bond is required since —, 18—. He has always, to the best of my knowledge and belief, given satisfaction in his personal conduct and performance of duties, and kept his accounts faithfully and without default. When last examined or audited by committee, on the twenty-second day of April, 1898, all the accounts of his office were found in every respect correct up to April 22, 1898. He has not been, nor is he at present, so far as I know or believe, in arrears, default, or with unsettled balance in this or any previous service. I know of nothing concerning his habits or antecedents affecting his title to confidence, and I know of



no reason why the guaranty hereby applied for should not be granted."

When the renewal bond was executed the cashier of the bank, in reply to questions submitted by the guaranty company, filled out the following statement, viz.: "To the United States Fidelity and Guaranty Co.: This is to certify that on the — day of —, 189—, the books and accounts of Mr. Lea, in our employ as —, were examined by us, and we found them correct in every respect, and all moneys handled by him accounted for. He has performed his duties in an acceptable and satisfactory <sup>16</sup> manner, and we know of no reason why the guaranty bond should not be continued. His salary is now thirteen hundred dollars, and he is employed as bookkeeper."

The court of chancery appeals finds, as a matter of fact, that on the 1st of May, 1898, when the original bond was executed, Lea was a defaulter in excess of four hundred and eighty dollars, two hundred and eighty dollars of which occurred in one account. When the renewal bond was executed, about the 1st of May, 1899, Lea was a defaulter to an amount aggregating about eight hundred dollars.

The court of chancery appeals further finds that the books and accounts of Lea had been examined by a committee of the directors on the 22d of April, 1898, who reported in writing as follows, viz.: "On the 18th of April, 1898, we, your examining committee, began, and continued until completed, an examination of the affairs of this bank. We find the cash in the hands of the receiving and paying tellers to agree with the amounts shown by the books; the time and demand loans, notes in attorney's hands, bills of exchange, and funds in transit, under charge of the assistant cashier, to balance with the general books. The general accounts balance. The individual accounts were checked and proved to be correct, as shown by the general ledger, except that the bookkeeper from A to K [referring to Lea] was out of balance about four hundred dollars, and the bookkeeper from L to Z about one hundred and fifty dollars. The <sup>17</sup> committee thinks that these discrepancies will be found by the respective bookkeepers, as they were hurried in going over their books, that the committee might begin their work. We believe that the books are correctly kept, and that the affairs of the bank are in a satisfactory condition."

It appears that after the report was made Lea claimed that he had discovered an error of four hundred dollars, which left

the books within twenty-one dollars of a balance. Lea reported this to the committee, and satisfied them and the cashier, Mr. Watts, that his books were out of balance only twenty-one dollars.

The court of chancery appeals finds that when Mr. Watts, the cashier, made the statement to the guaranty company, he knew what the committee had reported, and knew of the subsequent correction of the item of four hundred dollars, but that court finds that the statement was made by him in good faith, and without any knowledge or thought that Lea was a defaulter, and he (Watts) believed, as did the other officers of the bank, that Lea's accounts were substantially correct.

The court of chancery appeals also found that twice each year the United States sent one of its bank examiners to examine the condition of complainant bank, and that during the period when there were six or eight thousand dollars of false entries in the books kept by Lea, but unknown to the bank, the complainant employed E. P. Maxey, who is shown to be an expert bank accountant, to examine the bank's affairs. He spent <sup>18</sup> thirty days in making the examination, for which he was paid seven hundred and fifty dollars, but he discovered no false entries made by Lea. As already stated, the special committee appointed by the board of directors in April, 1898, examined all the affairs of the bank, including the books kept by Lea, but without discovering any false entries. It appears, says the court, that in some way the committee were deceived by a manipulation of the adding machine by Lea, who obtained and gave them a false addition. But after the committee wrote its report, finding the books out of balance to the amount of four hundred and twenty-one dollars, Lea convinced the committee that he had discovered an error of four hundred dollars, which brought the books within twenty-one dollars of an absolutely correct balance with the general bookkeeper's books. It is shown that Lea had in his charge about one thousand accounts.

The court of chancery appeals concludes on this branch of the case that the committee were justified, on account of the long service of Lea, his good character, and the examination of Mr. Maxey and other bank examiners, in concluding that his accounts were substantially correct.

The court of chancery appeals also finds that the officers and directors of the bank had perfect confidence in Lea, as did Mr. Watts, the cashier, and that when the statement was made to defendant company, it was made in good faith, and without

any suspicion that there was anything wrong with Lea's books and accounts, or that <sup>19</sup> he was a defaulter in any respect or for any amount.

That court also finds as a fact that nothing had occurred up to the time of Lea's vacation in 1900 to put the complainant on notice of any wrongdoing by Lea. The question then presented is, Was there such a false representation in the statement made by the bank's cashier to the defendant company as will exonerate it from liability on this bond, and were the statements made material, and did they increase the risk? The committee which made the examination in April, 1898, wound up its report as follows: "We believe that the books are properly and correctly kept, and that the affairs of the bank are in a satisfactory condition."

Section 3306 of Shannon's Code, which applies to a case like this, provides that "no written or oral misrepresentation or warranty therein made, in negotiations of a contract or a policy of insurance, or any application therefor by the assured, or in his behalf, shall be deemed material, or defeat or void the policy, or prevent its attaching, unless such misrepresentation is made with actual intent to deceive, or unless the matter represented increases the risk of loss."

The court of chancery appeals finds as a fact that the statement of Mr. Watts was not fraudulent, but made in the utmost good faith.

Further, it is claimed, under the authorities, that the statement of Mr. Watts is not a warranty, but a representation.

Says Mr. May, in his work on Insurance (volume 1, <sup>20</sup> section 184): "Representations need not, like warranties, be strictly and literally complied with, but only substantially, and in those particulars which are material to be disclosed to the insurers to enable them to determine whether they will enter into the contract, and upon what terms."

The same author, at section 186, says: "Representations of this kind, however, are not strictly warranties and differ from warranties in that a substantial compliance with them is sufficient to answer their terms. Whether there has been such substantial compliance, that is, whether the representation is in every material respect true, is a question of fact for the jury."

In the case of Missouri etc. Trust Co. v. German Nat. Bank (decided by the court of appeals for the eighth circuit), 77 Fed. 117, 23 C. C. A. 65, the defense interposed by the guar-

anty company was that, in answer to an inquiry, the indebtedness of the risk (one Goldman) had been placed at four thousand dollars, when, as a matter of fact, it was some three thousand seven hundred dollars or three thousand eight hundred dollars additional.

Judge Thayer, in delivering the opinion of the court, wrote, viz.: "In the present case it appears that the statement made by Goldman of his indebtedness to his employer, the bank, is found in the application only. No reference whatever is made to the application in the bond. It is obvious that the statement in question must be treated as a representation." He further says: "Counsel for the trust company insist, however, that, <sup>21</sup> even if the statement be regarded as a representation, it nevertheless related to a subject concerning which the trust company, in its printed form of application, has seen fit to make special inquiry, and it was therefore a material representation, and that the court erred in permitting the jury to determine whether it was material or otherwise. This contention," said the court, "rests upon a misconception of the charge.

"The trial court did not allow the jury to determine whether the representation related to a material matter.

"It held, as a matter of law, that the representation was material, but directed the jury to ascertain whether it was so far false and misleading as to render it substantially untrue."

The court further said, viz.: "If a representation relating to a material matter is substantially true—that is to say, if it is so far true that the conduct of the insurer would not have been different if it had known the exact truth—it will not vitiate the policy, and whether it was substantially true or substantially false is the question for the jury."

Applying these principles, the court of chancery appeals held that, as a matter of law, the statements made by Mr. Watts were material, but found, from the facts and circumstances set out in the record, that Mr. Watts' statements were substantially true. This was a finding of fact which is conclusive upon this court.

That court further said: "We are satisfied that, if <sup>22</sup> Mr. Watts had fully stated all the facts within his knowledge at that time, the course of the defendant company would not have been different. He (Watts) was reporting and stating with substantial accuracy the report made by the auditing committee, and this was all that he was purporting to do. The committee had found and reported substantially that the books



were properly kept. He himself did not undertake to state how the books were kept."

These are all findings of fact, which it is not within the province of this court to review.

It is also well settled, as matter of law, that it makes no difference that a "risk" is at the time a defaulter, and the officers and directors may have negligently failed to ascertain the fact. The obligee must know and conceal the facts in order to relieve the insurer from liability: *Guarantee Co. of North America v. Mechanics' Sav. Bank etc. Co.*, 80 Fed. 766, 26 C. C. A. 146, and many authorities; *Tapley v. Martin*, 116 Mass. 275.

It is next assigned as error that the court of chancery appeals failed to find that the following condition of the bond was not breached, viz.: "That, in the discovery of any act capable of giving rise to a claim thereunder, the employer shall at the earliest practicable moment give notice thereof to the company."

The contention of defendant company under this stipulation of the bond was that the bond was executed June 6, 1898, and on the 28th of June, 1898, only twenty-two <sup>23</sup> days thereafter, the report of the auditing committee, which showed Lea's books out of balance four hundred dollars was turned over to the directors and formally entered on the books of the bank, and that the directors did not communicate anything with respect thereto to the defendant company. The argument is that these facts bring this case within the *Schardt* case: *Guarantee Co. of North America v. Mechanics' Sav. Bank etc. Co.*, 183 U. S. 402, 22 Sup. Ct. Rep. 124, 46 L. ed. 253.

The court of chancery appeals finds that the officers and directors of the bank had not discovered "any act capable of giving rise to a claim" within the meaning of the clause just quoted. The argument of that court is that there might have been clerical errors of thousands of dollars in the accounts without the fact being capable of giving rise to any claim under the bond. We think this assignment is virtually disposed of by the finding on the first assignment. Moreover, the court of chancery appeals finds that notice was given, and that it was sufficiently prompt.

The seventh assignment is that the court of chancery appeals erred in holding that defendant company was liable for two penalties of seven thousand dollars each. It is insisted by defendant that there was in effect but one bond, and that the maximum liability was only seven thousand dollars, the penalty of

the bond; that the last bond was simply a renewal of the first, and was not intended to create a new liability; and that, in legal <sup>24</sup> effect, the two bonds constitute but one contract, with a single penalty.

It will be observed that the word "renewal" is written in the second bond, and the certificate refers by number to the original bond, and provides that it is subject to all the covenants and conditions set forth and expressed in the original bond. The period covered by the renewal certificate is that intervening between May 1, 1899, and May 1, 1900. The penalty prescribed in the renewal certificate is seven thousand dollars. The original bond expressly provides for a maximum penalty in these words, viz.: "Make good and reimburse to the employer to the extent of seven thousand dollars, and no further, all and any pecuniary loss sustained by the employer, occasioned by the fraud or dishonesty on the part of the employé in the employer's service, and occurring during the continuance of this bond or any renewal thereof, and discovered during such continuance or renewal, or any time thereafter," etc.

The court of chancery appeals held that the original bond and renewal certificate are separate and independent contracts, covering different periods of time. It was held by that court that under the first bond the company was only liable for a default occurring between the 1st of May, 1898, and the 1st of May, 1899, and under the last bond for a default occurring between the 1st of May, 1899, and the 1st of May, 1900. It was further held that, if the default occurred during the first bond or renewal, under the express language of the bond, the liability attached <sup>25</sup> when the default was discovered, whether occurring during continuance of first bond or renewal, and discovered during continuance or renewal or any time thereafter. The court accordingly pronounced a decree for complainants for fourteen thousand dollars, penalties of both bonds.

We are of opinion the court of chancery appeals was in error in this position. The new bond expressly recites on its face that it is a renewal, subject to all the covenants and conditions set forth and expressed in the bond of this company, No. 23,717, heretofore issued on the 1st of May, 1898. Referring to the original bond, we find it stipulated that the guaranty company will make good and reimburse to the employer to the extent of seven thousand dollars and no further all and any pecuniary loss sustained by the employer, occasioned by the fraud and dishonesty on the part of the employé in the employer's service, and

occurring during the continuance of the bond or of any renewal thereof, etc. So that, under the plain terms of the bond, the maximum liability is seven thousand dollars, and no further, whether the default occurred during the currency of the original bond or during the renewal thereof. Now, it is true that the renewal certificate is a new contract, but it is only a new contract as respects time; that is to say, it extends the indemnity provided by the old contract to a new period of time—May 1, 1899, to May 1, 1900. The parties themselves understood there was only one bond and one penalty. Mr. Watts, cashier of the bank, in the first <sup>26</sup> letter written by him to the company, notifying it of the Lea's defalcation, said, viz.: "We hold your indemnity bond in the sum of seven thousand dollars on William W. Lea, who was one of our bookkeepers. Said bond is number 23,717, dated May 1, 1898, and expired May 1, 1900." This letter, the record shows, was dictated by the counsel for the bank, and shows how the contract was understood and interpreted by the bank before this litigation arose. The officers of defendant company and officers of other similar companies so understood it. We are all of opinion the decree of the court of chancery appeals in this respect was erroneous, and that defendant company is liable in this bond for only one penalty, to wit, seven thousand dollars; and for this amount, with interest from date of filing the bill, a decree will be entered in this court in favor of complainant bank.

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### FIDELITY INSURANCE.

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**VIII. Release of Surety and Cancellation of Bond.**

**IX. The Doctrine of Subrogation.**

**I. Nature, Validity, and Interpretation of Contract.**

a. **Nature of Fidelity Insurance.**—Fidelity insurance, as the term usually is employed, is a contract whereby one, for a consideration, agrees to indemnify another against loss arising from the want of honesty, integrity, or fidelity of employés and persons holding positions of trust. While the agreement, in form, may resemble a contract of "suretyship," it is, in substance and effect, a contract of "insurance," and the general principles governing the older forms of insurance, such as fire, marine, and life, are applicable to this more modern form of insurance: *People v. Fidelity and Casualty Co.*, 153 Ill. 25, 38 N. E. 752, 26 L. R. A. 295; *People v. Rose*, 174 Ill. 310, 51 N. E. 246, 44 L. R. A. 124; *Guarantee Co. v. Mechanics' Sav. Bank etc. Co.*, 80 Fed. 766, 772. In the last Illinois case above it is held that a statute, in general terms pertaining to insurance corporations, enacted before fidelity insurance corporations came into existence, applies to such companies when organized, for they are a form of insurance companies.

b. **Construction of Contract in General.**—In respect to bonds guaranteeing the fidelity of employés and others, executed upon a consideration and issued for profit, the rules of construction peculiar to contracts of suretyship are not applicable. On the contrary, much the same general rules that have been evolved in construing fire, life, and the other older forms of insurance policies, are applied to this newer form of insurance, except, perhaps, that courts have adopted even a more liberal policy in upholding the contract and avoiding the technicalities of construction that have, to some extent, been unfavorable to the proper interpretation of other contracts of insurance: *Bank of Tarboro v. Fidelity and Deposit Co.*, 126 N. C. 320, 83 Am. St. Rep. 682, 35 S. E. 588; 128 N. C. 366, 83 Am. St. Rep. 682, 38 S. E. 908; *Wise v. Wise*, 60 S. C. 128, 38 S. E. 790; *Supreme Council of Catholic Knights v. Fidelity etc. Co.*, 63 Fed. 48; *Mechanics' Sav. Bank etc. Co. v. Guarantee Co.*, 68 Fed. 459. If, looking to all the provisions of the bond, it is fairly and reasonably susceptible of two constructions, one favorable and the other unfavorable to the insurance company, the latter is to be adopted for the reason that



the instrument was drawn by the attorneys, officers, or agents of the insurance company. Ambiguities must be construed most strongly against the insurer: *Champion Ice etc. Co. v. American Bonding Co.*, 25 Ky. Law Rep. 239, 75 S. W. 197; *Remington v. Fidelity and Deposit Co.*, 27 Wash. 429, 67 Pac. 989; *American Surety Co. v. Pauly*, 170 U. S. 133, 144, 18 Sup. Ct. Rep. 552, 42 L. ed. 977. This is a familiar rule in the law of insurance, that a policy susceptible of two interpretations must be given that most favorable to the insured: *Vorse v. Jersey Plate Glass Ins. Co.*, 119 Iowa, 555, 97 Am. St. Rep. 330, 93 N. W. 569; *Wertheimer-Swarts Shoe Co. v. United States Casualty Co.*, 172 Mo. 135, 95 Am. St. Rep. 500, 72 S. W. 635, 61 L. R. A. 766. This rule, however, cannot be availed of to refine away terms of a bond expressed with sufficient clearness to convey the plain meaning of the parties, and embodying requirements compliant with which is made the condition to liability thereon: *Guarantee Co. v. Mechanics' Sav. Bank etc. Co.*, 183 U. S. 402, 419, 22 Sup. Ct. Rep. 124, 46 L. ed. 253.

"It is a familiar rule of interpretation," says Justice Hammond in *Guarantee Co. v. Mechanics' Sav. Bank etc. Co.*, 80 Fed. 766, 772, "that we shall look to the general purpose of the parties to the contract, to see what they intended to provide. The old-fashioned bond to secure fidelity of trust administration being a contract of suretyship, strictly, and not of indemnifying insurance, in the expansion of the modern contrivance of organizing incorporated companies to furnish a guaranty of fidelity, these contracts naturally took the form of a bond, as these do, rather than that of a policy of insurance. But as to this subject matter of indemnity, as well as to the multitude of others formerly covered by bonds to which the principle of insurance is being so comprehensively applied, the general object is that of protection as broad at least as that afforded by the old-fashioned bond, the form of which as been assumed, and for which the modern contrivance is intended to be a substitute. Marine, fire, or life insurance against the destructive forces of nature is not quite the same thing as an insurance against the dangers of dishonesty; and, the risk being of an entirely different nature, the courts must interpret the contract in view of this difference, applying the words used to the purpose of covering the peculiarities of the risk assumed on the one hand, and on the other intended to be discarded or shifted to others. And if these new contracts, whatever their form, are to be turned into contracts of insurance, the courts will be careful not again to perplex themselves with regrettable technicalities of law such as have sometimes crept into the older contracts of insurance, and have required statutes for their removal. In marine, fire, and life insurance, it is not an unreasonable assumption that the owner knows more intimately than others can know the conditions which are material to the risk assumed, and it is therefore not unreasonable to require him to disclose those conditions to the

insurer, and to hold him strictly to that duty. But in an insurance like this the insurer and the insured deal at arm's length with each other, and upon a plane of equal opportunity for information. Indeed, the risk does not depend so much on conditions of fact as upon a mere judgment about human character in the subject of the insurance—his individuality of moral qualities. About this the insurer can inform himself, and the insured is not presumed to know anything, as in the case of the owner of a property or a life that has been insured. Hence it is not unreasonable to hold the insurer to his risk in the broadest sense that is required to indemnify the assured for any loss by dishonesty which falls within the employment of the person whose honesty is guaranteed, and to permit no escape except by lines of retreat or avenues of deliverance clearly defined, well marked, and mutually understood as part of the contract, evidenced by the use of unambiguous language for that purpose. It would be contrary to public policy to inconsistently allow the protection afforded by this new insurance to the vast business interests of the country, in public administration, as elsewhere, to be endangered by any lesser indemnity than that of the old form by bond, which is being rapidly displaced, the new contracts being offered by the companies as superior to the old in safety. The courts should interpret them with a view of accomplishing what the companies propose to secure, by adhering strictly to the rule we have quoted in the language of Mr. Justice Jackson." The quotation from Justice Jackson is from *Imperial Fire Ins. Co. v. Coos County*, 151 U. S. 452, 463, 14 Sup. Ct. Rep. 379, 38 L. ed. 231, and is this: "But the rule is equally well settled that contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used; and, if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary, and popular sense." See this case in *Guarantee Co. v. Mechanics' Sav. Bank etc. Co.*, 183 U. S. 402, 22 Sup. Ct. Rep. 124, 46 L. ed. 253.

### c. Commencement, Duration, and Termination of Liability.

1. **Commencement of the Risk.**—If a bond guaranteeing the fidelity of an employé recites that it was made July 1, 1891, and that it was for a period ending July 1, 1892, and an indorsement on the back states that these are the dates of the contract and of its expiration, the premium received covering one year, while the bond is dated July 10, 1891, the bond is in effect from July 1, 1891, regardless of evidence as to when it was accepted: *Supreme Council of Catholic Knights v. Fidelity and Casualty Co.*, 63 Fed. 48. In *Aetna Life Ins. Co. v. American Surety Co.*, 34 Fed. 291, the bond of an insurance agent bore date June 15, 1884, but was not delivered to and accepted by the insurance company until July 29th. The certificate as to the agent's character, previously submitted to the

secretary of the company, contained a blank to be filled in by him to show when the bond was to be dated. He wrote in this blank "June 15 or June 16, 1884." The bond itself recited that it was executed June 15, 1884, and was given in consideration of a premium for the term of twelve months ending June 15, 1885. It was held, under this state of facts, that surety's liability on the bond accrued, by relation, as of its date.

In *Hall v. United States Fidelity etc. Co.*, 77 Minn. 24, 79 N. W. 590, an employer applied for insurance without delay, and the next day the fidelity and guaranty company executed a temporary contract across the face of which was written, "Subject to result of investigation." It was contended that this writing converted what would otherwise be a contract into a mere proposal for one, to become binding on the fidelity company only in case the investigation proved satisfactory. But the court declined to so hold, and construed the words, "subject to result of investigation," as merely giving the company the right to cancel the contract on further investigation, and thereby exempt itself from liability after notice of the cancellation.

Of course, where a bond is construed to guarantee the faithful and honest discharge of his duties by an employé from and after its date, the insurer cannot be held liable for any breach of duty or misfeasance on the part of the employé which occurred before the bond was executed: *Dorsey v. Fidelity and Casualty Co.*, 98 Ga. 456, 25 S. E. 521.

**2. Duration and Termination of Risk.**—A stipulation, in a bond guaranteeing the fidelity of an employé, limiting the risk to a loss sustained and discovered during the continuance of the bond, and within six months from the employé ceasing to be in the service, does not bind the guaranty company for a loss discovered more than six months after the expiration of the bond, whether or not the employé has then quitted the service: *Guarantee Co. v. Mechanics' Sav. Bank etc. Co.*, 80 Fed. 766. Where the fidelity of a bank cashier is guaranteed, the six months from "the death or dismissal or retirement of the employé from the service of the employer," within which his dishonesty must be discovered in order to hold the insurer liable, does not commence to run prior to the appointment and qualification of a receiver for the bank, if it does then, although prior thereto the bank suspended business, and an investigation by the examiner commenced, during which time the employé ceased to perform his ordinary duties as cashier: *American Surety Co. v. Pauly*, 170 U. S. 133, 18 Sup. Ct. Rep. 552, 42 L. ed. 977. If the contract of indemnity limits the liability of the insurer to such losses as occur during the continuance of the contract, and are discovered during such continuance, and within six months after the death, dismissal, or retirement of the employé, at the expiration of the year for which insurance is given, the liability of the insurer

ceases as to an undiscovered loss caused by an employé, who still remained in the position in which his fidelity was guaranteed, although subsequently he died, and the loss was not discovered within six months thereafter: *Florida Cent. etc. R. R. Co. v. American Surety Co.*, 99 Fed. 674.

Where a bank employé's bond provides that any claim thereunder shall embrace and cover only acts and defaults committed during its currency, and within twelve months next before the time of discovering the act or default upon which the claim is founded, the bond does not cover a default committed more than twelve months previous to its discovery, which would have been discovered within a year from its commission but for the act of the employé in falsifying the books: *Fidelity and Casualty Co. v. Consolidated Nat. Bank*, 71 Fed. 116.

**d. Validity of Contract—Public Policy.**—It was urged in *Fidelity and Casualty Co. v. Eickhoff*, 63 Minn. 170, 56 Am. St. Rep. 464, 65 N. W. 351, 30 L. R. A. 586, that a contract guaranteeing the honesty of employés is against public policy. The employé involved in that case was in the service of a grain elevator company. The court said: "The second point urged is, that a contract guaranteeing the honesty of employés is void as being against public policy; that it is the duty of all employers dealing with the general public to employ honest agents; that the effect of such a contract as set out in the complaint is to make it a matter of indifference to an elevator company whether it employs honest or dishonest agents to deal with the patrons of the elevator. There is nothing whatever in this objection. The same principle is involved in every bond exacted from a public officer or a private agent as security for the faithful performance of his duty. And it is wholly immaterial whether the guarantor is a private person or an incorporated guaranty insurance company. The advantages of the latter over the former mode of insurance, if properly conducted, are very apparent."

#### **e. Signature of the Employé.**

**1. Necessity of Employé Signing Bond.**—If a bond for the indemnity of an employer against the dishonesty of his employé stipulates that it is essential to the validity of the contract that the employé sign the bond, the bond is not binding on the obligor unless so signed: *United States Fidelity etc. Co. v. Ridgley* (Neb.), 97 N. W. 836; *Blackmore v. Guarantee Co.*, 71 Fed. 363. And the bond is invalid notwithstanding subsequent renewals by renewal receipts declared to be subject to all covenants and conditions contained in the original bond: *Union Cent. Life Ins. Co. v. United States Fidelity etc. Co.* (Md.), 58 Atl. 437. The waiver of this condition by the obligor in retaining premiums paid, or by constituting the employé, in delivering the bond to him, its agent with authority to waive the signature, is considered in the above-cited Nebraska case. In Proc-



tor Coal Co. v. United States Fidelity etc. Co., 124 Fed. 429, the guarantor, by receiving premiums for two renewals of a bond, with knowledge, is held estopped to deny its validity on the ground that the employé did not sign the bond.

2. **Effect of His Signing Bond.**—When a surety company agrees to indemnify an employer against loss arising from the dishonesty of an employé, and the employé unites in the bond for the purpose of assenting to the terms thereof and of covenanting to indemnify the surety company, the bond is not a joint obligation, and an action thereon lies against the surety alone without the joinder of the employé: *American Bonding Co. v. Milwaukee Harvester Co.*, 91 Md. 733, 48 Atl. 72; *Guarantee Co. v. Mechanics' Sav. Bank etc. Co.*, 80 Fed. 766.

f. **Renewal Bonds.**—Where fidelity insurance contracts are renewed, it has been held in several cases that the renewals do not operate as a continuing contract, but that each renewal is a separate and distinct obligation: *De Jernette v. Fidelity and Casualty Co.*, 17 Ky. Law Rep. 1088, 33 S. W. 828; *Proctor Coal Co. v. United States Fidelity etc. Co.*, 124 Fed. 424. But see the principal case, ante, p. 765. A renewal may be vitiated by the fact that when it was procured by the president of the insured corporation he knew, but did not disclose to the surety company, that the employé was at the time a defaulter: *National Bank v. Fidelity and Casualty Co.*, 89 Fed. 819. But see *Remington v. Fidelity and Deposit Co.*, 27 Wash. 429, 67 Pac. 989, where a statement by an employer, made in good faith in procuring an extension of insurance, that the accounts of the employé had been examined and found correct, when the defalcation was such as to require an expert to discover, is held to be a representation of fact and not a warranty of the truth thereof: See, too, *Guarantee Co. v. Mechanics' Sav. Bank etc. Co.*, 80 Fed. 766, 776; "Statements Relative to Accounts of Employé," post.

## II. Warranties, Representations, and Concealment.

a. **In General.**—In suits upon ordinary insurance policies, "it is held universally that statements made by the insured, to constitute warranties, must enter into and form a part of the contract itself; and, where they are contained in the application, they are always construed as representations, unless, by the express provisions of the policy, the application is made a part thereof, and the intent is manifest to give them the effect of warranties. Besides, as warranties must be literally fulfilled, the courts have always manifested a strong indisposition to regard any statement made by the insured as a warranty, unless such was the obvious purpose of the parties": *Mis-souri etc. Trust Co. v. German Nat. Bank*, 77 Fed. 117, where these principles are applied in a suit on a policy of fidelity insurance, the statement in question having been made in respect to the amount

of the employé's indebtedness to his employer, and being found in the application only.

The person insured in a policy of fidelity insurance is not, perhaps, held strictly to the duty of disclosing all conditions material to the risk, as in the case of ordinary insurance, because the insured and the insurer stand upon a plane of equal opportunity for information: *Guarantee Co. v. Mechanics' Sav. Bank etc. Co.*, 80 Fed. 766, 773. But see this case in *Guarantee Co. v. Mechanics' Sav. Bk. Co.*, 183 U. S. 402, 22 Sup. Ct. Rep. 124, 46 L. ed. 253. Consult, also, *Supreme Council Catholic Knights v. Fidelity and Casualty Co.*, 63 Fed. 48; *Bank of Toronto v. St. Lawrence Fire Ins. Co.*, Rap. Jud. Que. 19 C. S. 434; *Globe Sav. & Loan Co. v. Employers' etc. Assur. Corp.*, 13 Man. Rep. 531.

**b. Materiality and Truth of Statements.**—Answers as to whether an employé has applied for insurance to other indemnity companies and been rejected, are material, and if false, and made with a knowledge of their falsity, the insurance is vitiated: *Imperial Bldg. etc. Co. v. United States Fidelity etc. Co.*, 23 Ohio Cir. Ct. Rep. 243. But statements made by one director of a corporation to another in regard to the "habits" of an employé are properly excluded as evidence, when the kind of habits referred to is not disclosed: *Perpetual Bldg. etc. Assn. v. United States Fidelity etc. Co.*, 118 Iowa, 729, 92 N. W. 686.

A written statement by employers to the obligor in a bond of indemnity against the dishonesty of their employé, to the effect that they will invariably apply certain checks to his action, which the parties expressly agree, by the statement itself and the bond, shall be the basis of the latter, and a condition precedent to a recovery upon it, is of the nature of a warranty, and a failure to comply with the promise it contains is fatal to an action upon the bond: *Rice v. Fidelity and Deposit Co.*, 103 Fed. 427.

The statement "eighty-five dollars per month as salary or commissions," in answer to a question as to the compensation received by an employé for his services, contained in an application for a fidelity bond, is not false, if the employé receives ten dollars a week in cash, the use of a flat worth twenty dollars a month, and two and one-half per cent commission on one thousand dollars rent collected by him monthly: *City Trust etc. Co. v. Lee*, 204 Ill. 69, 68 N. E. 485.

**c. Misrepresentations not Fraudulently Made.**—According to *Warrent Deposit Bank v. Fidelity and Deposit Co.*, 25 Ky. Law Rep. 289, 74 S. W. 1111, misrepresentations made in an application for fidelity insurance as to matters material to the risk avoid the bond whether or not they are fraudulent. See, also, *Sullivan v. Fraternal etc. Indemnity Co.*, 73 N. Y. Supp. 1094, 36 Misc. Rep. 578. But where answers are made by an employer to the best of his knowledge and belief, though it is stipulated that answers to questions contained in

the application shall be warranties, the surety company must show that they were knowingly false, in order to escape liability on the bond: *Meehanics' Sav. Bank etc. Co. v. Guarantee Co.*, 68 Fed. 459. But see this case in 183 U. S. 402, 22 Sup. Ct. Rep. 24, 46 L. ed. 253, and see, also, "Statements Relative to Accounts of Employé," post. It will be noted that in the principal case, ante, p. 765, it is held that a statute declaring that no misrepresentation or warranty shall be deemed material or affect the contract of insurance, unless made with an intent to deceive, or unless the matter represented increases the risk, applies to fidelity insurance contracts.

d. **Representations by President of Insured Corporation.**—A bond of indemnity against the dishonesty of a bank cashier is not, according to *American Surety Co. v. Pauly*, 170 U. S. 133, 18 Sup. Ct. Rep. 552, 42 L. ed. 977, rendered void by the fraudulent misrepresentations and concealments of the president of the bank, made to enable the cashier to qualify for his position, when the procuring of the bond was no part of the business of the bank, nor within the scope of the duties imposed upon the president. See, also, *Fidelity & Casualty Co. v. Gate City Nat. Bank*, 97 Ga. 654, 54 Am. St. Rep. 440, 25 S. E. 392, 33 L. R. A. 821. However, in *Warren Deposit Co. v. Fidelity & Deposit Co.*, 25 Ky. Law Rep. 289, 74 S. W. 1111, it is held that when a bank accepts the action of its president in obtaining a bond for the fidelity of its cashier, it must be considered as assenting to the condition of the bond to the effect that representations made by the president in respect to the duties and accounts of the cashier constitute a part and form the basis of the contract. The Kentucky court, commenting on the above-cited United States case, says: "We cannot regard the case of *American Surety Co. v. Pauly*, 170 U. S. 133, 18 Sup. Ct. Rep. 552, 42 L. ed. 977, as announcing a different rule from the above. In that case it was shown that the president of the bank, who made the representations as to the character, etc., of its cashier, was in collusion with the cashier to loot the bank, and that these statements were but a step toward consummating that end. It would scarcely need such eminent authority to sustain the conclusion that, when an agent steps aside from the duty enjoined by his position to commit a fraud upon his principal, his representations and acts in that affair are not those of his principal," citing *Guarantee Co. v. Mechanics' Sav. Bank etc. Co.*, 183 U. S. 462, 22 Sup. Ct. Rep. 124, 46 L. ed. 253; *American Credit Indemnity Co. v. Wood*, 73 Fed. 81; *Rice v. Fidelity & Deposit Co.*, 103 Fed. 427.

e. **Statements Relative to Accounts of Employé.**—A promissory statement by an assured, which is made a part of a contract of fidelity insurance, that he will make a monthly comparison and verification of cash in the hands of his agent, against whose dishonesty the insurance is given, to ascertain whether the cash corresponds with the balance that should be there according to his accounts, is in

effect, a warranty, which the assured is bound to fulfill in substance and according to its meaning: *Hunt v. Fidelity & Casualty Co.*, 99 Fed. 242. See, too, *Wieder v. Union Surety etc. Co.*, 42 Misc. Rep. 499, 86 N. Y. Supp. 105. Where the applicant for insurance represents that the books and accounts of his cashier and bookkeeper will be examined daily, and the applicant, by reason of his absence, fails for four days to comply with the terms of the agreement in this respect, during which time the employé absconds, such failure releases the surety company from liability: *Young v. Pacific Surety Co.*, 137 Cal. 596, 70 Pac. 660.

According to *Sullivan v. Fraternal etc. Indemnity Co.*, 73 N. Y. Supp. 1094, 36 Misc. Rep. 578, a false statement made in an application for reinsurance that the employé has always kept true accounts and made prompt returns, is not a part of the contract of reinsurance if the policy does not so make it, and hence is not a warranty; but it is, nevertheless, as a false statement concerning a material matter, a defense to an action on the policy, although innocently made. If a policy stipulates that statements theretofore or thereafter made by the insured relative to the risk shall constitute a part and form the basis of the contract, and to secure a renewal of the policy the insured certifies that the books and accounts of the employé have been examined and found correct, when in fact no examination has been made for nearly a year prior to the date certified, and the employé at that time is a defaulter, which a cursory examination of his books would have shown, the renewal is not binding on the insurance company: *Carstairs v. American Bonding etc. Co.*, 112 Fed. 620. See, in this connection, "Renewal Bonds," ante.

If the statement of the president of a corporation to a surety company that the accounts of an employé are correct, purports simply to be his statement made to the best of his knowledge and belief, the fact that at the time the auditing committee knew of an error in the accounts does not relieve the surety company from liability: *Perpetual Bldg. etc. Assn. v. Fidelity & Guaranty Co.*, 118 Iowa, 729, 92 N. W. 686.

The law requires of an employer, in making representations as to correctness of his employé's accounts with a view to obtain insurance, to use ordinary care to ascertain the truth of his statements: *United States Fidelity etc. Co. v. Blackley*, 25 Ky. Law Rep. 1271, 77 S. W. 709. But where the bond of a bank teller requires the bank to "observe all due and customary supervision over said employé for the prevention of default," and the only supervision specifically called for by the contract is a quarterly examination of the books and accounts customarily made by the bank on its own account, and a report of known speculations, an examination such as was the custom to make, and such as the appointed committee considered adequate for the bank's protection, satisfies the condition of the bond, although it may have been somewhat loose and careless:



Me hanics' Sav. Bank etc. Co. v. Guarantee Co., 68 Fed. 459. But see this case in 183 U. S. 402, 22 Sup. Ct. Rep. 124, 46 L. ed. 253.

### III. Duties of the Agent or Employé.

**a. Statements and Concealment Concerning.**—Statements made by an employer in support of his employé's application for a bond, as to the nature of the duties of the employé, the extent of his authority, and the like, are in the nature of warranties, and a breach thereof may avoid the bond: *United States Fidelity etc. Co. v. Ridgley* (Neb.), 97 N. W. 836. And if an officer of a corporation whose fidelity is guaranteed sustains relations to the corporation other than those disclosed by its statement on which the bond was given, which were essentially different and involved the receipt and expenditure of the employer's money, the failure to disclose such relations constitutes a defense to the surety company in an action on the bond: *Issaquah Coal Co. v. United States Fidelity etc. Co.*, 126 Fed. 89.

**b. Duties Covered by Bond.**—A bond indemnifying an employer against losses sustained by any act of fraud or dishonesty, amounting to larceny or embezzlement, perpetrated by an employé in the discharge of his duties as bookkeeper, or in other positions he might be called on to fill, covers a loss suffered by the fraudulent act of the employé in raising checks which it was his duty to fill out, whether that duty had reference to his position as bookkeeper or to any other position in the service of his employer: *Champion Ice etc. Co. v. American Bonding etc. Co.*, 25 Ky. Law Rep. 239, 75 S. W. 197.

**c. Effect of Change in Duties.**—If a fidelity company binds itself to make good to a bank such loss as it may sustain through the fraud or dishonesty of an employé in connection with his duties as receiving teller, or the duties to which he may subsequently be appointed, and afterward he is appointed assistant cashier, in which capacity he brings loss to the bank, the company is as much surety for him in the latter capacity as in the former, and must make good its losses: *Fidelity & Casualty Co. v. Gate City Nat. Bank*, 97 Ga. 634, 54 Am. St. Rep. 440, 25 S. E. 392, 33 L. R. A. 821. In *Sun Life Ins. Co. v. United States Fidelity etc. Co.*, 130 N. C. 129, 40 S. E. 975, it is held, Justice Douglas dissenting, that when a new contract between an employer and his employé increases the latter's responsibilities, such contract releases a fidelity company from its obligation on the employé's bond. See, too, *Globe Sav. & Loan Co. v. Employers etc. Assur. Co.*, 13 Man. Rep. 531.

### IV. Unfaithful and Dishonest Conduct of the Employé.

**a. Knowledge of and Condonation by Employer.**—When a bond is conditioned that if the employer shall, without the consent of the surety company, intrust his employé with money after having discovered any act of dishonesty, the bond shall become void, the retention of the employé in a position of trust after discovering his dishonesty is at the risk of the employer, and he cannot hold the

surety company liable for defalcations that occur after the discovery and before notice to the company: *Remington v. Fidelity & Deposit Co.*, 27 Wash. 429, 67 Pac. 989; *Phillips v. Foxall*, L. R. 7 Q. B. 666.

A stipulation in a bond that it shall be void if the employer shall condone the acts of a dishonest employé, or make any settlement with him for any loss under the bond, is not violated by the employer accepting money and property turned over by the employé in part payment of an indebtedness due on his defalcation, when the payment is not accepted with the intention of condoning the offense, and is used to reduce the amount claimed from the surety company: *Remington v. Fidelity & Deposit Co.*, 27 Wash. 429, 67 Pac. 989. And a voluntary conveyance of property to an employer by an employé who has misappropriated funds, with the request that it should be applied to the first items of indebtedness, does not constitute a settlement discharging the surety: *Perpetual Bldg. etc. Assn. v. United States Fidelity etc. Co.*, 118 Iowa, 729, 92 N. W. 686.

**b. Imputed Knowledge—Constructive Notice.**—Although a contract binding a fidelity company to make good to a bank any loss sustained through the fraud or dishonesty of its assistant cashier, may require the bank, upon discovering him to be untrustworthy, to give prompt notice thereof to the company, yet, where there is nothing in the contract requiring the bank to exercise any degree of diligence in watching or inquiring into his actions, to save the company from loss, the knowledge of the bank's cashier of fraud or dishonesty or misconduct on the part of the assistant cashier is not imputable to the bank itself. The doctrine of constructive notice has no application to such a transaction, and the bank is bound to impart only actual knowledge on its part: *Fidelity & Casualty Co. v. Gate City Nat. Bank*, 97 Ga. 654, 54 Am. St. Rep. 440, 25 S. E. 392, 33 L. R. A. 821. See, further, "Representations Made by President of Insured Corporation," ante.

**c. Evidence of Honesty or Dishonesty.**—When an employé is charged with fraud or dishonesty in the management of funds intrusted to his care, the intent with which he acted may be shown by his declarations, conduct, and accounts in regard thereto: *Clifton Mfg. Co. v. United States Fidelity etc. Co.*, 60 S. C. 128, 38 S. E. 790. Where one person alone is charged with the duty, in his employment, of receiving and disbursing funds and keeping the books of account, and the books show the receipt of funds of which there is no account of disbursement, and there is in fact a deficiency shown by the books to exist, the legal presumption is that the person whose duty it was to receive the funds did in fact receive them, and, no explanation being made, that he dishonestly appropriated them to his own use: *Guarantee Co. v. Mutual Bldg. etc. Assn.*, 57 Ill. App. 254.

A nonsuit in an action on a bond given to secure an employer against loss by reason of conduct of an employé amounting to larceny or embezzlement, is properly entered if there is no evidence

to show that the employé personally received goods shipped to him, or that they had come under his actual control, or that he had received the proceeds of their sale: *Reed v. Fidelity & Casualty Co.*, 189 Pa. St. 596, 42 Atl. 294.

**d. Speculation by Employé.**—When the president of a bank knows that a corporation insuring it against the dishonest acts of an employé regards the engagement in speculation by an employé as unfavorable to the risk, and is informed that the employé is engaged in speculation, a statement by the president that he does not know or has not heard of anything unfavorable in relation to the employé's habits, or of any matters in respect to him which it is deemed advisable for the corporation to investigate, is a misrepresentation: *Guarantee Co. v. Mechanics' Sav. Bank etc. Co.*, 183 U. S. 402, 22 Sup. Ct. Rep. 124, 46 L. ed. 253. And if a bond indemnifying a bank against loss through the fraud or dishonesty of its teller contains a stipulation that the bank shall notify the surety company on becoming aware of the teller being engaged in speculation or gambling, the duty of the bank requires it to give such notice when advised that the employé is speculating, although, while confessing the fact of speculation, he asserts that he has ceased doing so: *Guarantee Co. v. Mechanics' Sav. Bank. etc. Co.*, 183 U. S. 402, 22 Sup. Ct. Rep. 124, 46 L. ed. 253.

**e. Larceny, Embezzlement, and Conversion.**

**1. In General.**—In a bond indemnifying against loss sustained by an employer through dishonesty or any act of fraud on the part of an employé amounting to larceny or embezzlement, the words "larceny or embezzlement" do not qualify the word "dishonesty," and the bond guarantees against all loss by dishonesty and fraud: *City Trust etc. Co. v. Lee*, 204 Ill. 69, 68 N. E. 485. An employer is not required to introduce such proof, in an action on a bond insuring him against larceny or embezzlement by his employé, as would convict the latter of the crime of larceny or embezzlement as defined by the law of the commonwealth: *Champion Ice etc. Co. v. American Bonding etc. Co.*, 25 Ky. Law Rep. 239, 75 S. W. 197. Where an employé pays over to his employer all money collected by him during the period covered by a bond, but directs that a part thereof be credited on other accounts owing to the employer, without knowledge on the part of the employer that the money collected from certain accounts was so applied to the payment of other accounts for which the agent was also responsible, this amounts to a fraudulent conversion of the money collected for which the surety company is liable on the bond: *American Bonding etc. Co. v. Milwaukee Harvester Co.*, 99 Md. 733, 48 Atl. 72.

**2. Prosecution of Employé.**—It may be made a condition precedent to a right of action on a bond insuring an employer against the dishonesty of his employé, that the employer shall, on the re-

quest of the insurer, prosecute, with diligence, the employé for the crime causing the loss which is insured against: *London Guarantee Co. v. Fearnley*, L. R. 5 App. Cas. 911; *La Canadienne Compagnie D'Assurance Sur La Vie v. London Guarantee etc. Co.*, 9 Rap. Jud. Que. B. R. 183; 16 Rap. Jud. Que. C. S. 78. But the employer may be entitled to recover on the bond when he prosecutes the employé diligently, notwithstanding no conviction is secured: *Union Pac. Tea Co. v. Union Surety etc. Co.*, 86 N. Y. Supp. 466, 43 Misc. Rep. 50. And the insurance company will be responsible for the expenses of the prosecution, the bond so stipulating, incurred by the employer as to crimes committed before the company requests the employer to carry on the prosecution, but not as to offenses committed after such demand, although the employer is unsuccessful in his principal claim against the company: *Globe Sav. etc. Co. v. Employers' Liability Assur. Corp.*, 15 Man. Rep. 531.

#### V. Diligence of the Employer or Insured.

The obligor in a fidelity bond is not released from responsibility, it seems, by the want even of ordinary diligence and prudence on the part of the insured in lessening the risk, when there is no express stipulation therefor. Speaking of fidelity bonds, Justice Hammond, in *Guarantee Co. v. Mechanics' Sav. Bank etc. Co.*, 80 Fed. 766, remarks: "The business honesty or fidelity insured by such contracts as these is not that kind of enforced honesty which comes of a want of opportunity to be dishonest, but that which is to be sturdy enough to operate for safety, spite of opportunity and temptation. That is the only kind of insurance worth the premium paid by the assured, or which is a fair consideration for the risk of loss which he opens under the protection of the guaranty, and, in the absence of evidence to the contrary, presumably that which is bargained for in each instance; a kind of honesty which will not take advantage of lapses of watchfulness to construct deceitful appearances adjusted to familiar traits or habits of carelessness on the part of the employer, perhaps indulged because of reliance upon the insurance which he has accepted as protection. An employer would need no insurance against that close and relentless vigilance which makes stealing impossible, and under these contracts he is bound to no watchfulness except that which he has contracted to use, in plain words, for the benefit of the insurer. The old form of bond and security was usually without covenants for watchfulness or inspection by the employer, or other obligee, and, as that is the highest measure of liability of which the business is capable, it is that which the obligee would naturally seek for his protection, always desiring, presumably, to provide by some such guaranty even against his own negligence and careless business habits. The nature of the risk forbids the idea of any implied or general limitations upon the guaranty against loss by dishonesty, and, in our judgment, these contracts are not to be construed as imposing any by mere



inference of an understanding between the parties that the business will be conducted with either ordinary or any degree of diligence or prudence as to watchfulness. The insurer gets what he contracts for in respect of that, and nothing more; and he must provide by express stipulation for even ordinary prudence on the part of the insured in taking measures for minimizing or lessening the broad risk we have indicated as that most desirable to the assured, and, therefore, that which is intended to be covered by the words of insurance in these contracts, except so far as the 'provisos and conditions hereinafter contained' shall have limited that broad liability. Nothing is to be implied not necessarily indicated by the words used, as might be in other examples of insurance, where the relation of the parties and the character of the risk are different, and where those relations properly breed implication that would import a meaning not admissible when the thing guaranteed is so far disassociated from any duty owing by the assured to the insurer as we find in the subject matter of insurance here." But see this case in 183 U. S. 402, 22 Sup. Ct. Rep. 124, 46 L. ed. 253; and consult in this connection, *Fidelity & Casualty Co. v. Gate City Nat. Bank*, 97 Ga. 634, 54 Am. St. Rep. 440, 25 S. E. 392, 33 L. R. A. 821; *Bank of Tarboro v. Fidelity & Deposit Co.*, 126 N. C. 320, 83 Am. St. Rep. 682, 35 S. E. 588; 128 N. C. 366, 83 Am. St. Rep. 682, 38 S. E. 908; the principal case, ante, p. 765; *Aetna Life Ins. Co. v. American Surety Co.*, 34 Fed. 291.

But while the insured may not be bound to exercise diligence to discover the dishonesty of an employé, still if, in exercising ordinary and reasonable prudence and care in giving attention to matters of which he is advised he could not fail to infer that the employé is a defaulter, he may be chargeable with knowledge of that fact: *National Bank v. Fidelity & Casualty Co.*, 89 Fed. 819.

#### VI. Giving Notice of Loss or Dishonesty.

A condition in a bond of fidelity insurance that claims thereunder shall be made as soon as practicable after the loss is discovered, and within six months after the bond expires, is regarded as a material stipulation, and a condition precedent to recovering on the bond. The fact that the surety company has actual notice of a loss has been held not to excuse the insured from giving notice within the specified time: *California Sav. Bank v. American Surety Co.*, 87 Fed. 118. See, also, the same case in 82 Fed. 866. Such stipulations, however, do not render it necessary that the assured notify the company of every act of laches or inefficiency on the part of the employé which ultimately may create a loss to the assured, but only that notice be given of such acts as may create a loss for which the company is responsible—a loss arising from fraud or dishonesty. Mere inefficiency or laches, consistent with integrity, need not be communicated: *Pacific Fire Ins. Co. v. Pacific Surety Co.*, 93 Cal. 7, 25 Pac. 842. And the assured is not required to give notice upon

mere suspicion of dishonest or fraudulent conduct, but is entitled to a reasonable time for investigation in order to ascertain the facts: *Bank of Tarboro v. Fidelity & Deposit Co.*, 126 N. C. 320, 83 Am. St. Rep. 682, 35 S. E. 588; 128 N. C. 366, 83 Am. St. Rep. 682, 38 S. E. 908; *American Surety Co. v. Pauly*, 170 U. S. 133, 18 Sup. Ct. Rep. 552, 42 L. ed. 977.

Immediate notice means notice within a reasonable time, with due diligence under the circumstances of the particular case and without unreasonable and unnecessary delay, of which the jury ordinarily are the judges: *Remington v. Fidelity & Deposit Co.*, 27 Wash. 429, 67 Pac. 989; *American Surety Co. v. Pauly*, 72 Fed. 470. This is the well-established rule in other branches of insurance: See *Woodmen Accident Assn. v. Pratt*, 62 Neb. 673, 89 Am. St. Rep. 777, 87 N. W. 546, 55 L. R. A. 291; *Ward v. Maryland Casualty Co.*, 71 N. H. 262, 93 Am. St. Rep. 514, 51 Atl. 900; *Horsfall v. Pacific Mut. Life Ins. Co.*, 32 Wash. 132, 98 Am. St. Rep. 846, 72 Pac. 1028. Indeed, more latitude is allowed the assured in giving notice in cases of fidelity insurance than in the other forms of insurance. "In a case of fidelity insurance," observes Chief Justice Ladd in *Perpetual Bldg. etc. Assn. v. United States Fidelity etc. Co.*, 118 Iowa, 729, 92 N. W. 686, "some time may elapse after a well-grounded suspicion before the employer ought, in prudence, to make any charge of fraud or dishonesty. Mere laches or inefficiency in business, consistent with integrity, are not enough. Knowledge of a defalcation frequently depends on a long train of events, or the examination of extended accounts. Discrepancies or irregularities, confirmatory in themselves of guilt, are often explainable, or turn out to be entirely consistent with innocence. The confidence of years is not ordinarily shattered in an instant, and the employer may be commendably slow to be convinced of the depravity of the person whom he has implicitly trusted. Unjust inferences and false accusations are always to be avoided. The truth, only after being ascertained with reasonable certainty, can be safely made known. Character is too sacred to permit of tolerating a less liberal rule. It is only of facts which may create a loss for which the surety is responsible—that is, a loss arising from fraud or dishonesty—that immediate notice is exacted. . . . Of necessity, resort must be had to the facts of each particular case in determining whether notice was given within the time stipulated. And it is to be borne in mind that the condition relating to notice is not one precedent to the loss, but following it, and pertains more especially to the performance of the contract. Such conditions, as they relate to the remedy, are not usually as strictly construed as those involving the essence of the agreement."

Knowledge on the part of the insured for six months of the misconduct of his employé, without giving notice thereof to the insurer, is held to avoid the insurance in *Michigan Sav. etc. Assn. v. Missouri etc. Trust Co.*, 73 Mo. App. 161.

A condition in a policy of fidelity insurance for immediate notice of loss or dishonesty may be waived: *Globe Sav. etc. Co. v. Employers' Liability Assur. Corp.*, 13 Man. Rep. 531. Where a fidelity insurance company sends an inspector to investigate a loss, who states that the company will require an expert to check the books, and one is appointed at his suggestion, the company is chargeable with knowledge of what is going on and likely to be ascertained so as to amount to a waiver of notice, at least until the investigation is finished, although the contract prohibits waiver by inspectors: *Perpetual Bldg. etc. Assn. v. United States Fidelity etc. Co.*, 118 Iowa, 729, 92 N. W. 686. But it has been decided that where the insured inquires the insurer's reasons for not indemnifying him for a loss, and the insurer writes that, among other reasons, the employé was not acting within the duties contemplated in the bond, other defenses not mentioned are not waived: *Michigan Sav. etc. Assn. v. Missouri etc. Trust Co.*, 73 Mo. App. 161.

#### VII. Making Proof of Loss or Claim.

Where it is stipulated in a policy of fidelity insurance that the employer shall, upon the demand of the insurer, furnish particulars and proofs of his claim and the correctness thereof, this condition must be complied with, or an excuse or waiver of noncompliance shown, in order to recover on the policy: *Hough v. American Surety Co.*, 90 Mo. App. 475; *Wieder v. Union Surety etc. Co.*, 86 N. Y. Supp. 105, 42 Misc. Rep. 499. But the proofs of loss, when made, "are not to be tested by the same rules as would be applied to an indictment, or even to a pleading. They are mercantile documents. All that can reasonably be required of such a 'written statement of the loss' is that it shall be a brief and general statement of the facts expressed in the language of commerce, and, as thus expressed, shall truthfully inform the company how the loss occurred, giving the facts and the result with substantial accuracy. . . . We know of no principle of law and of no authority which requires documents such as these to be construed otherwise than liberally, unless, perhaps, either because of what they contain or because of what they omit, the insurer is or may be misled to his prejudice": *American Surety Co. v. Pauly*, 72 Fed. 484. See, also, *American Surety Co. v. Pauly*, 72 Fed. 470; *Globe Sav. etc. Co. v. Employers' Liability Assur. Corp.*, 13 Man. Rep. 531.

#### VIII. Release of Surety and Cancellation of Bond.

The fact that a bank is liable to an assured for a loss suffered through his employé fraudulently raising checks drawn on the bank, does not discharge the insurer of the employé's fidelity from liability to the assured: *Champion Ice etc. Co. v. American Bonding etc. Co.*, 25 Ky. Law Rep. 239, 75 S. W. 197. And under a statute allowing a surety company to be released from its liability on a bond on the same terms as an individual, such a company can release itself only

by getting off the bond: *Bank of Barboro v. Fidelity & Deposit Co.*, 126 N. C. 320, 83 Am. St. Rep. 682, 35 S. E. 588; 128 N. C. 366, 83 Am. St. Rep. 682, 38 S. E. 908.

A statute providing that when a corporation cancels a bond executed by it, or gives notice to the employer of the person whose fidelity is insured that it will no longer be security for the fidelity of that person, it shall furnish, under a penalty, a statement of the facts on which it bases its action, does not apply to a foreign corporation not doing business within the state, and receiving an application for a statement in a foreign state: *McBride v. Fidelity & Casualty Co.*, 14 Tex. Civ. App. 280, 37 S. W. 1091.

### IX. The Doctrine of Subrogation.

The right of an insurer, upon paying a loss, to be substituted in the place of the insured in respect to the rights and remedies of the insured against persons causing the loss, has frequently been recognized in cases of fire and marine insurance, though it has been denied in cases of accident and life insurance: See the monographic notes to *American Bonding Co. v. National etc. Bank*, 99 Am. St. Rep. 504; *Mobile Ins. Co. v. Columbia R. R. Co.*, 44 Am. St. Rep. 731-739. So, it would seem that a fidelity insurance company, in paying a loss sustained by the assured, should stand in the shoes of the latter and be subrogated to all his rights and remedies against the unfaithful employé: *London Guaranty etc. Co. v. Geddes*, 22 Fed. 639.

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## TEMPLE v. FERGUSON.

[110 Tenn. 84, 72 S. W. 455.]

**TRUST for Married Woman—When Active.**—A conveyance in trust for the separate use and benefit of a married woman creates an active trust. (p. 793.)

**TRUST for Married Woman.—Upon the Death of Her Husband,** property conveyed in trust for the separate use and benefit of a married woman becomes hers absolutely. (pp. 793, 794.)

**TRUSTS.—Trustees Take Exactly that Quantity of Interest** which the purposes of the trust require. If property is conveyed to one and his heirs and assigns forever as trustee for the separate use and benefit of a married woman, the purpose of the trust is accomplished and the legal title of the trustee is extinguished upon the death of her husband, and the whole title, legal and equitable, becomes vested in her with full power of disposition. (pp. 794, 795.)

James L. Watts, for the appellant.

Smith & Maddin, for the appellee.



<sup>86</sup> McALISTER, J. The controversy in this case is over a tract of land comprising twelve acres, situated in the nineteenth civil district of Davidson county. It is claimed by complainants as heirs at law of Mrs. Anne Tennessee Temple, and by defendant as devisee under the will of Mrs. Temple.

The settlement of the controversy depends upon the proper construction of a certain deed of settlement. It appears from the record that on the 26th of October, 1861, J. E. Gleaves, clerk and master of the chancery court of Davidson county, conveyed to John Taylor, trustee for Mrs. Anne Tennessee Temple, wife of C. L. Temple, the tract of land in question. The conveyance was made upon the direction of C. L. Temple, the husband. It conveyed "to the said John Taylor, as such trustee of Anne Tennessee Temple, and his heirs and assigns, forever, a certain tract or parcel of land in the county of Davidson and state of Tennessee, and on the south side of Neeley's Bend Turnpike, civil district No. 19, bounded as follows: . . . . To have and to hold the said real estate, with all the hereditaments and appurtenances thereto belonging, to the said John Taylor and his heirs and assigns, forever, as trustee, however, of Anne Tennessee Temple, and for her sole and separate use and benefit."

John Taylor, the trustee, died many years ago, and no successor to him was appointed. C. L. Temple, the husband, also died, leaving his wife, the said Mrs. Annie T., surviving him. Mrs. Temple died in 1902, leaving a last <sup>87</sup> will and testament, in which she devised the land in question to her granddaughter, Mrs. Bettie L. Ferguson.

The present bill was filed by the four sons of C. L. and Anne Tennessee Temple, claiming the land by inheritance, and seeking to remove the devise made to Bettie L. Ferguson as a cloud on their title.

The theory of the bill is that Mrs. Anne T. Temple was not vested with such title as she could convey by will or otherwise. Complainants allege that upon the death of John Taylor, trustee, the legal title to the land descended to his heirs, and the bill prays that the title be divested out of them, and that the land be sold for partition among the complainants as heirs of Mrs. Temple.

A demurrer was interposed on behalf of defendant Bettie L. Ferguson, which was sustained by the chancellor, and the bill dismissed. The court of chancery appeals affirmed the decree of the chancellor.

The first question for determination is whether the conveyance to John Taylor, trustee, created an active or a mere naked, dry trust.

The law is now well settled in this state that when the trust is created, and the property conveyed to a trustee to hold for the separate use and benefit of a married woman, an active trust is thereby created. As stated by Justice Lurton in *Jourolmon v. Massengill*, 86 Tenn. 81, 5 S. W. 719: "Trusts for the protection of the estates of married women during coverture against their <sup>88</sup> husbands and his creditors, and the wife and her extravagance, as well as her contracts, are made every day. Such trusts are sustained upon the ground that they are intended to protect the estate during coverture, and are hence held special and active. Such a trust is not within the purview of the statute of uses, and is not executed by the statute."

The next question that arises is, What effect did the death of C. L. Temple, the husband, have upon the trust estate? The record discloses that the husband, C. L. Temple, died many years ago, and his widow did not contract a second marriage. As already stated, the property in question was conveyed by John E. Gleaves, clerk and master, to Taylor, trustee, upon the direction of C. L. Temple, the husband, and for the purpose of creating a separate estate in the wife, free from the marital rights of the husband. It is unnecessary to consider the question whether this trust would have applied to a second marriage, for no other marriage was contracted. What, then, was the nature of the trust estate at the date of the death of C. L. Temple?

In *Beaufort v. Collier*, 6 Humph. 487, 44 Am. Dec. 321, Judge Green quotes with approval the following language of Lord Langdale, used in *Tullett v. Armstrong*, 1 Beav. 1, to wit: "Whether the gift to her separate use be made with or without the power of alienation, the restraint is annexed to the separate estate only, and the separate estate has its existence only during the coverture. While the woman is discovert the <sup>89</sup> separate estate, whether modified by restraint or not, is suspended, and has no operation, though it is capable of arising upon the happening of a marriage."

In *Brown v. Foote*, 2 Tenn. Ch. 260, Judge Cooper said, viz.: "There seems to be no conflict in the authorities upon this point, and Mr. Perry lays it down as law, for which he cites a number of cases, that property conveyed to a married woman, to her sole and separate use, becomes absolutely hers, and may be sold

by her as soon as her husband dies; or creditors may seize it for her debts": 2 Perry on Trusts, 2d ed., sec. 652.

"So, in *Pooley v. Webb*, 3 Cold. 603, it was held that the separate estate exists only during coverture, being suspended when the feme becomes discovert; and upon becoming discovert the feme possesses the same power of disposition over her property as other persons."

The next question that arises is in respect of the extent of the title of the trustee, and the quantity of estate he took in this land.

Where there is no remainder over, or other estate, to be preserved by trustee, does his title descend to his heirs? We think the question is answered in the leading case of *Ellis v. Fisher*, 3 Sneed, 231, 65 Am. Dec. 52, viz.: "The established doctrine is that trustees take exactly that quantity of interest which the purposes of the trust require. The question is not whether the testator (or grantor) has used words of limitation, or expressions adequate to carry an estate of inheritance, but <sup>90</sup> whether the exigencies of the trust demand the fee simple, or can be satisfied by any, and what, less estate; and therefore a devise to trustees may be either restricted or extended, as the nature and purposes of the trust require. Although the devise be expressly to the trustees and their heirs, it is well settled that if the duties imposed on them, or the purposes of the trust, require only an estate pur autre vie to be vested in them, their legal interest will be cut down to that extent, notwithstanding the express limitation to them in fee. This construction has been held to prevail even in the case of a deed by necessary implication arising from the object of the trust in connection with the nature of the subsequent limitations," etc.

In *Smith v. Metcalf*, 1 Head, 64, it was said, viz.: "It is well settled that an estate coextensive with the duties to be performed will vest in the trustee, and he will take exactly that quantity of interest which the purposes of the trust require, which being executed, the trust estate ceases."

Again, in *Rogers v. White*, 1 Sneed, 68, the headnote is, viz.: "Where an estate is settled upon a trustee for the sole use and benefit of a feme covert, free from the use, control, or creditors of the husband, the interest of the trustee continues no longer than the purposes of the trust demand. The object being to protect the property against the marital rights of the husband, upon his death all the purposes of the trust are accomplished."

<sup>91</sup> We are therefore of opinion that upon the death of C. L.

Temple the purpose of this trust was accomplished, the legal title of the trustee extinguished, and the whole title, legal and equitable, became vested in Mrs. Temple, with full power of disposition as a feme sole.

It follows that the devise of this property by Mrs. Temple to her granddaughter was valid, and that complainants are not entitled to recover.

The decree of the court of chancery appeals, as well as that of the chancellor, in dismissing the bill, is affirmed.

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*A Trust for the sole use of a married woman is held terminated upon the death of her husband in Snelling v. Lamar, 32 S. C. 72, 17 Am. St. Rep. 835, 10 S. E. 825. See, also, Kuntzleman's Trust Estate, 136 Pa. St. 142, 20 Am. St. Rep. 909, 20 Atl. 645; Beaufort v. Collier, 6 Humph. 487, 44 Am. Dec. 321. As to the quantity of interest in the estate taken by a trustee, see Coulter v. Robinson, 24 Miss. 278, 57 Am. Dec. 168; Ellis v. Fisher, 3 Sneed, 231, 65 Am. Dec. 52.*

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## TOMPKINS v. RAILROAD.

[110 Tenn. 157, 72 S. W. 116.]

### ATTORNEY AND CLIENT—Control of Action by Client.—

A plaintiff may dismiss his suit at pleasure, without the intervention of his attorney, notwithstanding there is a statute giving attorneys who begin a suit a lien upon the plaintiff's right of action from the date of filing the suit. (p. 798.)

II. C. Lassing and Allen & Raines, for the appellant.

Whitaker & Lytle and A. B. Neil, for the appellee.

**159** McALISTER, J. The present suit involves the proper construction of section 1, chapter 243 of the acts of 1899, viz.: "That attorneys of record who begin a suit in a court of record in this state shall have a lien upon the plaintiff's right of action from the date of filing the suit."

The facts necessary to be stated to raise the question in litigation are that on September 2, 1902, Cora Tompkins, through her attorneys, H. C. Lassing and Messrs. **160** Allen & Raines, instituted an action in the circuit court of Davidson county against the Nashville, Chattanooga and St. Louis Railway to recover damages for the alleged negligent killing of plaintiff's husband. A declaration was filed on the 24th of October, 1902,



in which it was alleged that the deceased was killed while riding as express messenger on one of defendant's trains in the state of Georgia, and that said train was negligently brought in collision with another of defendant's trains, occupying the same track, but moving in an opposite direction.

It appears that the writ and declaration were signed by H. C. Lassing and Allen & Raines, as attorneys for the plaintiff.

At a subsequent day of the term, the plaintiff without notice to her counsel, caused the following motion to be entered on the motion docket of the court, viz.: "In this cause the plaintiff moves the court for an order dismissing her suit against the defendant railroad company, without prejudice in any way to her right of action against the said railroad company."

Prior to the hearing of said motion, Messrs. Lassing and Allen & Raines, by leave of the court, appeared and filed a petition in said cause, alleging, among other things, that petitioners were plaintiff's attorneys of record, and, as such, instituted the suit, and had a lien on plaintiff's right of action for their compensation; that, under the contract and employment made by petitioners, they would be entitled, if case should be compromised, <sup>161</sup> to one-fourth of the recovery, in lieu of fees for their services, and, if said case was prosecuted to final judgment, they would be entitled to more than one-fourth of the recovery, to be governed by the extent of services rendered, but not to exceed one-half of the recovery.

It is alleged that petitioners are interested in any step or move which may be taken in said suit, and that petitioners are entitled to prosecute said suit to final judgment, because of their interest in said suit, and their lien on the plaintiff's right of action; that petitioners have not been paid for their services in said cause; and that plaintiff is insolvent, and unable to pay their fees unless she obtains a recovery in said cause.

Petitioners resisted the right of plaintiff to dismiss her suit, and asked leave of the court to be allowed to prosecute said suit in plaintiff's name to final recovery, and to be made joint parties with plaintiff in said suit. This petition was signed and sworn to. On the 8th of November, 1902, plaintiff, by her attorneys, Whitaker & Lytle and A. B. Neal, interposed a demurrer to the petition, which was sustained by the court, and the original suit dismissed on the motion of plaintiff. The substance of the demurrer was that counsel's lien on the right of action cannot be enforced so long as plaintiff fails or refuses to prosecute the suit, that plaintiff is alone entitled

to prosecute said right of action, and that petitioners are not entitled to be made parties to said action.

**162** We are constrained to believe this contention sound. The object of the legislature in giving an attorney's lien on the right of action was to prevent the compromise and settlement of cases out of court, so as to defeat the collection of fees for professional services rendered. It was not contemplated by the act that suitors should thereby be precluded from managing their cases or dismissing them at pleasure.

In *Railroad v. Wells*, 104 Tenn. 707, 59 S. W. 1043, in considering this statute, it is said: "The lien which the statute fixes on the plaintiff's right of action follows the transaction without interruption, and simply attaches to that into which the right of action is merged. If a judicial recovery is obtained, the lien attaches to that; if a compromise agreement is made, the lien attaches to that; and in each case the attorney's interest is such that it cannot be defeated or satisfied by a voluntary payment to his client without his consent. . . . Since the passage of the act, as before, the plaintiff may prosecute or compromise or dismiss his suit at will, and the defendant is liable only for such sum as may be adjudged or stipulated in the plaintiff's favor."

It is insisted, however, that the question presented in that case was whether counsel of record were entitled to a lien on the amount paid to plaintiff by way of compromise, and that the question presented in this record was not involved in the *Wells* case.

**163** Counsel insist the question now presented is whether the plaintiff can defeat and defraud her attorneys of their lien on her right of action by dismissing her suit, the plaintiff being insolvent and unable to pay their fees.

As already stated, it is not shown or charged in the petition of counsel that plaintiff has settled or compromised her suit, or has acted fraudulently or collusively with the defendant company. The allegation merely is that she has directed the dismissal of her suit without prejudice, and petitioners object to such dismissal, and ask the court for leave to prosecute the suit to final judgment in the plaintiff's name. Counsel cite in support of this contention *Twiggs v. Chambers*, 56 Ga. 279; *Moses v. Bagley*, 55 Ga. 283; *Coleman v. Ryan*, 58 Ga. 132.

The Georgia decisions hold that the plaintiff will not be allowed to dismiss or discontinue his suit, over the objection of his attorney, without paying his charges. Those cases, how-

ever, are based on a statute which not only gives an attorney's lien on the suit, but provides that the attorney may control the suit to enforce his lien for the amount due him for services: Ga. Code, sec. 2814. By the act of 1826 (Shannon's Code, sec. 4940), suits may be dismissed, in writing, out of term time, as well as in term time, and further costs saved. So it was held in *Sharpe v. Allen*, 11 Lea, 521, that by virtue of this statute a dismissal of a suit in vacation puts an end to the suit, and terminates the control of the court over it. The jurisdiction of the court over it ceases, except <sup>164</sup> to render judgment for costs: See, also, *Stanton v. Houston*, 12 Heisk. 266.

So, in *Yoakley v. Hawley*, 5 Lea, 673, it was held that the attorney cannot prosecute or defend in the name of his client against the latter's consent. The fact that the attorney may be interested to continue the defense, in order to secure his fee, does not give the right to control the case. The court in that case continues: "She [the plaintiff] had the right, as we have repeatedly held, to dismiss or compromise her suit, independent of their wishes, and this right was beyond their control": *Stephens v. Railway Co.*, 10 Lea, 450; *Thompson v. Thompson*, 3 Head, 529. The question, then, is presented, whether these holdings are changed or modified by chapter 243 of the acts of 1899.

In *Railroad Co. v. Wells*, 104 Tenn. 711, 59 S. W. 1043, it was held "that this act does not deprive the plaintiff of the right to control her own suit, nor make all defendants in suits brought in courts of record liable for the fees of plaintiff's attorneys. Since the passage of this act, as before, the plaintiff may prosecute or compromise or dismiss her suit at will, and the defendant is liable only for such sum as may be adjudged or stipulated by compromise in plaintiff's favor."

We may observe that if the act of 1899 had, in terms, undertaken to deprive the plaintiff of the right to control his own suit, it would be open to grave constitutional objections; but, as held in the *Wells* case, the act does not expressly or by necessary implication import such <sup>165</sup> a meaning, but leaves the plaintiff to prosecute, compromise, or dismiss his suit at will. So we think that public policy and private right would be best subserved by adhering to the rule so long adopted in this state, both by statute and legal practice, of permitting a litigant to dismiss her suit without the intervention of her attorney.

If, for instance, a complainant in a bill for divorce should conclude to withdraw her complaint and become reconciled to her husband, should the dismissal of her suit be prevented by her attorney, and he be permitted to become coplaintiff with her in the prosecution of her suit, because by attachment he has impounded property of the husband to secure her alimony? This very case was recently before this court, wherein it was seriously contended by counsel that he had a lien on complainant's cause of action, and the bill could not be dismissed without the settlement of his fees. It is needless to say that the question was resolved adversely to the contention of counsel.

Again, it would seem that a litigant has a right to say when he will no longer incur the liability of a bill of costs for the prosecution of a suit. If he has no right to control this matter, his counsel can carry him through all the courts, and, at the end of a long litigation, leave him mulcted in a heavy bill of costs.

We are unable to agree with counsel in their construction of the statute, and the result is that the judgment of the circuit court must be affirmed.

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*The Principal Case* is cited and considered with other similar decisions in the monographic note to *Cameron v. Beezer*, 13 Ann. St. Rep. 175, on the extent to which a litigant may control a cause in which he has appeared by attorney.

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## RAILROAD COMPANY v. SMITH.

[119 Tenn. 197, 75 S. W. 711.]

**CARRIER'S Duty to One not a Passenger.**—When, as between a railroad company and a person riding on its train, the relation of carrier and passenger has not been established, or, if established, has been forfeited by the passenger, the company owes him no duty, and is liable to him only for willful, wanton, or intentional injury. (p. 802.)

**CARRIER—Passengers Alighting from Train.**—The Conductor on a railroad cannot be required absolutely to allow and see that no hazards every person who may attempt to get on or off his train. (p. 802.)

**CARRIER—Passengers Alighting from Train.**—When the Conductor on a train has called for tickets and ascertained the destination of his passengers, he can be required to see after only those whom, by proper diligence, he has been able to discover, and not after those who have evaded or neglected to pay fares, or to notify him of their destination. Especially is this true as to persons who



enter or leave the car improperly and at a point where they cannot be seen by him. (p. 802.)

**CARRIER—Destination of Passengers.**—It is the Duty of a Passenger, when the conductor approaches him, calling for and collecting fares, to tender his ticket or money, and, in the latter event, to notify the conductor of his destination; and the conductor must take notice of the destination of each passenger known to him, or that, in the discharge of his duty, he may be able to discover, but he cannot be held liable for those who, by evading the payment of fare, do not come under his notice. (pp. 802, 803.)

Charles B. Simonton & Son and Fentress & Cooper, for the appellant.

R. W. Sanford, for the appellee.

**198 WILKES, J.** This is an action for damages for personal injuries. It was tried before a jury in the court below, and there was a verdict and judgment for one thousand dollars. There was an error in the original judgment, for which it was reversed **199** by this court, and on remand the judgment was corrected. The railroad company has appealed and assigned errors.

The facts, so far as necessary to be stated, are that plaintiff was a young lady nineteen years of age, and resided with her father at Brighton, a station seven miles south of Covington on the Illinois Central Railroad. She went to Covington on the 29th of November, 1900 (Thanksgiving Day), with her brother, Elmer, a lad twelve years of age. In the evening she went with him to the station, expecting to send him home, and to remain all night in Covington herself. Her brother was not willing to return home without her, and, after much time spent in vain efforts to persuade him, they got upon the train together, not having bought any tickets she giving as a reason that she was trying to persuade her brother to go alone until too late to get tickets, and, moreover, that she thought the money would be as good as a ticket. She and her brother entered the rear end of the ladies' coach with other passengers, and took seats; she says near the back end, he says about the middle of the coach. She was accustomed to riding on the train, and often went from her home to Covington and Memphis, and had gone upon the same evening train on previous occasions when she had tickets. She made no inquiry whether the train would stop at Brighton, her destination. She knew that that station was a flag station, and trains did not stop there unless there were passengers to get off of the **200** train, or the train was flagged to let passengers on.

The coach was full of passengers. They (the sister and the brother) state that they had their fares in their hands, but the conductor did not call upon them for tickets nor the passage money, nor did they offer it to him, nor tell him that they wanted to stop at Brighton. The conductor says he passed through the train between Covington and Brighton, and called for and took up tickets and fares. He was in uniform, and stated that as he approached the passengers' seats he would call for tickets, and take up all that were offered, or that he could discover. The porter was with him, and says that as the conductor would go through the cars he would call out "Tickets." No ticket for Brighton was presented, and no fare paid to that point by anyone; and the conductor says he did not know that anyone desired to get off at Brighton, and he would not have stopped there, if it had not been that the train was flagged to stop and let on a United States mail inspector, who was there waiting for a train. At Covington, the conductor, when the train stopped, had gone immediately to the ticket office for telegraph orders, and did not assist passengers to board the train, though quite a number got on.

As the train approached Brighton, it was flagged and signaled to stop, and the conductor entered the front door of the ladies' coach, and called out "Brighton." No person arose or indicated a purpose to get off. The conductor stepped down on <sup>201</sup> the platform at the front end of the car, the usual place for passengers to alight, and stood ready to help passengers on or off, and, after seeing the waiting mail agent get on the car, signaled the engineer to go ahead, and the train started. After the conductor passed out of the front door, plaintiff, with her brother, went out of the rear end of the coach, which was somewhat dark, and proceeded to alight. The train started as she was stepping from the bottom step, and she fell on the platform, a smooth crushed-stone surface, and broke her thigh bone, causing a serious injury. It appears that her brother stepped off the cars after she did, and reached the ground safely.

The trial judge charged the jury, in substance, that the company, under the circumstances of the case, owed the plaintiff ordinary care and prudence to see that she was not injured, and this was due her, though she had never paid her fare, or offered to do so, and though she attempted to leave the car without paying, and forfeited all rights as a passenger, that the duty of the company in such case was one of ordinary dili-

gence, and not the highest kind of diligence required toward passengers who had paid fare; and, if the conductor did not stop a reasonable time for all passengers to alight, the company would be liable.

We are of opinion that the court was in error in part of this instruction. If the relation of carrier and passenger had never been established, or if it had been forfeited <sup>202</sup> by the passenger, the company owed her no duty, and would be liable to her only for willful, wanton, or intentional injury.

We cannot see how the company was under any obligation to hold the train for the plaintiff to alight beyond the usual halt, which the conductor says was made, when the conductor did not know, and without his fault could not know, that she wanted to alight, or that she was a passenger, or that any passenger intended to alight; and this is all conceded by the plaintiff herself. He had adopted all the usual precautions to ascertain if there were any passengers for Brighton, and the usual, though apparently unnecessary warnings for any to alight that might be aboard. The plaintiff left the car at an unusual place—the rear of the coach—in the night, and was not, and could not be, seen by the conductor from his usual place of observation, and he was totally ignorant that she was on the train and wanted to get off. We are unable to see any negligence on the part of the conductor, or any duty the company was under to plaintiff. If he had seen her, and recognized that she was attempting to alight, he would have been under obligation to give her reasonable time to get off; but, not knowing anything whatever of her, there could be no obligation to wait for her—certainly not longer than the usual halt.

We are of the opinion that a conductor upon a train of a commercial road cannot be required absolutely to see and know at all hazards every person who may <sup>203</sup> attempt to get on and off his train. He cannot be at each entrance to each coach, and see each person who may attempt to enter or leave. When he has called for tickets, and ascertained the destination of his passengers, he can only be required to see after those whom, by proper diligence, he has been able to discover, and not after those who have evaded or neglected to pay fare or to notify him of their destination; and especially is this true of persons who enter or leave the coach improperly, and at a point where they cannot be seen by the conductor. It is the duty of the passenger, when the conductor approaches him collecting fares

and calling for them, to tender his ticket or money, and, in the latter event, to notify the conductor of his destination; and the conductor must take notice of the destination of each passenger known to him, or that, in the discharge of his duty, he may be able to discover, but cannot be held liable for those who do not come under his notice by evading payment of fare.

We are of opinion there is error in the judgment of the court below upon the features indicated, and it is reversed, and the cause remanded for a new trial. Appellee will pay costs of appeal.

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*A Common Carrier of passengers must exercise the highest degree of care for their safety: Le Blanc v. Sweet, 107 La. 355, 31 South. 766, 90 Am. St. Rep. 303, and cases cited in the cross-reference note thereto. As to who are passengers within this rule, see the monographic note to Illinois Cent. R. R. Co. v. O'Keefe, 61 Am. St. Rep. 75-104. A railroad company seems to be under no duty to a trespasser on its train further than to do him no willful or wanton harm: Richmond etc. R. R. Co. v. Burnsed, 70 Miss. 437, 35 Am. St. Rep. 656, 12 South. 958; Baltimore etc. Ry. Co. v. Cox, 66 Ohio St. 276, 90 Am. St. Rep. 583, 64 N. E. 119; McNeill v. Durham etc. R. R. Co., 132 N. C. 510, 95 Am. St. Rep. 641, 44 S. E. 34. It is answerable, however, for injuries to him inflicted through the willful, reckless, or grossly negligent conduct of its employes: Illinois Cent. R. R. Co. v. Leiner, 202 Ill. 624, 95 Am. St. Rep. 266, 67 N. E. 398.*

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## MEMPHIS STREET RAILWAY COMPANY v. GRAVES.

[110 Tenn. 232, 75 S. W. 729.]

**STREET RAILWAY.**—A Street-car Transfer ticket is a mere token to be used for the convenience of the railway company, and is not the contract between the carrier and the passenger. (p. 806.)

**STREET RAILWAY—Wrong Transfer.**—If a conductor makes a mistake in a transfer ticket, so that the passenger is denied passage thereon and expelled from the car, it is the fault of the railway company, for which it is liable. (p. 806.)

**STREET RAILWAY—Transfer, Duty of Passenger to Examine.** When a passenger on a street-car in good faith accepts a transfer ticket, he is not bound to stop and scrutinize it to see that no mistake has been made; he has a right to presume that the conductor has given him a proper ticket. (p. 806.)

Wright, Peters & Wright, for the appellant.

J. W. Canada, for the appellee.

**233 WILKES, J.** This is an action for the alleged unlawful ejection of the plaintiff from the car of the defendant com-



pany by one of its conductors. The action was commenced before a justice of the peace. On appeal it was tried before the court and a jury, and there was a verdict and judgment for fifty dollars, and the street railway company has appealed and assigned errors.

The facts necessary to be stated are that the plaintiff boarded a car of the defendant company on its suburban <sup>234</sup> line at the corner of Latham and McLeMore streets. When he paid his fare, he asked for a transfer ticket to go east on Vance street. At the proper transfer point he boarded a Vance street-car, and, when the conductor of that car came for his fare, handed him the transfer ticket received from the conductor of the initial car. The conductor of the Vance street-car refused to recognize the transfer ticket, and after some parley the plaintiff was ejected from the car. He had no money with him, and was compelled to walk to his place of business, where he arrived late, causing him anxiety lest he lose his position. The plaintiff testifies that the conductor ejected him by force, over his protest and explanation, and treated him roughly. He testifies that, when he presented his transfer ticket, the conductor insolently and insultingly handed it back to him, saying: "This ain't no good. You will have to pay your fare." He further states that he politely protested, and informed the conductor that the conductor on the suburban line had given it to him as a transfer east on Vance street. To which the conductor replied, "You will have to get off," and thereupon had the car stopped, and jerked him by the arm in the presence of the passengers, and rudely and roughly carried him out of the car, and put him on the ground, without any explanation why he would not honor the transfer; that there were many passengers on the car, some of whom were ladies, and he was greatly humiliated and embarrassed; and that it was a rainy, disagreeable morning.

<sup>235</sup> It is said that the court erred in charging the jury that "it was the duty of the defendant company, upon being applied to for a transfer, to furnish the plaintiff a proper transfer, and, if the conductor furnished the plaintiff a different transfer from the one called for, that would be the negligence of the conductor, and not the negligence of the plaintiff; that the plaintiff had the right to presume that the street-car conductor would do his duty in the premises, and had a right to rely for passage upon the transfer given him." It is said, also, that it was error to charge it to be negligence on the

part of the company if the conductor gave him a wrong transfer, and also that it was error to hold that the plaintiff could accept the transfer without question, and that his acceptance of a wrong transfer would not constitute negligence on his part. We think there is no error in the charge, and that the question has already, in principle and effect, been settled in the case of *O'Rourke v. Street Ry. Co.*, 103 Tenn. 126, 76 Am. St. Rep. 639, 52 S. W. 872, 46 L. R. A. 614. In that case the court said: "To require a passenger, who has made a valid contract for transportation and paid the requisite fare, to retire from the car and suspend his journey because of an original defect in the ticket furnished him by the company's agent, is to visit the wrong of the offender upon the offended. It is to make the rightful passenger suffer for the fault of the carrier, and that, too, in the latter's interest. This court <sup>236</sup> will not yield its assent to a result so unjust and oppressive. The plaintiff had a right to believe the transfer ticket all that it should be. With it he diligently sought and promptly entered the first transfer car, and, upon being challenged by the conductor of that car as too late to use the ticket, he made a fair and reasonable statement, showing that he had just left the first car, and that the first conductor must have wrongfully indicated the hour of issuance on the face of the ticket. He owed the company no other duty, and his expulsion under such circumstances was a tortious breach of contract, for which he became entitled to recover all approximately resulting damages, including those for humiliation and mortification, if such were in fact sustained": *O'Rourke v. Street Ry. Co.*, 103 Tenn. 135, 76 Am. St. Rep. 639, 52 S. W. 874, 46 L. R. A. 614.

This court said again in the *O'Rourke* case: "The passenger is not required in law, nor allowed in fact, to print or write or stamp the ticket. The carrier alone has that right, and the passenger is authorized to believe and presume it will be properly exercised, and that the ticket, when delivered, is a faithful expression of the contract as made": *O'Rourke v. Street Ry. Co.*, 103 Tenn. 133, 76 Am. St. Rep. 639, 52 S. W. 874, 46 L. R. A. 614.

There was in the *O'Rourke* case a printed statement on the back of the transfer ticket to the effect that the passenger would "examine date, time, and direction, <sup>237</sup> and see that the same are correct." But the court held that it would not enforce such a condition, that it was unreasonable, and that it would not place upon the passenger the duty of verifying the act of

the conductor in issuing a transfer ticket; and in that case the plaintiff made no examination at all of the transfer check, as in this case: *O'Rourke v. Street Ry. Co.*, 103 Tenn. 141, 76 Am. St. Rep. 639, 52 S. W. 872, 46 L. R. A. 614.

The argument of counsel for the street-car company is that passengers should be required to examine transfer tickets when handed to them, and verify the action of the conductor, and, if there is any defect in the ticket or any deviation from the request, to have it at once corrected, and, if he does not do so, he is guilty of such negligence as must bar his recovery. We think this contention not sound. The ticket is a mere token, to be used for the convenience of the road. It is not the contract between the road and the passenger. It is a statement by the initial conductor to the subsequent conductor what the contract is, and what the passenger is entitled to, and, if it is not correct, the fault is that of the road. Nor can passengers be required to verify the acts of the conductor, but they may presume that he acts correctly. The tickets or tokens are prepared by the company. They contain more or less of printed and other directions. Some passengers cannot read. Others are children. None of them have the time or opportunity in the rush of travel to scrutinize the ticket, and in many instances, if they did, they could not understand <sup>238</sup> the devices used by the company. The passenger has the right to presume the conductor has given him a proper ticket; and, if he make a mistake, it is the fault of the company, for which it is liable; and, if the passenger in good faith accept the ticket, he is not bound to stop and scrutinize it, to see that no mistake has been made.

We are of opinion that there is no error in the judgment of the court below, and it is affirmed with costs.

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*The Principal Case* is supported by the recent Indiana case of *Indianapolis St. Ry. Co. v. Wilson*, 161 Ind. 153, 66 N. E. 950, 67 N. E. 993, ante p. 261, and see the cases cited in the cross-reference note thereto.

## MEMPHIS STREET RY. CO. v. KARTRIGHT.

[110 Tenn. 277, 75 S. W. 719.]

**ELECTRIC RAILWAY—Fall of Trolley.**—Negligence is Presumed against an electric railway company from the breaking and falling of its trolley wire in a public street. (p. 808.)

**ELECTRIC RAILWAY—Degree of Care Required in Its Operation.**—An electric street railway company should be held to the highest or utmost degree of care in the construction, maintenance, and operation of its lines. (p. 812.)

Wright, Peters & Wright, for the appellant.

Jere Horne and M. C. Ketchum, for the appellee.

**279** WILKES, J. This is an action for damages for personal injuries. It was tried in the court below by a jury, and there were a verdict and judgment for two hundred and fifty dollars, and the railway company has appealed and assigned errors.

The facts, so far as necessary to be stated, are that plaintiff, a young man, about twenty years of age, was standing on the pavement at the corner of Rayburn and Vance streets, in the city of Memphis. A car of the defendant company was approaching on the street, when the trolley wire, forming part of its overhead construction, with an insulator upon its end, fell, and the insulator struck the plaintiff upon the head, inflicting a wound over his right eye, which left a permanent scar or blemish on his face. He was confined to his bed for several days, and was not able to work for some ten days, and incurred a medical bill of twenty-five dollars. It is not definitely shown what caused the breakage and fall of the trolley wire, but the plaintiff states that the trolley pole knocked the wire down; that he saw it fly off and knock the wire down.

**280** It is assigned as error that there is no evidence to sustain the verdict. This assignment is based upon the theory that there is no definite testimony as to why the wire broke, and no evidence of negligent construction, maintenance, and operation of the line, while there is testimony that the wire was in good condition, and had been inspected two days before; that at the time there was a break in the wire near the same place which was repaired, and the wire was then found to be in proper condition. The rule, as laid down in the case of Chattanooga Ry. Co. v. Mingle, 103 Tenn. 667, 76 Am. St. Rep. 703, 56 S. W. 23, is that "negligence on the part of the street-



car company in the selection, construction or supervision of its guy wire is presumed, without further evidence, from the fact that such wire, dangerously charged with electricity, falls on or near a public street, even if its fall was caused by a stroke from the deranged trolley of a passing car." This presumption of negligence must be overcome by the car company. The evidence introduced by the company consisted of the testimony of Bowen, the lineman; Erickson, the foreman of the repair apparatus, called the "Trouble wagon"; and a negro, Branch, a member of his crew. The testimony of these witnesses is quite contradictory, though they speak, in general terms, quite emphatically as to the quality of the wire, its condition, and frequent inspection. They are more or less interested, as employes whose duties were to make repairs and keep the line in order.

281 On the other hand, the testimony of the plaintiff furnishes some evidence that the breakage was caused by the slipping of the trolley pole, which is not explained; and the jury, from his statement, might have legitimately inferred that there was negligence in the slipping of the pole, or a defect in the condition of the wire, and, under the rule, this is sufficient testimony, coupled with the presumption, arising out of the breakage, that there was negligence.

The other assignments of error may be treated together, and relate to the degree of care required to be exercised by electric street railways in the construction, maintenance, and operation of its superstructure.

The court charged the jury that the street-car company was obligated to use the best material, most approved methods of construction, and the highest degree of care and skill in maintaining and keeping the same in repair, considering the dangerous nature of the appliances, and the peril to life and limb embodied in their use. And it is insisted that this was requiring too great a degree of care, and the court was requested to charge that the company was only required to exercise a high degree of care in these respects, and not the highest degree of care.

Counsel cites in support of his contention the language of this court in *Chattanooga St. Ry. v. Mingle*, 103 Tenn. 667, 76 Am. St. Rep. 703, 56 S. W. 23; *Baltimore etc. Street Ry. Co. v. Nugent*, 86 Md. 349, 38 Atl. 779, 39 L. R. A. 151; *Nellis on Street Surface Railroads*, 288.

<sup>282</sup> The trial judge, in portions of his charge, did state the rule to be a high degree of care, and defined the term, with accuracy, as requiring care commensurate with the perils to be apprehended, and such as would make the appliances safe in their use; but he also, in another part, charged that the highest degree was required. The charge is open to the objection that the rule is not stated in the same or equivalent terms in all portions of the charge, and was, to some extent, confusing to the jury; but we must assume that the jury applied the strict rule of the highest degree of care, in order to constitute error, even upon defendant's contention.

It is true in the case of *Chattanooga R. Co. v. Mingle*, 103 Tenn. 670, 76 Am. St. Rep. 703, 56 S. W. 24, this court said: "In view of the extreme peril consequent upon the displacement and fall of the wires, and in the operation of an electric railway system, it is essential that a high degree of care be exercised, not only in the construction, but in their continued maintenance in a good and safe condition"; citing *Denver Cons. Co. v. Simpson*, 21 Colo. 371, 41 Pac. 499, 31 L. R. A. 566; *Giraudi v. Electric Imp. Co.* 107 Cal. 120, 48 Am. St. Rep. 114, 40 Pac. 108, 28 L. R. A. 596.

The real point at issue in the *Mingle* case was whether the doctrine of *res ipsa loquitur* applies in case of breakage of the wires, so as to require the company to repel the presumption of negligence arising from the mere fact of breakage; but the court was not attempting to lay down with strict accuracy <sup>283</sup> the full measure of care required of such companies in the construction, maintenance, and operation of their lines.

So the question recurs, Was it error to instruct the jury that the highest degree of care must be exercised? In the case of *Denver Cons. Co. v. Simpson*, 21 Colo. 371, 41 Pac. 499, 31 L. R. A. 566, it was said by the trial judge: "The defendant was not an insurer of the safety of the plaintiff, but, in constructing its line and in maintaining the same in repair, it was held to the highest degree of care and diligence, and in this respect was bound to the highest degree of care, skill, and diligence in the construction and maintenance of its lines of wires and other appurtenances, and in carrying on its business so as to make the same safe against accidents, so far as such safety can, by the use of such care and diligence, be secured. If it observed such a degree of care, it was not liable. If it failed therein, it was liable for the injuries caused thereby."

On appeal this charge was affirmed, the appellate court saying: "Where all minds concur, as they must in a case like the one we are considering, in regarding the carrying on of a business as fraught with peril to the public, inherent in the nature of the business itself, the court makes no mistake in defining the duty of those conducting it as the exercise of the utmost care. It was therefore not prejudicial error for the court to tell the jury in that case what the law requires of the defendant, viz., the highest degree of care in conducting its business. The late <sup>284</sup> case of *Block v. Milwaukee St. Ry. Co.*, 89 Wis. 371, 46 Am. St. Rep. 849, 61 N. W. 1101, 27 L. R. A. 365, rightly interpreted, supports this doctrine; and the case of *Haynes v. Raleigh Gas Co.*, 114 N. C. 203, 41 Am. St. Rep. 786, 19 S. E. 344, 26 L. R. A. 810, expressly lays down the rule as observed by the trial court in the instructions given in this case."

In *Giraudi case*, the court say: "The public, aside from the consumers using the commodity, owe no duty to those introducing it. But on the other hand, it is the duty of those making a profit from the use of so dangerous an element as electricity to use the utmost care to prevent injury to any class of people composing the public, which consists in considerable members. They must protect those having less than the ordinary knowledge of the character of the commodity."

In *Haynes v. Raleigh Gas Co.*, 114 N. C. 203, 41 Am. St. Rep. 786, 19 S. E. 344, 26 L. R. A. 810, the rule is stated thus: "It is due to the citizen that electric companies that are permitted to use for their own purposes the streets of a city or town shall be required to use the utmost degree of care in the construction, inspection, and repair of their wires and poles, to the end that travelers along the highway may not be injured by their appliances. The danger is great, and care and watchfulness must be commensurate with it. All the reasons that support the rigid enforcement of this rigid rule against the carrier of passengers by steam apply with double force to those who are allowed to place <sup>285</sup> above the streets of a city wires charged with a deadly current of electricity, or liable to become so charged. The requirement does not carry with it too heavy a burden."

In *City Electric Ry. Co. v. Conery*, 61 Ark. 381, 54 Am. St. Rep. 262, 33 S. W. 426, 31 L. R. A. 570, the court uses this language: "Electric companies are bound to use reasonable care in the construction and maintenance of their lines and appar-

atus—that is, such care as a reasonable man would use under the circumstances—and will be responsible for any conduct falling short of this standard. This care varies with the danger which will be incurred by negligence. In cases where the wires carry a strong and dangerous current of electricity, and the result of negligence might be exposure to death or most serious accidents, the highest degree of care is required. This is especially true of electric railway wires suspended over the streets of populous cities or towns. Here the danger is great, and the care exercised must be commensurate with it. But this duty does not make them insurers against accidents, for they are not responsible for accidents which a reasonable man, in the exercise of the greatest prudence, would not, under the circumstances, have guarded against.”

In the case of *Cook v. Wilmington City Electric Co.*, 9 Houst. 306, 32 Atl. 643, the court say: “The law requires that they [electric light companies] should use every way to protect and save the public from loss <sup>286</sup> or injury. They must use every means, regardless of expense, to protect and make safe the public, or citizens passing over the streets of the city, who are not aware of danger. They must use due care and ordinary diligence in such case, with the legal meaning in law following and attached to such words as I have stated.” As to the meaning of these words, the court say: “The words ‘usual and ordinary care’ mean, in such cases, nothing more or less than, if there be a great danger and hazard in the business, there should be a corresponding degree of skill and attention required by the law.”

Mr. Keasbey, in his work on Electric Wires, says: “The use of the electric current is authorized by law. It will do no harm if it is kept in its proper place, but it is very dangerous if it is allowed to escape. Those who use it are charged with a public duty to use the greatest care to keep it from doing harm, and, for failure to observe this care, they are responsible to persons using the public streets who may be injured without any fault of their own”: Keasbey on Electric Wires, sec. 243. And Mr. Joyce, in his work on Electricity, holds the same view: “An electrical company is under the duty of so maintaining its wires as not to interfere with the free, unobstructed, and safe use of the highway. Although it is not an absolute insurer of its wires, yet it is bound to use the utmost care in maintaining them”: Joyce on Electricity, sec. 450. See, also, *McAdam v. Central R. Co.*, 67 Conn. 445, 35 Atl. 341.



287 We are of the opinion that in view of the danger attendant upon the breaking and falling of overhead electric wires in the streets, and the results to be apprehended to persons in the streets, the company should be held to the highest or utmost degree of care in the construction, maintenance, and operation of its lines; and the court was not in error in so charging. We are of opinion, also, that, taking the whole of his charge together, the jury must have understood the trial judge to lay down the rule of the highest degree of care; and there is therefore no reversible error in the record, and the judgment is affirmed, with costs.

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*The Principal Case* is cited and considered with other similar decisions in the monographic note to *Hebert v. Lake Charles etc. Co.*, ante, pp. 515-539, on the duty and liability of electric corporations.

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## GORDON v. COX.

[110 Tenn. 306, 75 S. W. 925.]

**JUDGMENT LIEN on Land Passing Through Debtor as a Medium of Transmission.**—If one makes a conveyance before a judgment is rendered against him, and the grantee informs an intending purchaser from her that she will not make a deed directly to him, but will convey to the original owner, who will make the desired conveyance, which is done, the two deeds being withheld by the respective grantors and simultaneously delivered to the purchaser, who at the same moment delivers them for registration, the lien of the judgment does not attach to the property during the transmission of title. And it is immaterial, the purchaser being in good faith, whether or not the original transfer was fraudulent. (pp. 813, 814.)

McFarland & Neblett, for the appellant.

H. D. Minor, for the appellee.

308 BEARD, C. J. On December 6, 1898, A. G. Cox recovered a judgment against J. O. Cox in a court of record in the county of Shelby, where the defendant then resided. Several months before the rendition of this judgment, the defendant debtor transferred all of his real estate in that county to one Mrs. McGuoy, the deed to her being at once put of record in the register's office. In 1900 the complainant, Gordon opened negotiations with a real estate company in Memphis, which, as an agent, had for sale some of the lots covered by this deed, for a purchase

of the same. These negotiations ended with an agreement on the part of Gordon to buy. After this agreement, but before the completion of the contract of purchase, the complainant was informed that Mrs. McGuoy declined to make a deed direct to him, but was willing to make it to the original vendor, J. O. Cox, who would convey to the complainant. The complainant accepted in good faith this modified arrangement, and without any suspicion that there was any fraud in the original transaction between J. O. Cox and Mrs. McGuoy. Thereupon a deed was made by Mrs. McGuoy to J. O. Cox, and he and his wife executed a conveyance to complainant, Gordon, and the two deeds were withheld by the respective grantors, and were simultaneously delivered to the complainant, Gordon, who at the same moment delivered them to the proper officer in Shelby county for registration. At the time of the delivery of these deeds to complainant, he paid the purchase money, and so much as was left, after settling the taxes on the <sup>309</sup> property and certain expenses, was divided between Mrs. McGuoy and the wife of J. O. Cox. Soon thereafter, an execution was issued upon the judgment before referred to, and levied upon the property purchased by Gordon. To enjoin a sale under this levy, the present bill was filed.

We think this case clearly falls within the authority of *Huffaker v. Bowman*, 4 Sneed (Tenn.), 94. J. O. Cox was merely a conduit for the transmission of the title from Mrs. McGuoy to the purchaser, and there was no such seisin in him as would afford a point of time for the lien of this judgment to attach. We think it immaterial whether the original transaction between Mrs. McGuoy and the judgment debtor was fraudulent or not. If it was not fraudulent, then the judgment creditor had no more right to levy upon this property than if Cox had been a stranger to the title, and yet had been selected by the vendor as a channel through which she saw proper to convey to her vendee. On the other hand, if it was fraudulent, Gordon in no way participated in this fraud, nor was he advised of any wrong that might have been perpetrated by the parties. In either event, he was entitled to the benefit of the rule as announced in *Huffaker v. Bowman*, 4 Sneed (Tenn.), 94.

It is insisted, however, that the case of *Gregg v. Jones*, 5 Heisk. 459, is authority for the contention of the judgment creditor. We do not think so. That case was rested alone upon the construction of section 2399 of the Code of 1858 (Shannon's Code, sec. 4139), which <sup>310</sup> gave a widow dower in all the estate, both legal and equitable, of which her husband died

seised and possessed. This case has never been understood to shake in the slightest degree the authority of *Huffaker v. Bowman*, 4 Sneed (Tenn.), 94.

The decree of the chancellor is affirmed.

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*Estates and Interests Subject to Judgment Liens* are discussed in the monographic note to *Filley v. Duncan*, 93 Am. Dec. 345-358. As to whether the lien of a subsequent judgment attaches to lands fraudulently conveyed by the judgment debtor, see *French Lumbering Co. v. Theriault*, 107 Wis. 627, 81 Am. St. Rep. 856, 83 N. W. 927, 51 L. R. A. 910; *Preston-Parton Milling Co. v. Dexter*, 22 Wash. 236, 79 Am. St. Rep. 928, 60 Pac. 412.

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## AMERICAN STEEL AND WIRE COMPANY v. SPEED.

[110 Tenn. 524, 75 S. W. 1037.]

**TAX ON MERCHANTS.**—A Manufacturing Corporation of another state selling and distributing its goods from warehouses in Tennessee through its representative there, is a merchant and taxable as such under the statutes of that state. (p. 821.)

**TAX ON MERCHANTS**—*Interstate Commerce.*—A merchant's tax on a nonresident manufacturing corporation that ships its goods to a distributing point in the state, where a local transfer company takes charge of, assorts, and stores them in a warehouse, and then delivers and distributes them in the original package to customers of the manufacturer both in and out of the state, either in accordance with its express directions, or general directions in favor of recognized and approved customers, whose names are furnished to the local company, does not contravene the commerce clause of the federal constitution. The goods at the warehouse are not in transit from one state to another; they are a part of the common mass of the property of the state. (p. 825.)

Patterson, Neeley & Henderson, for the appellant.

Attorney General Cates, Carroll, McKellar & Bullington and Greer & Greer, for the appellee.

527 NEIL, J. This suit was instituted in the chancery court of Shelby county to recover one thousand thirty-one dollars and forty-four cents, a merchant's tax assessed against complainant by R. A. Speed, clerk of the county court of that county, which was paid by complainant, under protest, on the 18th of October, 1902. The chancellor rendered a decree in favor of complainant and the cause is now in this court on appeal of the defendant clerk.

The facts upon which the controversy arises are as follows: Complainant is a corporation created under the laws of New Jersey. Its situs is in the state of New Jersey, and its principal

business office is situated at Chicago, Illinois. It is engaged in the manufacture of nails, staples, barbed and smooth wire, at different <sup>528</sup> points north of the Ohio river. None of its manufactories are situated in Tennessee, and all of its products consigned to Memphis are shipped from points beyond the limits of this state.

Prior to the 1st of February, 1900, its manufactured products were sold and distributed throughout the southwest, from Louisville, Kentucky, Memphis, Tennessee, Greenville, Vicksburg, and Natchez, Mississippi and New Orleans, Louisiana. About that time the Patterson Transfer Company, a corporation created under the laws of Tennessee, having its situs at Memphis, and doing business at Memphis, represented to appellee that Memphis was the most available point in the southwest at which to mass and distribute its manufactured products to its customers in that section. At this time and for many years prior thereto, the Patterson Transfer Company had been engaged in the business of transferring passengers and freights to and from the various depots at Memphis and from the landings on the Mississippi river. Appellee entered into an arrangement with the Patterson Transfer Company whereby said company was to receive its manufactured products at Memphis, assort them so as to separate the different kinds of nails, staples, and wire, and then to deliver them either to the jobbers at Memphis, or to the jobbers beyond the limits of Tennessee, over the various lines of railroads and steamboats running into Memphis, as directed by complainant.

None of complainant's products are ever sold to the Patterson Transfer Company, or are by it sold to others, <sup>529</sup> and neither its officers nor employes have any knowledge whatever of the price at which goods are sold by complainant.

Under the arrangement between them, the business of the Patterson Transfer Company, in connection with complainant's products, is confined to their transfer to the warehouses, their assortment in the warehouses, the keeping of them in storage, and their subsequent delivery to the customers of the complainant, under its general or special orders, as below indicated.

The goods of complainant are manufactured at different points, and it is convenient and useful, from a business point of view, to mass them at some place at which they can be assorted and from which they can be distributed to complainant's customers. It is impracticable to assort the goods either at the river landing or at the railroad depots when they reach Mem-



phis, and in order to facilitate the work, the Patterson Transfer Company has rented three warehouses in which the goods are stored for the purpose of assortment and distribution, and for other purposes below indicated. These warehouses are rented exclusively for this purpose, and the manufactured products of complainant, and no other goods are stored therein.

The evidence further shows that, as a general rule, prior to the time the goods are shipped to Memphis, sales agents of the complainant canvass the southwestern country, and make contracts, exclusively with jobbers; <sup>530</sup> and in each instance where a contract is made it is embodied in writing, on a form prepared by complainant, in which is set down the amount of goods which constitutes the subject of the contract, and the time agreed upon within which they are to be delivered. The goods so contracted for are described as so many kegs of nails, so many kegs of staples, so many reels of barbed wire or so many coils of smooth wire, according to the terms of the contract, in respect of the quantity agreed upon. But the contract does not specify the grade and quality of the goods desired. The grade and quality are left open, to be subsequently specified when the customer desires a delivery, as below stated. The customer can, when he makes his specification, select any grade of goods he desires, and upon so selecting they will be delivered to him, up to the quantity contracted for, within the time agreed upon, at prices contracted for applicable to the several grades. In fixing the price of its goods, the complainant always, except when necessary to lower prices in order to meet competition, figures in the freight on the goods.

As above indicated, it is shown in the evidence that there are many different kinds of nails, as well as different kinds of barbed and smooth wire, and it is expressly stipulated in the contract that the customer shall have the privilege of specifying, during the life of the contract, the kind of wire, or kind of nails or staples, he desires delivered to him under the contract. These contracts also specify from sixty to ninety days as the time within <sup>531</sup> which the products are to be delivered, and, at any time during the period prescribed in the contract, the customer may designate the kind of goods he desires delivered under it.

These contracts are made, usually, before the goods arrive at Memphis, their point of destination, and generally the contracts are made in advance of the production of the goods at the complainant's factory.

Usually the sale agents of the complainant, not only in advance of the shipment of the goods, but in advance of their

production, canvass the southwestern country in the manner above stated, visiting the various jobbers, ascertaining the amount of goods they will require within sixty or ninety days, and the contract is prepared, to the purport above indicated, in which the complainant obligates itself to deliver, at the prices stated, as above mentioned, the amount of goods contracted for therein, and the customer agrees to receive and pay for that quantity upon the goods being delivered to him after he shall have made, and according to his specification, which he may make during the life of the contract, the customer reserving the right, in the face of the contract, to specify the exact grade or quality of goods he desires delivered under it. He does this after the making of the contract, and at any time he desires to do so, within the life of the contract, by writing out his specification showing precisely what grade of goods he desires, and forwards this specification to the office of the complainant in Chicago, and then the goods, under an order from the <sup>532</sup> Chicago office, addressed to the Patterson Transfer Company at Memphis, are selected by the latter out of the mass of goods belonging to the complainant in the aforesaid warehouses in Memphis, and are shipped by the said Patterson Transfer Company to the customer who has signed the specification. This order from the complainant to the Patterson Transfer Company is effected through the agency of a copy of the specification which is forwarded to the latter from complainant's central office at Chicago; it being understood, according to the course of business between the two companies, that the Patterson Transfer Company will select, out of the mass of goods, those set out in the specification, and will ship them to the customer whose name is signed to the specification, upon receiving such copy of the specification, from the central office at Chicago.

This method of transacting the business is modified, in practice, in so far as the fulfillment of the contracts made with the jobbers at Memphis is concerned. For the convenience of the Memphis trade, complainant advises the Patterson Transfer Company of the names of its customers at Memphis, and that company is instructed to deliver the goods embraced in the contracts with the Memphis jobbers in the following manner: The Memphis jobber makes out his specification in duplicate, and addresses a letter to complainant, as in any other case; but, instead of forwarding this letter and his specification directly to complainant, he delivers the letter to the Patterson Transfer Company, and the Patterson Transfer Company at once delivers the goods <sup>533</sup> so specified, attaching the dray receipt to

a copy of the specification, and forwards the specification, letter, and dray receipt to the office of the complainant in Chicago, and that office makes out an invoice and sends it directly to the jobber.

Another variation is made, in the course of the business, in favor of the Memphis jobbers, to the following effect: Any jobber in Memphis who is a recognized customer of the complainant can, without any previous written contract or other special agreement, make out a specification of the goods he desires, and hand this, in duplicate form, to the Patterson Transfer Company. Upon this being done, it is the duty of the Patterson Transfer Company, under its general instructions from the complainant, to select, out of the mass of goods in the warehouses, goods corresponding to those contained in the specification, and deliver them to such jobber, this delivery being usually made by the next day, or, at most, within two or three days. Other deliveries on specifications sent direct to the Chicago office are not usually made within less than six or eight days, and sometimes a longer period is required. When the Patterson Transfer Company receives from Memphis jobbers the specifications which are the special subject of this paragraph, one copy is kept by it, and the other copy is forwarded to the office at Chicago, where, upon its arrival and reception, the customer is charged with the goods specified, at current prices.

The testimony shows that, of the mass of goods kept <sup>534</sup> on hand in Memphis in the above-mentioned warehouses, about ninety per cent ultimately goes to the jobbers who reside outside of Memphis and beyond the limits of this state. The remaining ten per cent goes to the Memphis jobbers in fulfillment of the general contracts previously referred to, pursuant to specifications thereunder made, and under specifications made without previous written contracts, the latter covering about two and one-half per cent of all the goods kept on hand.

No one but an agreed or recognized customer of the complainant can make out a specification, or have goods delivered from the storehouses of the Patterson Transfer Company; and no goods are ever delivered or distributed to anyone by the Patterson Transfer Company except under the express directions of complainant, or under general directions given by complainant to the said Patterson Transfer Company in favor of recognized and approved customers of the complainant, whose names are furnished by it to the Patterson Transfer Company.

The testimony further shows that the quantity of goods which the complainant keeps on hand at Memphis fluctuates consider-

ably, owing to the state of trade, from time to time. Sometimes the stock is as low in value as \$30,000, and sometimes the complainant has on hand a stock of the value of more than \$100,000.

Some of the goods, a very small amount, are shipped to Memphis by rail. Nearly all of these goods which come to the hands of the Patterson Transfer Company from this complainant are transported to Memphis on <sup>535</sup> barges belonging to transportation companies in which complainant has no interest, and which are engaged in the carrying trade. As a general rule, while the complainant endeavors to secure contracts covering its output before the goods are manufactured, yet it does not always do so, but, taking advantage of the seasons when there is a good stage of water in the rivers which must be used in floating its products from its mills to Memphis, it masses its goods at the latter point in anticipation of future sales.

The testimony shows that when goods are shipped from complainant's mills, consigned to Memphis, the Patterson Transfer Company is notified by the Chicago office that a certain quantity of complainant's products were shipped at a certain time on barges to the port at Memphis. These barges are met at the river landing by the Patterson Transfer Company, which receives the goods, transfers them to its warehouses, and assorts them. Then from time to time it ships the goods on specifications as before explained. On receiving the goods, they are credited to the complainant on the books of the Patterson Transfer Company, and, on being shipped out, they are charged on the same books to the complainant. When the goods reach Memphis they are always consigned to the complainant, in care of the Patterson Transfer Company.

All of the goods forwarded to Memphis are products of the factories of complainant. No part of them are ever purchased by it. Its sale agents are exclusively engaged <sup>536</sup> in selling these products. They are produced by complainant beyond the limits of this state, and are made the subject of contracts by its sale agents throughout the southwest in the manner before explained. These sale agents report all contracts effected by them directly to the office in Chicago, whether made with the jobbers at Memphis or elsewhere beyond the limits of this state. All invoices for goods, when sold by specifications in the manner above stated, are made out at the office at Chicago, and forwarded directly to the customer, in the manner and under the circumstances previously stated.



Some of complainant's goods are produced at one factory and some at another, and consequently, when a purchaser contracts for the delivery to him, within sixty or ninety days, of a certain number of packages, it frequently turns out that some of goods desired are the product of one factory and some of another, and it is accordingly most convenient, in the conduct of complainant's business, that goods from complainant's various factories should be massed at some point where they can be dealt with in the manner before explained.

Complainant's goods are put up in the following original packages. The nails and staples are put up in kegs, each keg weighing one hundred pounds; the smooth wire in coils tied by wires, and each coil weighing one hundred pounds; the barbed wire on reels, the wire on each reel weighing one hundred pounds. Each package is separately and distinctly made up at the factories for convenience of transportation, <sup>537</sup> and is in this form delivered to the common carriers. In this form they are delivered at the initial point of transportation. In this form they are transported in barges or by railroads to Memphis, and received by the Patterson Transfer Company. In this form they are assorted at the warehouses by the Patterson Transfer Company, and delivered by it to the complainant's customers at Memphis, under the circumstances previously stated, or to the various lines of steamboats and railroads running out of Memphis, consigned, under circumstances previously stated, to customers beyond the limits of Tennessee, and in this form they ultimately come to the hands of complainant's customers in such foreign states. Each package is separate and distinct in itself, and, while no particular package is consigned to any special customer, each keg of nails and staples is marked so as to show exactly what the package contains, and each coil and reel of wire is marked with a tag showing what the coil or reel contains, and no package is ever changed, in any particular, from the time it leaves the factory until it ultimately reaches the hands of the customer.

The testimony shows that Memphis has within recent years become, by reason of its accessibility to railway and river transportation, a great distributing point, and it was selected as the basis of the operations which are the subject of the present controversy, by reason of these exceptional advantages.

Other facts proven by the complainant are as follows: The testimony of Mr. Young, the tax assessor, shows that <sup>538</sup> none of the cotton shipped into Memphis from the surrounding states

pays any tax whatever, and that the manufacturers of lumber in Memphis pay no tax on lumber made from logs which are produced from the soil of this state.

There is also an agreement of counsel to the effect that there are large iron deposits in Tennessee, and a number of furnaces in this state engaged in the manufacture of iron from the iron ore deposits in this state.

The bill alleges, and the answer admits, that complainant was assessed by the defendant clerk as a merchant, and was required to pay to the state a merchant's tax for the years 1901 and 1902, amounting to one thousand and thirty-one dollars and forty-four cents. On appeal to the state board of equalizers, this assessment was affirmed, and thereupon, within the time required by law, to wit, on the eighteenth day of October, 1902, complainant paid these taxes under protest. This suit was instituted by complainant, within the time prescribed by the statute, to recover the taxes so paid, on the ground that the assessment was illegal and void for the following reasons: 1. Because complainant was never at any time a merchant doing business at Memphis; 2. That the assessment was in violation of article 1, section 8, subsection 3, of the constitution of the United States, which empowers Congress "to regulate commerce with foreign nations, and among the several states, and among the Indian tribes."

We shall now briefly consider the points raised in argument in this court.

**529** It is insisted that the complainant was not a merchant; but we think it was a merchant within the sense and meaning of our act of 1901, page 329, chapter 174, section 27. This section reads as follows: "The term 'merchant,' as used in this act, includes all persons, copartnerships, or corporations engaged in trading, or dealing in any kind of goods, wares or merchandise, . . . whether such goods, wares, or merchandise be kept on hand for sale, or the same be purchased and delivered for profit as ordered."

Under the facts proven in this case, the complainant was "dealing" in nails, staples, and wire, in the city of Memphis, at the time it was assessed for taxes, and had been since February, 1900, and for a short time prior thereto. It is immaterial that its agent at Memphis, the Patterson Transfer Company, had no authority to fix prices, but only kept the stock and delivered the goods on contracts made with the office at Chicago, said deliveries being made under orders issued from Chicago, either

special, or to be inferred from the general course of business. The vital fact is that the goods were not sold from their place of manufacture, but were kept in stock at Memphis, and this stock was drawn on from time to time to fill contracts of sale made by the company's salesmen, or to fill contracts made by means of intending purchasers depositing specifications of goods desired with the Patterson Transfer Company, and in that manner obtaining the goods.

It is insisted that complainant was only a manufacturer <sup>540</sup> selling its goods as any other manufacturer. In *Taylor v. Vincent*, 12 Lea, 284, 47 Am. Rep. 338, it is said that, if the manufacturer of an article be engaged in selling it as a business, he may be taxed for the privilege of doing so, as a tax upon his occupation or as a privilege; but that if he sells from his place of manufacture in unbroken packages, as a manufacturer, he cannot be taxed as a dealer. A later case (*Kurth v. State*, 86 Tenn. 134, 5 S. W. 393) goes further and holds that a manufacturer of liquors cannot sell without taking out license as a dealer. This latter case had reference to sales at retail, but in another case (*Webb v. State*, 11 Lea, 662) the same rule was applied to manufacturers selling to wholesale liquor dealers. And in *Kurth v. State*, 86 Tenn. 134, 5 S. W. 393, in referring to *Taylor v. Vincent*, 12 Lea, 284, 47 Am. Rep. 338, it was said: "The case of *Taylor v. Vincent*, 12 Lea, 284, 47 Am. Rep. 338, is pressed upon us as determining that a dealer is one who buys to sell again. In this we do not concur. But this proposition is no part of the decision of the case, and was only used in argument by the judge delivering the opinion of the court. The decision in that case only goes to the point of deciding that, under the revenue laws of 1881 and 1883, a manufacturer of liquors from the produce of this state, who sold at his place of manufacture to dealers in unbroken packages, was not a wholesale dealer within the meaning of these acts."

There is an earlier case (*State v. Smith*, 5 Humph. 394), construing acts of 1835-36, page 61, chapter 13, section 5, which takes the contrary view, but this is not controlling under <sup>541</sup> the language of the act of 1901, and the later cases above referred to.

It is next insisted that the act taxing the goods was a violation of the provisions of the federal constitution above referred to, because the goods were in course of transit from one state to another at the time the tax was levied. We do not think that this position is well taken. Under the method of business pur-

sued by the complainant, these goods had been sold to no one, nor were they in course of transit for the purpose of being put directly upon the market. The warehouse of the Patterson Transfer Company was in the nature of a permanent place of deposit, where complainant's goods were gathered together and were left to await the orders of customers, and from the mass so created goods were from time to time drawn to meet the wants of customers, and as called for by them. It is true that an effort was generally made to get agreements from intending purchasers that they would take the output of complainant's mills before the goods were manufactured, and that usually enough of these contracts were in existence, and calling for a sufficient quantity of goods, to cover the expected output for sixty or ninety days, the time during which these contracts usually ran; but these contracts did not constitute sales. They were only agreements to the effect that, during the sixty or ninety days next ensuing their date, such intending purchasers would take such and such a quantity of complainant's goods, say one thousand kegs of nails, or one thousand kegs of staples, or five hundred coils of 542 wire. But there were many kinds and grades of nails, and this class of goods varied very much in size, running from four-penny to twenty-penny nails. There were also different grades of staples. And as to wire, there were several kinds: First, the two general classes of smooth wire and barbed wire, also wire galvanized, and wire not galvanized. And in barbed wire there were different grades, based on the number of points or barbs, as two-point and three-point wire, etc.

Any customer of the complainant who had contracted to take a given quantity of complainant's nails, as one thousand kegs, had the right to select, at any time within the sixty or ninety days covered by his contract, the kind of nails he would take. He might, if he chose, call for and receive all of one kind, or some of each kind, or in any proportion, as respects the several kinds, that he desired. So with the staples. And so of the wire. He might specify, during the sixty or ninety days, so many coils of smooth wire galvanized, so many coils not galvanized, so many reels of barbed wire two-point, and so many reels of barbed wire three-point. At the time these contracts or agreements were entered into, neither the complainant nor its customers knew how much of any kind of complainant's goods would be called for. Hence there was no meeting of the minds of the parties as to an essential term of the contract.



These contracts were nothing more than options extended to complainant's customers to select from complainant's stock of goods, within a given time, such articles as they might desire, up to <sup>543</sup> and not to exceed an agreed quantity, the price of each article (kegs of nails, kegs of staples, coils of wire, and reels of barbed wire) composing the mass being fixed for the time agreed upon, and the customer being allowed to select within the time such articles as he desired, with the understanding that they were to be charged to him at the price ruling, as per agreement, during the sixty days or other time agreed upon. Nor was the customer under the contract bound to take all of the goods at one time. He had the right, according to the contract and the usage of the business, to specify and select all at one time, or to specify and select different parts of the agreed aggregate, for the sixty or ninety days, at different periods, or on different days during that period.

The substance of the contract, agreement, or arrangement between the complainant and any given customer may be thus expressed: On his part, the customer said: During the next sixty days, I will take from you one thousand kegs of nails, or one thousand kegs of staples, and one thousand coils of wire, reserving to myself the right to select from the mass of your goods such and so much of the many different kinds of goods which you have of the classes referred to as I may desire, provided I do not go beyond the aggregate quantity of each general class (nails, staples, and wire) above indicated; the price for each of the several grades and kinds of the several classes of goods to be thus and thus.

Or, to state the matter from the complainant's point <sup>544</sup> of view, the substance of the negotiation between the parties, in general, may be thus set down, viz.: During the next sixty days I will sell you my goods at the following schedule of prices (stating prices); what quantity will you take during that period? The customer replies, in substance, I will take one thousand kegs of nails, one thousand kegs of staples, and one thousand coils or reels of wire, of such kinds as I may specify of the several kinds or grades of nails, and of the several kinds of staples, and of the several kinds of wire, during the next sixty days, at the prices offered. Here it is manifest that there being no agreement as to the amount of each kind or quality of goods in advance, and there being no means of making certain these matters, except through the uncontrolled choice of the customer, there can be no means of determining

the sum due until there is a selection made by the customer in any given instance.

As appears from the statement of facts above, complainant has all the time a large number of such contracts running in this state, and in Arkansas, Texas, and other states in the southwest, and keeps on hand its stock of goods to meet them, that is, to fill such orders or "specifications" as its customers may from time to time make, the orders, in general, being sent to complainant's Chicago office, and from that office the directions being sent, in the manner set forth in the statement of facts, to the Memphis branch, to fill the orders by shipping the goods to the customer so ordering or "specifying."

<sup>545</sup> Likewise, as appears from the said statement of facts, complainant, from time to time, as occasion offers, has through its agent, the Patterson Transfer Company, dealings with its recognized customers among the merchants of Memphis, without the formality of such previous written contracts, allowing these merchants to select or "specify" whenever they desire goods, and imposing upon the Patterson Transfer Company the duty to deliver promptly to such merchants, whenever calls are made, without any previous notification to the office at Chicago or negotiations therewith.

The goods kept on hand at Memphis in the stock referred to must be regarded as kept on hand for this purpose also.

And it is important at this juncture to note, as shown in the statement of facts, that the fact last stated is not the only evidence that the goods are not massed at Memphis merely for the purpose of meeting the general contracts, above referred to, previously made in and through the southwest; on the contrary, as previously stated, it appears that the complainant takes advantage of the stages of the water, in the rivers over which it ships its goods in barges, to float down large quantities of its goods in anticipation of sales, and to have them ready against a time when the waters may be so low that shipments cannot be made by that means, but only by the more expensive method of railroad transportation.

We do not think that under these circumstances it can <sup>546</sup> be justly said that the goods were in transit from one state to another when the tax was assessed.

It is next said that the complainant was not liable to taxation on its goods, because they were sold in the original packages. We do not think that this is a sound view, because the facts above stated show that complainant's goods were put up

for sale in Memphis, and were so dealt with as to make them a part of the common mass of property in the state: *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. Rep. 1091, 29 L. ed. 257; *Pittsburgh etc. Co. v. Bates*, 156 U. S. 577, 15 Sup. Ct. Rep. 415, 39 L. ed. 538; *Woodruff v. Parham*, 8 Wall. 123, 19 L. ed. 382; *Ilinson v. Lott*, 8 Wall. 148, 19 L. ed. 387; *Coe v. Town of Errol*, 116 U. S. 517, 6 Sup. Ct. Rep. 475, 29 L. ed. 715. And see *Emert v. Missouri*, 156 U. S. 296, 15 Sup. Ct. Rep. 367, 39 L. ed. 430.

Much stress is laid by complainant's counsel upon *Brown v. Maryland*, 12 Wheat. 436, 6 L. ed. 678; *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. Rep. 681, 34 L. ed. 128; *Lyng v. Michigan*, 135 U. S. 161, 10 Sup. Ct. Rep. 725, 34 L. ed. 150; *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347; *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. Rep. 592, 30 L. ed. 694; *Leloup v. Port of Mobile*, 127 U. S. 611, 8 Sup. Ct. Rep. 1380, 32 L. ed. 311; and the case of *Asher v. Texas*, 128 U. S. 129, 9 Sup. Ct. Rep. 1, 32 L. ed. 368. We do not think there is any real conflict between any of these cases and those which we have cited in support of our conclusion, nor have the cases which we have cited ever been overruled by the <sup>547</sup> supreme court of the United States. We are also referred by counsel for complainant to several cases decided by the courts of other states upon the federal questions involved, but these are, of course, not controlling on such questions, and they need not be specially examined or commented upon.

From some of the evidence which was introduced by the complainant, which we have referred to in the last part of the statement of facts, it would seem that the complainant intended to support the contention that the tax assessed against it was a discriminative one in favor of goods manufactured out of the produce of this state, and against those manufactured out of the produce of other states. There was such a contention made in the bill, but it is unnecessary now to go into this question at all, because the complainant concedes that if it is to be or rather can lawfully be, treated as a merchant, then the objection could not apply, because there is no discrimination in this state in respect of the origin of goods when they are in the hands of merchants: *Jenkins v. Ewin*, 8 Heisk. 456, 484. Complainant concedes that such contention could be raised only against a direct tax, and there is no such tax involved in this case. The tax assessed must stand or fall as a

merchant's tax. Hence the question of a discriminative tax does not arise in this case, and need not be considered. The tax which is under consideration in the present case has no element of discrimination against the complainant as a <sup>548</sup> foreign dealer or otherwise, and hence cannot be objected to on that ground.

It results that the decree of the chancellor must be reversed, and the bill dismissed, with costs.

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**The Principal Case** was affirmed by the supreme court of the United States: See 192 U. S. 500, 24 Sup. Ct. Rep. 365. Mr. Justice White delivered the following opinion:

“Whether the plaintiff in error is entitled to recover the sum of certain taxes which were paid under protest, on the ground that the taxes were repugnant to the constitution of the United States, is the question for decision on this record.

“Section 28, article 2, of the constitution of the state of Tennessee, so far as pertinent to the issue to be decided, is as follows: ‘All property, real, personal, or mixed, shall be taxed. . . . All property shall be taxed according to its value, that value to be ascertained in such manner as the legislature shall direct, so that taxes shall be equal and uniform throughout the state. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of the same value; but the legislature shall have power to tax merchants, peddlers, and privileges, in such manner as they may from time to time direct. The portion of a merchant's capital used in the purchase of merchandise sold by him to nonresidents and sent beyond the state shall not be taxed at a higher rate than the ad valorem tax on property.’

“Section 30, article 2, of the same constitution, provides: ‘No article manufactured of the produce of this state shall be taxed otherwise than to pay inspection fees.’

“The assessing and taxing laws of the state of Tennessee in force at the time the taxes in controversy were levied provided, first, for a general ad valorem tax upon all property; second, for a merchants' tax separate from the general ad valorem levy, this latter tax being of two classes: A tax upon the average capital invested in business and a privilege tax, which was at a different rate and in other respects distinct from the merchants' tax just referred to. Moreover, at the time the tax assessments in question were made the statutes of the state of Tennessee concerning the merchants' tax contained the following: ‘The term “merchants” as used in this act, includes all persons, copartnerships, or corporations engaged in trade or dealing in any kind of goods, wares, merchandise, either on land or in steamboats, wharf boats, or other craft stationed or plying in the waters of this state, and confectioners, whether such goods, wares, or merchandise be kept on hand for sale or the same be purchased and delivered for profit as ordered.’



“Moreover, the assessment laws, whilst providing that all ‘persons, copartners, and joint stock companies engaged in the manufacture of any goods, wares, merchandise, or other articles of value shall pay an ad valorem tax upon the actual cash value of their property, real, personal, or mixed,’ made the following exception: ‘Provided, the value of articles manufactured from the produce of the state in the hands of the manufacturer shall be deducted in assessing the property.’ And a like exception qualified a provision imposing an ad valorem tax upon the capital and franchises of manufacturing corporations. Besides, the assessing statutes contained a general provision exempting ‘all growing crops of whatever nature or kind—the direct product of the soil of this state—in the hands of the producer or his immediate vendee, and manufactured articles from the produce of this state in the hands of the manufacturer.’

“Whilst these laws were in force the officer whose duty it was to list the merchant tax assessed against the American Steel and Wire Company, which we shall hereafter call the steel company, both the general merchants’ tax and a merchants’ privilege tax. The company resisted the assessment, and, after unsuccessfully pressing, through the administrative channels provided by the law of Tennessee, its objections, paid the tax under protest, and thereupon, as authorized by the law of Tennessee, commenced this suit to recover the amount paid.

“Without going into detail, it suffices to say that the bill filed in the action to recover substantially alleged as follows: That the company was a New Jersey corporation, having a place of business in the city of Chicago, and owning and operating the various plants for the manufacture of wire, nails, etc., in states other than the state of Tennessee. And, for the purpose of facilitating the sale and delivery of the goods by it manufactured, it had selected Memphis, Tennessee, as a distributing point, and had made an arrangement in that city with the Patterson Transfer Company, a corporation engaged at Memphis in the transfer of merchandise. By this arrangement the Patterson Transfer Company was to take charge of the products when shipped to Memphis, consigned to the steel company, store them in a warehouse there, assort them and make delivery to the persons to whom the goods were sold by the steel company. It was averred that the Patterson Transfer Company, in fulfilling its obligations under the contract, was in no sense a merchant, but only a carrier, and that the steel company, in storing and delivering its goods at Memphis, was not a merchant in Memphis, but was simply a manufacturer, delivering in the original packages goods made in other states to the persons who had bought them. In substance, besides, it was alleged that the goods in the warehouse in Memphis were merely in transit from the point of manufacture outside of the state of Tennessee to the persons to whom they had been previously sold. The levy of the tax was charged to be repugnant to the commerce clause of the constitution of the United States:

1. Because the goods in the warehouse in Memphis were in the original packages as shipped from other states and had not been sold in Tennessee, and hence had not been commingled with the property of that state, and because, in any event, they had acquired no situs in Tennessee, as they were moving in the channels of interstate commerce from the place where the goods were manufactured, for delivery to the persons to whom in effect they had been sold. 2. Because, as the state of Tennessee exempted from taxation articles manufactured from the produce of that state, no tax could be imposed by Tennessee upon articles manufactured from the produce of other states, without operating a discrimination against articles manufactured from the produce of other states. Issue was joined on the complaint. The trial court, deducing from the proof conclusions of ultimate fact in favor of the complainant, entered a decree in favor of the steel company. The case was taken to the supreme court of the state. In that court the validity of the tax was upheld and the judgment below was reversed. The questions raised concerning the repugnancy of the tax to the constitution of the United States were expressly considered and decided adversely to the steel company. This writ of error was thereupon prosecuted.

"The supreme court of Tennessee stated the facts as follows:

"Complainant is a corporation created under the laws of New Jersey. Its situs is in the state of New Jersey, and its principal business office is situated at Chicago, Illinois. It is engaged in the manufacture of nails, staples, barbed and smooth wire, at different points north of the Ohio river. None of its manufactories are situated in Tennessee, and all of its products consigned to Memphis are shipped from points beyond the limits of this state.

"Prior to the 1st of February, 1900, its manufactured products were sold and distributed throughout the southwest from Louisville, Kentucky; Memphis, Tennessee; Greenville, Vicksburg, and Natchez, Mississippi; and New Orleans, Louisiana. About that time the Patterson Transfer Company, a corporation created under the laws of Tennessee, having its situs at Memphis, and doing business at Memphis, represented to appellee that Memphis was the most available point in the southwest at which to mass and distribute its manufactured products to its customers in that section. At this time, and for many years prior thereto, the Patterson Transfer Company had been engaged in the business of transferring passengers and freights to and from the various depots at Memphis, and from the landings on the Mississippi river. Appellee entered into an arrangement with the Patterson Transfer Company, whereby said company was to receive its manufactured products at Memphis, assort them so as to separate the different kinds of nails, staples, and wire, and then to deliver them, either to the jobbers at Memphis, or to the jobbers beyond the limits of Tennessee, over the various lines of railroads and steamboats running into Memphis, as directed by complainant.

“None of complainant's products are ever sold to the Patterson Transfer Company, or are by it sold to others, and neither its officers nor employés have any knowledge whatever of the price at which goods are sold by complainant. Under the arrangement between them, the business of the Patterson Transfer Company, in connection with complainant's products, is confined to their transfer to the warehouses, their assortment in the warehouses, the keeping of them in storage, and their subsequent delivery to the customers of the complainant, under its general or special orders, as below indicated.

“The goods of complainant are manufactured at different points, and it is convenient and useful, from a business point of view, to mass them at some place at which they can be assorted, and from which they can be distributed to complainant's customers. It is impracticable to assort the goods either at the river landing or at the railroad depots when they reach Memphis, and, in order to facilitate the work, the Patterson Transfer Company has rented three warehouses in which the goods are stored for the purpose of assortment and distribution, and for other purposes below indicated. These warehouses are rented exclusively for this purpose, and the manufactured products of complainant, and no other goods, are stored therein.

“The evidence further shows that, as a general rule, prior to the time the goods are shipped to Memphis, sales agents of the complainant canvass the southwestern country, and make contracts exclusively with jobbers; and in each instance where a contract is made it is embodied in writing, on a form prepared by complainant, in which is set down the amount of goods which constitutes the subject of the contract, and the time agreed upon within which they are to be delivered. The goods so contracted for are described as so many kegs of nails, so many kegs of staples, so many reels of barbed wire, or so many coils of smooth wire, according to the terms of the contract, in respect of the quantity agreed upon. But the contract does not specify the grade and quality of the goods desired. The grade and quality are left open, to be subsequently specified when the customer desires a delivery, as below stated. The customer can, when he makes his specification, select any grade of goods he desires, and, upon so selecting, they will be delivered to him, up to the quantity contracted for, within the time agreed upon, at prices contracted for applicable to the several grades. In fixing the price of its goods, the complainant always, except when necessary to lower prices in order to meet competition, figures in the freight on the goods.

“As above indicated, it is shown in the evidence that there are many different kinds of nails, as well as different kinds of barbed and smooth wire, and it is expressly stipulated in the contract that the customer shall have the privilege of specifying, during the life of the contract, the kind of wire, or kind of nails or staples he desires delivered to him under the contract. These contracts also specify from sixty to ninety days as the time within which the pro-

ducts are to be delivered; and at any time during the period prescribed in the contract the customer may designate the kind of goods he desires delivered under it.

“These contracts are made usually before the goods arrive at Memphis, their point of destination, and generally the contracts are made in advance of the production of the goods at the complainant's factory. Usually the sales agents of the complainant, not only in advance of the shipment of the goods, but in advance of their production, canvass the southwestern country in the manner above stated, visiting the various jobbers, ascertaining the amount of goods they will require within sixty or ninety days, and the contract is prepared to the purport above indicated, in which the complainant obligates itself to deliver, at the prices stated, as above mentioned, the amount of goods contracted for therein, and the customer agrees to receive and pay for that quantity, upon the goods being delivered to him after he shall have made, and according to, his specification, which he may make during the life of the contract; the customer reserving the right, in the face of the contract, to specify the exact grade or quality of goods he desires delivered under it. He does this after the making of the contract, and at any time he desires to do so, within the life of the contract, by writing out his specification showing precisely what grade of goods he desires, and forwards this specification to the office of complainant in Chicago, and then the goods, under an order from the Chicago office, addressed to the Patterson Transfer Company at Memphis, are selected by the latter out of the mass of goods belonging to the complainant in the aforesaid warehouses in Memphis, and are shipped by the said Patterson Transfer Company to the customer who has signed the specification. This order from the complainant to the Patterson Transfer Company is effected through the agency of a copy of the specification, which is forwarded to the latter from the complainant's central office at Chicago, it being understood, according to the course of business between the two companies, that the Patterson Transfer Company will select out of the mass of goods those set out in the specification, and will ship them to the customer whose name is signed to the specification, upon receiving such copy of the specification from the central office at Chicago.

“This method of transacting the business is modified in practice, in so far as the fulfillment of the contracts made with the jobbers at Memphis is concerned. For the convenience of the Memphis trade, complainant advises the Patterson Transfer Company of the names of its customers at Memphis, and that company is instructed to deliver the goods embraced in the contracts with the Memphis jobbers, in the following manner: The Memphis jobber makes out his specification in duplicate, and addresses a letter to complainant, as in any other case; but, instead of forwarding this letter and his specification directly to complainant, he delivers the letter to the Patterson Transfer Company, and the Patterson Transfer Company at



once delivers the goods so specified, attaching the dray receipt to a copy of the specification, and forwards the specification, letter, and dray receipt to the office of complainant in Chicago and that office makes out an invoice and sends it directly to the jobber. Another variation is made in the course of the business, in favor of the Memphis jobbers, to the following effect: Any jobber in Memphis who is a recognized customer of the complainant can, without any previous written contract, or other special agreement, make out a specification of the goods he desires, and hand this, in duplicate form, to the Patterson Transfer Company. Upon this being done it is the duty of the Patterson Transfer Company, under its general instructions from the complainant, to select out of the mass of goods in the warehouses, goods corresponding to those contained in the specification, and deliver them to such jobber, this delivery being usually made by the next day, or, at most, within two or three days. Other deliveries on specifications sent direct to the Chicago office are not usually made within less than six or eight days, and sometimes a longer period is required. When the Patterson Transfer Company receives from Memphis jobbers the specifications, which are the special subject of this paragraph, one copy is kept by it, and the other copy is forwarded to the office at Chicago, where, upon its arrival and reception, the customer is charged with the goods specified, at current prices.

“ ‘The testimony shows that of the mass of goods kept on hand in Memphis, in the above-mentioned warehouses, about ninety per cent ultimately goes to jobbers who reside outside of Memphis, and beyond the limits of this state. The remaining ten per cent goes to the Memphis jobbers in fulfillment of the general contracts previously referred to, pursuant to specifications thereunder made, and under specifications made without previous written contracts, the latter covering about two and one-half per cent of all the goods kept on hand.

“ ‘No one but an agreed or recognized customer of the complainant can make out a specification, or have goods delivered from the storehouses of the Patterson Transfer Company; and no goods are ever delivered or distributed to anyone by the Patterson Transfer Company except under the express directions of complainant, or under general directions given by complainant to the said Patterson Transfer Company, in favor of recognized and approved customers of the complainant, whose names are furnished by it to the Patterson Transfer Company.

“ ‘The testimony further shows that the quantity of goods which the complainant keeps on hand at Memphis fluctuates considerably, owing to the state of trade from time to time. Sometimes the stock is as low in value as thirty thousand dollars, and sometimes the complainant has on hand a stock of the value of more than one hundred thousand dollars.

“ ‘Some of the goods—a very small amount—are shipped to Memphis by rail. Nearly all of these goods which come to the hands of the Patterson Transfer Company from this complainant are transported to Memphis on barges belonging to transportation companies, in which complainant has no interest, and which are engaged in the carrying trade. As a general rule, while the complainant endeavors to secure contracts covering its output before the goods are manufactured, yet it does not always do so; but, taking advantage of the seasons when there is a good stage of water in the rivers, which must be used in floating its products from its mills to Memphis, it masses its goods at the latter point in anticipation of future sales.

“ ‘The testimony shows that when goods are shipped from complainant’s mills, consigned to Memphis, the Patterson Transfer Company is notified by the Chicago office that a certain quantity of complainant’s products were shipped at a certain time, on barges, to the port of Memphis. These barges are met at the river landing by the Patterson Transfer Company, which receives the goods, transfers them to its warehouses and assorts them. Then, from time to time, it ships the goods on specifications, as before explained. On receiving the goods they are credited to the complainant on the books of the Patterson Transfer Company, and, on being shipped out, they are charged on the same books to the complainant. When the goods reach Memphis they are always consigned to the complainant, in care of the Patterson Transfer Company.

“ ‘All the goods forwarded to Memphis are products of the factories of complainant. No part of them are ever purchased by it. Its sales agents are exclusively engaged in selling these products. They are produced by complainant beyond the limits of this state, and are made the subject of contracts by its sales agents throughout the southwest, in the manner before explained. These sales agents report all contracts effected by them directly to the office in Chicago, whether made with the jobbers at Memphis, or else where beyond the limits of this state. All invoices for goods, when sold by specifications in the manner above stated, are made out at the office at Chicago, and forwarded directly to the customer, in the manner and under the circumstances previously stated.

“ ‘Some of the complainant’s goods are produced at one factory and some at another, and, consequently, when a purchaser contracts for the delivery to him, within sixty to ninety days, of a certain number of packages, it frequently turns out that some of the goods desired are the product of one factory, and some of another, and it is, accordingly, most convenient in the conduct of complainant’s business that goods from complainant’s various factories should be massed at some point where they can be dealt with in the manner before explained.

“ ‘Complainant’s goods are put up in the following original packages: The nails and staples are put up in kegs, each keg weighing

one hundred pounds; the smooth wire in coils tied by wires, and each coil weighing one hundred pounds; the barbed wire on reels, the wire on each reel weighing one hundred pounds. Each package is separately and distinctly made up at the factories for convenience of transportation, and is, in this form, delivered to the common carriers. In this form they are delivered at the initial point of transportation. In this form they are transported in barges, or by railroads, to Memphis, and received by the Patterson Transfer Company. In this form they are assorted at the warehouses by the Patterson Transfer Company, and delivered by it to the complainant's customers at Memphis, under the circumstances previously stated, or to the various lines of steamboats and railroads running out of Memphis, consigned, under circumstances previously stated, to customers beyond the limits of Tennessee, and in this form they ultimately come to the hands of complainant's customers in such foreign state. Each package is separate and distinct in itself, and while no particular package is consigned to any special customer, each keg of nails and staples is marked so as to show exactly what the package contains, and each coil and reel of wire is marked with a tag showing what the coil or reel contains, and no package is ever changed in any particular from the time it leaves the factory until it ultimately reaches the hands of the customer.

“The testimony shows that Memphis has, within recent years, become, by reason of its accessibility to railway and river transportation, a great distributing point; and it was selected as the basis of the operations which are the subject of the present controversy, by reason of these exceptional advantages.

“Other facts proven by the complainant are as follows: The testimony of Mr. Young, the tax assessor, shows that none of the cotton shipped into Memphis from the surrounding states pays any tax whatever, and that the manufacturers of lumber in Memphis pay no tax on lumber made from logs which are produced from the soil of this state: *American etc. Wire Co. v. Speed* (the principal case), 110 Tenn. 537, ante, p. 820, 75 S. W. 1057.

“With these facts in hand we are of opinion that the court below was right in deciding that the goods were not in transit, but, on the contrary, had reached their destination at Memphis, and were there held in store at the risk of the steel company, to be sold and delivered as contracts for that purpose were completely consummated. All question, therefore, as to the power of the state to levy the merchants' tax based on the contrary contention, being without merit, may be put out of view. The other propositions pressed upon our attention require consideration. They relate to two subjects: 1. The asserted want of power of the state of Tennessee to tax because the goods were imported from another state, and were yet, it is contended, in the original packages; and 2. Because of the alleged discrimination asserted to result from the provision of the state constitution exempting goods manufactured from the produce of the state.

“1. Since *Brown v. Maryland*, 12 Wheat. 436, 6 L. ed. 684, it has not been open to question that taxation imposed by the states upon imported goods, whether levied directly on the goods imported or indirectly by burdening the right to dispose of them, is repugnant to that provision of the constitution providing that ‘No state shall, without the consent of Congress, lay any imposts or duties on imports or exports’: Const., art. 1, sec. 10, par. 3. And *Brown v. Maryland* also settled that where goods were imported they preserved their character as imports, and were therefore not subject to either direct or indirect state taxation as long as they were unsold in the original packages in which they were imported. A recent case referring to the authorities and restating this elementary doctrine is *May v. New Orleans*, 178 U. S. 496, 44 L. ed. 1165, 20 Sup. Ct. Rep. 976. Assuming that the goods concerning which the state taxes in this case were levied were in the original packages and had not been sold, if the bringing of the goods into Tennessee from another state constituted an importation, in the constitutional signification of that word, it is clear they could not be directly or indirectly taxed. But the goods not having been brought from abroad, they were not imported in the legal sense, and were subject to state taxation after they had reached their destination and whilst held in the state for sale. This is as conclusively foreclosed by the decisions of this court as is the doctrine resting upon the decision in *Brown v. Maryland*: *Woodruff v. Parham*, 8 Wall. 123, 19 L. ed. 382; *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091. The doctrine upon which the cases rest was this: That imports, in the constitutional sense, embrace only goods brought from a foreign country, and consequently do not include merchandise shipped from one state to another. The several states, therefore, not being controlled as to such merchandise by the prohibition against the taxation of imports, it was held that the states had the power, after the goods had reached their destination and were held for sale, to tax them, without discrimination, like other property situated within the state.

“Those two cases decided, the one more than thirty-five and the other more than eighteen years ago, are decisive of every condition urged on this record depending on the import and the commerce clause of the constitution of the United States. The doctrine which the two cases announced has never since been questioned. It has become the basis of taxing power exerted for years, by all the states of the Union. The cases themselves have been approvingly referred to in decisions in this court too numerous to be cited, and we therefore content ourselves by mentioning two of the cases where the doctrine was restated: *Emert v. Missouri*, 156 U. S. 296, 39 L. ed. 480, 5 Int. Com. Rep. 68, 15 Sup. Ct. Rep. 367; *Kelley v. Rhoads*, 188 U. S. 1, 47 L. ed. 359, 23 Sup. Ct. Rep. 259. But it is strenuously insisted that the principle of the cases referred to, reiterated again and again and uniformly followed for so long a period of time, has been, by inevitable implication, overruled by the cases of *Leisy v.*



Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Int. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Lyng v. Michigan, 135 U. S. 161, 34 L. ed. 150, 3 Int. Com. Rep. 143, 10 Sup. Ct. Rep. 725, and other cases resting on the rule expounded in those cases.

“We might well leave the unsoundness of the proposition to be demonstrated by what we have previously said, and also by the fact that, in *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 10 Sup. Ct. Rep. 681, and *Lyng v. Michigan*, and most of the similar cases relied on, the decisions in *Woodruff v. Parham*, 8 Wall. 123, 19 L. ed. 382, and *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091, were referred to without even an intimation that those cases were deemed to be overruled or even qualified. The earnestness with which the contention is pressed induces us, however, briefly to point out the misconception upon which it rests. It results from assuming that the rule which governs in a case where there is an absolute prohibition is applicable where no such prohibition obtains. *Brown v. Maryland* illustrates the first of these cases, while *Woodruff v. Parham*, *Brown v. Houston*, *Leisy v. Hardin*, *Lyng v. Michigan* are examples of the other. Thus, in *Brown v. Maryland* there was an absolute want of power to tax imports, and it was held that a state enactment which operated to tax imports, whether directly or indirectly, was within the positive prohibition. In other words, that imports could not be taxed at all until they had completely lost their character as such. *Woodruff v. Parham* and *Brown v. Houston*, on the other hand, so far as interstate commerce was concerned, dealt with no positive and absolute inhibition against the exercise of the taxing power, but determined whether a particular exertion of that power by a state so operated upon interstate commerce as to amount to a regulation thereof, in conflict with the paramount authority conferred upon Congress. In order to fix the period when interstate commerce terminated, the criterion announced in *Brown v. Maryland*—that is, sale in the original packages at the point of destination—was applied. The court, therefore, conceded that the goods which were taxed had not completely lost their character as interstate commerce, since they had not been sold in the original packages. As, however, they had arrived at their destination, were at rest in the state, were enjoying the protection which the laws of the state afforded, and were taxed without discrimination, like all other property, it was held that the tax did not amount to a regulation in the sense of the constitution, although its levy might remotely and indirectly affect interstate commerce. In *Leisy v. Hardin* and *Lyng v. Michigan* the same question in a different aspect was presented. The goods had reached their destination and the question was not the power of the state to tax them, but its authority to treat the goods as not the subjects of interstate commerce, and to prohibit their introduction or sale. This was held to be a regulation within the constitutional sense, and therefore void. The cases, therefore, did not decide that interstate commerce was to be considered as

having completely terminated at one time for the purposes of import taxation, and at a different period for the purposes of interstate commerce. But both cases, whilst conceding that interstate commerce was completely terminated only after the sale at the point of destination in the original packages, were rested upon the nature and operation of the particular exertion of state authority considered in the respective cases.

"2. The discrimination is asserted to have arisen from the provision of the state constitution, saying that 'no article manufactured of the produce of this state shall be taxed otherwise than to pay inspection fees.' But in *Kurth v. State* (1887), 86 Tenn. 134, 5 S. W. 593, it was decided that this provision of the constitution referred only to a direct levy of taxation on articles manufactured of the produce of the state, and did not apply to taxes levied by virtue of the grant conferred by the constitution to tax 'merchants, peddlers, and privileges, in such manner as they (the legislature) may from time to time direct.' The two provisions, it was held, should be construed together, so that the one would not limit the other. We have been referred to no case decided by the supreme court of Tennessee modifying this interpretation of the state constitution, and its correctness is in effect directly affirmed by the ruling made by the court in this case. Now the tax complained of on this record is not the general ad valorem tax levied on property as such, but is a merchants' tax, and is therefore not within the purview of the exemption clause from which it is asserted the discrimination arises. Construing the taxing statutes of the state, the court below decided in this case that they equally apply to all merchants, and hence did not discriminate as against any member of the merchants' class. The argument is made that under the facts found by the court below it was erroneously held that the steel company, because of the business which it carried on in the state of Tennessee, was a merchant within the statutes, and the power to review this question, it is insisted, should be exerted because the question is federal in its nature. The contention is without merit. As the levy of the merchants' tax violated no federal right, the mere determination of who were merchants within the state law involved no federal question. The construction of the state law being conclusive and embracing all persons doing a like business with the steel company, it follows that there was no discrimination. Conceding it to be true, as argued, that in the past there would seem to have been conflict of opinion in the court of Tennessee in interpreting various statutes concerning the merchants' tax, this contrariety does not concern the meaning of the statute construed in this case. As that statute has been construed by the state court as applying to all merchants and as embracing alike all persons engaged in the character of business which the steel company was carrying on, it follows that there is no ground upon which to predicate the complaint of undue discrimination. Nor do we think that

the opinion of the supreme court of Tennessee in *Benedict v. Davidson County*, 110 Tenn. 183, 67 S. W. 806, conflicts with the views just expressed. That case involved, not a merchants' tax, but the validity of a general ad valorem levy on property as such, and, therefore, affords no ground for the contention that manufacturers in Tennessee who shipped the goods by them made from the products of the state to a depot for sale, and there sold them under conditions and circumstances identical with those presented here, could not be taxed as merchants under the law of Tennessee.

"Affirmed."

*For Other Recent Authorities on State Taxation* as interfering with interstate commerce, see *People ex rel. Pennsylvania R. Co. v. Knight*, 171 N. Y. 354, 98 Am. St. Rep. 610, 64 N. E. 152; *Crossman v. Lurman*, 171 N. Y. 329, 98 Am. St. Rep. 599, 63 N. E. 1097; *Saulsbury v. State*, 43 Tex. Cr. Rep. 90, 96 Am. St. Rep. 837, 63 S. W. 568; *State v. Northern Pac. Express Co.*, 27 Mont. 419, 94 Am. St. Rep. 824, 71 Pac. 404. And for a general discussion of this question, see the monographic note to *People v. Wemple*, 27 Am. St. Rep. 547-568.

CASES  
IN THE  
COURT OF CRIMINAL APPEALS  
OF  
TEXAS.

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ALLEN v. STATE.

[44 Tex. Cr. Rep. 63, 68 S. W. 286.]

**FORGERY—Indictment—Explanatory Averments—Burden of Proof.**—Explanatory averments may be inserted in an indictment for forgery, as to the name forged, and this simply casts upon the state the burden of proving them. (p. 840.)

**FORGERY—Indictment.**—The name of the person intended to be injured or defrauded need not be alleged in an indictment for forgery. (p. 840.)

**FORGERY—Indictment.**—If a name is wrongly written but intended for a specific individual, it may be forgery, and it is proper to so aver in the indictment. (p. 840.)

**FORGERY.—An Instrument may be the Subject of Forgery** although not addressed to anyone. (p. 840.)

R. A. John, assistant attorney general, for the state.

**63** DAVIDSON, P. J. Appellant was convicted of forgery, and his punishment assessed at two years confinement in the penitentiary.

The indictment charges appellant with forging the following instrument, to wit: "Mr. George Eslaps Please pay this boy \$3.00 Dollars for me T. W. WOOrd." It further charges, that by the name "Mr. George Eslaps," to whom said instrument was directed, was meant and intended Mr. George Islieb; and that by the expression, "this boy," to whom the instrument was made payable, was meant and intended that the same <sup>64</sup> should be paid to Wesley Allen, etc. That the name "T. W. WOOrd" was intended for "T. W. Ward," and that Ward was running an account with George Islieb. That by this order appellant



intended and meant that it was to be an order for three dollars in money, directed by said T. W. Ward to George Islieb, and that if he (Islieb) would pay the said Allen the three dollars, that he (Ward) would pay said George Islieb said amount. There is a further count charging appellant with having said instrument in his possession, with the same explanatory and innuendo averments. The indictment is criticised because it fails to allege the person who was intended to be defrauded, or whose act it purported to be; and (2) because it shows on its face to have been signed by "T. W. WOOrd," and the innuendo or explanatory averments charge that it meant T. W. Ward. We do not think there is any merit in either of these contentions. If they are necessary they may be treated as surplusage; and perhaps it would make no difference whether he intended the instrument to have been signed by T. W. Ward or not. It would equally have been forgery if appellant had signed the name of a fictitious person. But we believe the explanatory averments were permissible. By making these, the state took the burden of proving these explanatory averments, in order to obtain a conviction. The evidence fully sustains these allegations. Appellant himself testified to that effect. It was not necessary to allege the person who was intended to be injured or defrauded; but by the averments of the indictment it occurs that it was so alleged and was fully proved. The following authorities, we think, fully sustain the proposition, that where the name is wrongly written but intended for a specific individual it would be forgery; and it is proper to so aver in the indictment: *Rollins v. State*, 22 Tex. Cr. App. 548, 58 Am. Rep. 659, 3 S. W. 759; *Crawford v. State*, 40 Tex. Cr. Rep. 344, 50 S. W. 378. The instrument is even the subject of forgery if not addressed to anyone: *Kennedy v. State*, 33 Tex. Cr. Rep. 189, 26 S. W. 78; *Dixon v. State* (Tex. App.), 26 S. W. 500.

The evidence supports the conviction, and the judgment is affirmed.

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*The Crime of Forgery* is discussed in the monographic notes to *Arnold v. Cost*, 22 Am. Dec. 306-321, and *Hendricks v. State*, 8 Am. St. Rep. 467-470. As to whether misspelling the name forged prevents the writer from being guilty of forgery, see *State v. Gryder*, 44 La. Ann. 962, 32 Am. St. Rep. 358, 11 South. 573; *State v. Warren*, 109 Mo. 430, 32 Am. St. Rep. 681, 19 S. W. 191.

An *Indictment for Forgery* need not name the person intended to be defrauded: *State v. Cross*, 101 N. C. 770, 9 Am. St. Rep. 53, 7 S. E. 715; *State v. Tingle*, 32 W. Va. 546, 25 Am. St. Rep. 830, 9 S. E. 935; *State v. Warren*, 109 Mo. 430, 32 Am. St. Rep. 681, 19 S. W. 191; *Howard v. State*, 37 Tex. Cr. Rep. 494, 66 Am. St. Rep. 812, 36 S. W. 475.

## ADDISON v. STATE.

[44 Tex. Cr. Rep. 80, 68 S. W. 679.]

**MURDER—Indictment—Name of Deceased.**—If the deceased is known by one name as well as by another, an indictment for murder may allege either name, without creating a variance. (p. 841.)

R. A. John, assistant attorney general, for the state.

<sup>80</sup> HENDERSON, J. Appellant was convicted of murder in the first degree, and his punishment assessed at confinement in the penitentiary for life.

There is no bill of exceptions in the record. The only question raised is as to a variance claimed between the name of the deceased, as alleged in the indictment, and the name proven. The indictment charges the name of the deceased as Helen Pendleton. The proof showed that she had lived a long time, perhaps all her life, in that neighborhood, and was then about sixty years old; her maiden name was Helen Pendleton, by which she was universally known. On the night of the alleged murder, about 11 o'clock, she was married to appellant, John Addison, and the proof tends strongly to show that she was murdered by him on that night between 11 o'clock and daylight, by crushing her skull with an ax, the motive being robbery. The question presented is, that having married on that night her name was eo instanti changed from that of Pendleton to Addison. We understand this to be the general rule. As was said in a former case there is no law requiring it, but in pursuance <sup>81</sup> of a custom in our country the wife takes the name of the husband. However, in this case all of the witnesses speak of the deceased as Helen Pendleton, although conventionally she may have at 11 o'clock that night assumed the name of her husband; yet she was known almost up to the very time of her death as Helen Pendleton. The witnesses all speak of her by that name. Where a person is known as well by one name as another, the indictment can allege either name, and there is no variance: *Carter v. State*, 39 Tex. Cr. Rep. 345, 46 S. W. 236, 48 S. W. 508. In this case deceased was known as Helen Pendleton, and we hold that there was no variance between the indictment and the proof. We have examined the record carefully, and the evidence amply supports the conviction. The judgment is affirmed.

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*That a Person* equally well known in a community by either of two names may be indicted for a crime in either name, see *State v. Bundy*, 64 Me. 507; *Taylor v. Commonwealth*, 20 Gratt. 825. Consult, also, *McBeth v. State*, 50 Miss. 81; *People v. Freeland*, 6 Cal. 96.

## KUBRICHT v. STATE.

[44 Tex. Cr. Rep. 94, 69 S. W. 157.]

**LIBEL—False Entry in Baptismal Record.**—If a minister of a church makes an entry upon the church record of the birth and name of a bastard, thus naming a certain person as its father, after he has been requested by him not to make such entry, and after he has knowledge of the trial and acquittal of such imputed father on a charge of seduction of the mother of the child, upon whose statement and refusal to recant he makes such entry, he is guilty of libel. (p. 843.)

M. Pazdoral, for the appellant.

R. A. John, assistant attorney general, for the state.

**94** DAVIDSON, P. J. The information charges appellant with libel, in substance, that he, with malicious intent, etc., entered **95** on the birth record of the church of which he was the minister the following: "Vlasta Anna Alzbeta. Born 7th September, 1900, in Wesley, Texas. Baptized 8th April, 1901, in Wesley, Texas. Father of child, Frank James. Mother of child, Julie Pomikal. Sponsors, Frank and Anna Psencik. Acting minister B. Kubricht." That by making such entry it charged James (prosecutor) with being the father of the child, which record was public and open to the inspection of the public, etc. That said child was a bastard, and that by making said entry he was charging the prosecutor with the crime of seduction and of being the father of a bastard child, etc., which held him up to contempt among honorable men, and for the purpose of bringing him in disrepute, etc.

The main contention is that the evidence does not support the conviction. The facts in substance show that the mother of the child, accompanied by the sponsors, presented the child for baptism on the 8th of April, 1901; that the baptism occurred and a memorandum was taken by the minister at the time, but it was not entered upon the church record until some time during the month of July following. Hearing of the baptism and the charge made by its mother, that prosecutor was the father of the bastard, prosecutor's father approached the minister in regard to the matter, and requested him to erase that portion of the entry from the register which showed prosecutor to be the father of the child. This occurred in June, a month before the entry was made by the minister in the church register. Among other things he stated to the minister that his son was

not guilty of the offense of seduction; nor was he the father of the child. The minister insisted that the facts stated by the mother that prosecutor was the father of the child should go upon the record; that he had no authority to change it. that it was the custom of the church for the minister to make these entries, and that the girl had given prosecutor's name as the father of the child. Appellant's attention was called to the fact, which he seemed to have known anyway, that the imputed father had been tried and acquitted of the crime of seduction, but he insisted upon making the entry, which he did finally about a month later. Appellant himself testifies substantially to the same fact; but said that, if the mother of the child would agree to it, he would not make the entry upon the register charging the imputed father with the paternity of the child.\* The mother would not agree, and he accordingly made the entry some time during the month of July. This, perhaps, is a sufficient statement of the case. We are of opinion that the evidence is sufficient. Appellant knew long before the entry upon the record of the trial and acquittal of the imputed father on the charge of seduction, but insisted that he had no power to refrain from placing the statement of record imputing its paternity, as stated by the mother; and yet agreed, if she would recant her statement, that he would change the record or rather refrain from making the entry. This entry upon the church record, naming prosecutor as the father of the child, occurred <sup>96</sup> after the trial and after the conversations above mentioned. The substance of this testimony is that appellant, knowing the fact that the imputed father had been acquitted of seduction, and having been requested not to make the entry upon the church record and hold him up in the records of the church as the father of a bastard, that appellant, without just cause and evidence, did place of record this false imputation against the character of the imputed father. This was certainly calculated to bring him into disrepute with his neighbors; and under all the circumstances, it occurs to us, would constitute a libel within the definition of our statute.

Appellant denied the malicious intent, and assumes the truth of the girl's statement that the party libeled was the father of the child. Appellant had all the facts in connection with the case before him long prior to making the entry upon the record. He made it upon the ex parte statement of the girl, and declined to refrain unless the girl would consent. Certainly it would not be asserted that the laws of a Christian church would require



its minister to enter a falsehood upon the records of his church: *Holt v. Parsons*, 23 Tex. 9, 76 Am. Dec. 49. Appellant seems to rely upon article 742 of the Penal Code, which provides: "Where any person by virtue of his office is required to record the proceedings of any department of the government or of any body corporate or politic, or of any association organized for purposes of business, or as a religious, moral, benevolent, literary or scientific institution, he cannot be charged with libel for any entry upon the minutes or records of such department, body or association made in the course of his official duties." It seems that the church of which appellant was the minister was an incorporated body, by the custom of which, though not by its law, he kept a register of the birth and baptism of each infant of the members of the church together with the name of the parents and sponsors. This under the testimony, was his authority and only authority for making these entries. The following article, however, provides that, "If any false statement be entered upon the minutes or record of proceedings of any corporate body or association included within the meaning of the preceding article, which would be libel if written, printed, published or circulated by an individual, according to the previous articles of this chapter, the persons, being members of such body or association, who assent to and direct such libelous statement to be made, are guilty of libel under the same rules as if the false statement had been written, published or circulated in any other manner than as a part of the record or proceedings of such body or association, subject, however, to the restrictions contained in the succeeding article." The succeeding article provides that the statements referred to in the preceding article are not presumed to be made with intent to injure from the mere fact that such would be the natural result thereof, unless it appear from other facts that the statement was in fact made with that intention. If it be conceded that these articles apply to the case in hand, then it may be answered that <sup>97</sup> the facts justify the jury in finding that the entry upon the baptismal record charging the prosecutor with the paternity of the bastard are sufficiently shown; the acts, deportment and language and testimony of appellant himself justify the jury in arriving at their conclusion, for appellant himself testified that he was fully aware of the acquittal of seduction of the imputed father long before the entry upon the baptismal record, and that he agreed not to make the entry if the mother would consent thereto, but as she refused he made the entry. The article of the

statute referred to makes defendant liable if the entry is made with malicious intent. As we view the record, the evidence is sufficient. The charge as given by the court and supplemented by appellant's requested instruction we think fully and correctly charges the law applicable to the case. The judgment is affirmed.

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*Words Charging a Man with bigamy, rape, fornication, or adultery are actionable:* Parker v. Meader, 32 Vt. 300; Beirer v. Bushfield, 1 Watts, 23; Lowe v. Herald Co., 6 Utah, 175, 21 Pac. 991; Walton v. Singleton, 7 Serg. & R. 451, 10 Am. Dec. 472. See, too, Morey v. Morning Journal Assn., 123 N. Y. 207, 20 Am. St. Rep. 730, 25 N. E. 161, 9 L. R. A. 621; Collins v. Dispatch Pub. Co., 152 Pa. St. 187, 39 Am. St. Rep. 636, 25 Atl. 546. Justification in slander and libel is the subject of a monographic note to Rutheford v. Paddock, 91 Am. St. Rep. 285-309.

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## HOOPER v. STATE.

[44 Tex. Cr. Rep. 125, 69 S. W. 149.]

**MURDER—Self-defense.**—If the accused, who has provoked a difficulty with the deceased, abandons it and is leaving the vicinity, when the deceased approaches and renews the difficulty in such a manner as to cause the accused to believe that the deceased intends to kill him or do him great bodily harm, his right of self-defense is revived and perfected, and he has a right to kill the deceased in self-defense. (p. 847.)

**MURDER—Self-defense—Manslaughter.**—If the accused, who has provoked a difficulty with the deceased, abandons it, and it is renewed by the deceased, but the accused is not in danger of his life or great bodily harm, or the deceased is not seeking to get some advantage by which he could take the life of the accused or do him great bodily harm, the law of manslaughter would apply to that portion of the difficulty which may have resulted fatally to the deceased after such abandonment by the accused, and the jury should be instructed thereon. (p. 847.)

W. G. Barber and E. R. Kone, for the appellant.

R. A. John, assistant attorney general, for the state.

**127** DAVIDSON, P. J. Appellant was convicted of murder in the second degree, and his punishment assessed at confinement in the penitentiary for a term of twenty-five years. The court's failure to charge on the law of retreat, manslaughter and the meagerness of the charge on self-defense, and refusal of the continuance, are the main questions presented for revision.

A brief summary of the evidence discloses that prior to the fatal encounter deceased and his brother had given the small

brother of appellant a whipping. About a week before the homicide deceased stated that he understood the Hoopers were mad about this; that he was sorry they had whipped the boy, but "if the Hoopers did not like it they could get in the middle of the road, and he was ready for them." Appellant was informed of this before meeting deceased. Deceased and appellant were strangers, never having met prior to the evening of the killing. On the evening of the trouble, and prior to the homicide, defendant had been to a tournament above the little village of Wimberly, and coming back through the village stopped at the schoolhouse, where a crowd was assembled. Upon reaching the schoolhouse he dismounted from his horse, and while sitting in the crowd heard some one address deceased as Dee Meeks, and this was the first time he knew who deceased was. Deceased was sitting in a buggy. Appellant approached it and asked him if he was one of the men who "beat up the kid." Upon receiving an affirmative reply, appellant cursed and abused Meeks. Deceased said he did not care to fight, as appellant was armed and he was not; that the matter could be settled without a difficulty. Thereupon appellant left deceased, went to and mounted his horse. There is some question as to whether Meeks was in the buggy at the time of this conversation or out on the ground, but this is immaterial. Some of the witnesses testified that appellant cursed deceased; others deny this. Appellant, testifying in regard to this matter, stated in substance that when he approached the buggy he asked the man whom he had heard called Dee Meeks if he was one of those who "had beat up the kid," and being informed that he was, asked deceased, "Don't you think it was very cowardly for two men to jump on a kid?" Deceased replied, "I call myself a kid, too, but I can fight you or any other man." That he then abused deceased as a coward, but did not curse him. Deceased said he did not want to fight, as appellant was armed and he was not. Defendant thereupon walked off and left deceased and mounted his horse to go home. It is further shown that shortly after Hooper had gotten on his horse, Meeks left the buggy and started toward the schoolhouse, and, turning, advanced upon appellant, and when within a few <sup>128</sup> feet of him, began talking. There was some question as to the position of Meeks' hands during his approach to appellant, and the subsequent colloquy. Some of the witnesses stated that his left hand was extended and his right hand by his side; and in this position appellant fired upon his adversary. Some of the witnesses say that as he

approached appellant he said something to appellant about he (deceased) being fixed; that his left hand was extended and his right hand was folded across his breast and under his coat. That appellant told deceased two or three times to stop if he did not mean to fight; that, as he got within a few feet of appellant, the latter drew his pistol and fired four times rapidly, the last as Meeks was falling. Defendant, in this connection, testified that Meeks started from his buggy as if to go into the schoolhouse, but turned and came toward him; that he understood Meeks to say that he was fixed. Witness told him three times, "If you don't mean fight, stop." Meeks continued to advance with his right hand across his breast under the lapel of his coat; and when within two or three feet, Meeks grabbed with his left hand as if to catch the horse's bridle. Defendant drew his pistol and fired three shots before Meek turned, the fourth shot just as he turned, the last shot being fired at his head. Appellant further testified that he had not gone to the schoolhouse expecting to meet Meeks, who was a stranger to him. One shot entered the top of the head, another between the shoulder and breast, the third one behind the right ear, all ranging downward. It is error under this state of facts for the court to fail to charge the law of retreat. If his testimony is true, appellant had evidently abandoned the difficulty which he sought to provoke with Meeks while Meeks was sitting in the buggy, and had mounted his horse to go away. The second difficulty was brought about by deceased approaching appellant. This placed appellant, under his view of the case, as acting in self-defense. If he believed from the environments of the approach of deceased that he intended to kill him or do him serious bodily harm, he had a right to shoot. His right of self-defense was revived and perfected. This was not a case of imperfect self-defense as was Carter's Case, 30 Tex. Cr. App. 552, 28 Am. St. Rep. 944, 17 S. W. 1002; Pen. Code, art. 678; Bell v. State, 17 Tex. Cr. App. 550; Pierce v. State, 21 Tex. Cr. App. 540, 1 S. W. 463; Parker v. State, 22 Tex. Cr. App. 105, 3 S. W. 100; Gonzales v. State, 28 Tex. Cr. App. 130, 12 S. W. 733; Ball v. State, 29 Tex. Cr. App. 107, 14 S. W. 1012; Williams v. State, 30 Tex. Cr. App. 429, 17 S. W. 1071; Nalley v. State, 30 Tex. Cr. App. 456, 17 S. W. 1084.

The law of manslaughter should also have been given. If defendant abandoned the difficulty and was leaving, and the fatal shot was fired after such abandonment, it raised the question of manslaughter. While it is true appellant had the right, under



the law of perfect self-defense, to pursue his adversary or fire upon him until all danger to his life or the infliction upon him of serious bodily injury had passed, without jeopardizing that right of self-defense, still if his life was not in danger or he was not in danger of serious bodily injury, or deceased was not seeking to get some advantage by which he could take the life of appellant, <sup>129</sup> or do some such bodily harm after an apparent abandonment, the law of manslaughter would apply to that portion of the difficulty which may have resulted fatally to deceased after such abandonment: *West v. State*, 2 Tex. Cr. App. 460; *Tollett v. State* (Tex. Cr.), 55 S. W. 573.

Upon another trial the law of self-defense should be stated more fully, so as to present that issue clearly under the facts.

The motion for continuance will not be discussed for the reason that the witnesses may be before the jury upon another trial; if not, the matter will come in different form and manner.

The judgment is reversed and the cause remanded.

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**In the Subsequent Case** of *Clay v. State*, 44 Tex. Cr. Rep. 129, 69 S. W. 413, it appeared, on a trial for murder, that the accused and the deceased had a previous difficulty, which had been abandoned, and that the deceased at that time and place had said to the defendant that "it was not all over," and that he would see him later, to which the accused replied, that, "it was all right; he would be ready," whereupon the deceased went to his place of business, and the accused, having gone to other places, returned to the scene of the original difficulty after a lapse of twenty minutes, and was there engaged in a conversation with a third person, when the deceased approached and began drawing a pistol, whereupon the accused drew his pistol and both fired, resulting in the killing of the deceased; and the court held that, under the foregoing facts, the acts of the deceased clearly made him the aggressor in the second difficulty, and fully restored and perfected the accused's right of self-defense, and that he did not lay himself liable to the law of mutual combat by remaining on the scene of the first difficulty and in not leaving it in order to avoid meeting the deceased.

*Whether the Plea of Self-defense* can be invoked by one who provokes a difficulty is discussed in the monographic note to *State v. Sumner*, 74 Am. St. Rep. 731-735; and the subsequent cases of *Airhart v. State*, 40 Tex. Cr. Rep. 470, 76 Am. St. Rep. 736, 51 S. W. 214; *State v. Cobb*, 65 S. C. 324, 95 Am. St. Rep. 801, 43 S. E. 654; *Cook v. State*, 43 Tex. Cr. Rep. 182, 96 Am. St. Rep. 854, 63 S. W. 872.

## SMITH v. STATE.

[44 Tex. Cr. Rep. 137, 68 S. W. 995.]

**RAPE—Evidence of Subsequent Acts.**—On a trial for rape evidence as to carnal acts of the parties subsequently to the rape as charged in the indictment, and in other and different counties, is not admissible. (p. 851.)

**RAPE—Evidence of Subsequent Acts.**—On a trial for rape, evidence that subsequently to the commission of the rape as charged, and by agreement, the prosecutrix was married to another man, who in accordance with an arrangement previously made abandoned and turned her over to the accused, who lived with her afterward in other counties as his wife, is inadmissible. (p. 851.)

**RAPE.—Proof that the Prosecutrix Was not the Wife of the Defendant** in rape must be made by direct evidence, and proof that he is a married man with two children is irrelevant and inadmissible to show that he was not the husband of the prosecutrix. (p. 851.)

**TRIAL—Improper Remarks of Counsel.**—If, on a trial for rape, counsel remarks to the jury that “in a case like this the law ceased to be a virtue and while I do not believe in mob law as a rule, I will be doing my duty as a citizen and a father if I can induce this jury to hang defendant as high as Haman, and then go to my home and tell my wife what I have done, and hear her remark, ‘Well done, thou good and faithful servant; you have performed your duty,’ ” his words constitute reversible error, although the court admonishes him to desist and instructs the jury to disregard his remarks. (p. 852.)

**RAPE—Belief in Age of Prosecutrix.**—On a trial for rape of a girl under the age of statutory consent, it is no defense that the accused believed her to be over such age, nor can the fact of such belief be taken in consideration in mitigation of punishment. (p. 852.)

**RAPE—Age of Consent—Instructions.**—On a trial for rape of a girl under the statutory age of consent, committed with her consent, the accused is entitled to have the jury instructed that if it believed that the prosecutrix was of the age of statutory consent or over at the time of the alleged rape it must acquit, and, if it has a reasonable doubt whether or not she was of that age or under, it must give the defendant the benefit of such doubt and acquit him. (p. 853.)

N. J. Lewellyn and Rice & Bartlett, for the appellant.

R. A. John, assistant attorney general, for the state.

139 HENDERSON, J. Appellant was convicted of rape, and his punishment assessed at confinement in the penitentiary for a term of seventy-five years; hence the appeal.

Appellant made a motion for continuance. Without entering into a discussion of it, we would observe that it does not occur to us that the 140 absent testimony was material or probably true. The court did not err in overruling the same.

Bills of exception numbers 3, 4 and 5 present no error.

When the prosecutrix, Elma Walker, was on the stand, the state was allowed to prove over defendant's objection that, after the carnal intercourse, which she testified to as having occurred at or about June 1, 1901, at her home in the section-house at Gurley, in Falls county, about the 2d of August, 1901, thereafter, upon agreement between herself and defendant that Fuller was to marry her and turn her over to defendant, they went together to Bell county, and while in Belton, Fuller procured a marriage license and married her—defendant not being actually present at the marriage, but in the house while it was being performed; that after such marriage Fuller abandoned prosecutrix and turned her over to defendant in pursuance of their agreement; that thereafter she and defendant went from Bell county to one Ed Walker's, a relative of defendant, in Milam county. They stayed there two weeks or more, cohabiting together. That thereafter they returned to Temple, in Bell county, and there lived together as man and wife for two and one-half months. That after that they went to Somerville, in Burleson county, where they lived together as man and wife for a good while. All this evidence was objected to, because the acts occurred long after the alleged rape as charged in the indictment; and occurred in other and different counties than Falls county; and that said acts could not explain or elucidate defendant's actions in Falls county in the commission of the alleged rape. Appellant objected to all the acts after said marriage of prosecutrix with George Fuller, because she was then of full age, under the law, and had all the rights and privileges of a married woman, and because rape by consent on such a person cannot be committed. By another bill of exceptions appellant objected to his cross-examination by the state in regard to the same matters, urging the same grounds of objection. As they involved the same questions, we will treat both of them together. In support of the state's contention that said testimony was admissible we are referred to *Hamilton v. State*, 36 Tex. Cr. Rep. 372, 37 S. W. 431, and *Manning v. State*, 43 Tex. Cr. Rep. 302, 96 Am. St. Rep. 873, 65 S. W. 920. In *Hamilton's* case the acts introduced in evidence were prior in point of time to the act for which appellant was being prosecuted. So the question there was not raised. In *Manning's* case the acts introduced in evidence were shortly after the alleged act for which appellant was being tried. The objection there urged, however, was not that the acts were subsequent, but that they related to other and distinct offenses. The court in said case

held the testimony was admissible as being transactions between the same parties, and tending to show an intimacy and familiarity between them, which with other circumstances would tend to show the guilt of appellant as to the transaction charged against him in the indictment. This, as we understood it, is in accord with the authorities: *Williams v. State*, 8 Humph. 583; *State v. Knapp*, 45 N. H. 148; *State v. Walters*, 45 Iowa, 389. But all these cases relate to prior <sup>141</sup> acts, and not to acts or conduct occurring subsequent to the charge in the indictment. Mr. Wharton's *Criminal Evidence*, section 35, lays down the proposition in general terms that "In prosecutions for adultery or for illicit intercourse of any class, evidence is admissible of sexual acts between the same parties prior to, or, when indicating continuousness of illicit relations, even subsequent to the act specifically under trial. Prior sexual attempts on same woman are admissible, under the same limitations, on a trial of rape." We have examined the authorities, and so far as we are aware there is no case, where the party was being tried for rape, in which subsequent acts to the charge in the indictment were admitted in evidence. But it is urged by the state that rape of a girl under fifteen years of age, with her consent, is as to the act of carnal intercourse analogous to cases of adultery and incest; and then the rule with reference to the admission of testimony in such cases is applicable here, that is, that any testimony which would tend to show familiarity between the parties involving like offense not too remote, though subsequent, would be admissible in evidence as a circumstance tending to show the likelihood that appellant committed the offense charged against him. We confess that the reasons for the admissibility of such testimony in the one case seem equally cogent in the other: *Burnett v. State*, 32 Tex. Cr. Rep. 87, 22 S. W. 47, and particularly see *Bishop on Statutory Crimes*, section 682. However, as stated before, no authority can be found extending this doctrine to cases of rape, and we apprehend it will be found that even in incest and adultery cases, being continuous offense, such testimony is admissible only as tending to solve some controverted issue. In this case the act of carnal intercourse was abundantly proven by positive testimony on part of the state, and it was not only not denied by appellant, but admitted by him. So that the fact of subsequent carnal intercourse between the same parties would serve to shed no light upon the truth of the allegation in the indictment, but it would serve the purpose in the minds of the jury of aggravating the punishment of appellant for the offense



proved against him. Moreover, in point of time, these subsequent acts were remote, transpiring long after the alleged offense, and in other counties; and the marriage performed between prosecutrix and Fuller was not only long after the alleged offense, but would not be admissible as a subsequent offense between the same parties, under the broad latitude allowed in cases of adultery, where subsequent offenses between the same parties are admissible. We accordingly hold that none of the testimony here complained of was admissible. It was of a character highly prejudicial to appellant, and no doubt operated in the minds of the jury to enhance the punishment inflicted by them in their verdict. We do not think it was relevant to any issue in this case to prove that appellant was a married man and had two children. While it was competent for the state to show, in accordance with the allegations in the indictment, that prosecutrix was not the wife of appellant, this should be done by direct evidence to that effect.

During the progress of the argument, and while T. A. Blair, private <sup>142</sup> prosecutor, was making his closing speech to the jury on behalf of the state he said among other things: "This is the most horrible crime so far as my long experience at the bar has brought to my attention. I am surprised that this case was ever brought here; and it ought not to have been brought here; that while I do not believe in mob law as a rule, yet in a case like this the law ceases to be a virtue. I will be doing my duty as a citizen and a father if I can induce this jury to hang defendant as high as Haman, and then go to my home and tell my wife what I have done, and hear her remark, 'Well done, thou good and faithful servant; you have performed your duty.'" When this was objected to by counsel for appellant, Blair turned to the jury and said: "Gentlemen of the jury, let the galled jade wince; my withers are unwrung." These remarks were objected to at the time, and the court reprimanded counsel; whereupon he claimed to be replying directly to the argument of counsel for defendant, and the court instructed counsel to desist from any further remarks upon that subject, which he did. And the court furthermore, at the request of appellant, instructed the jury not to regard said remarks. In *Gazley v. State*, 17 Tex. Cr. App. 267, the rule was laid down that, in cases of this character, counsel could not be too careful in the discussion of the case not to travel out of the record; and especially should scrupulously avoid any improper or unfair means to secure a conviction. In *Thompson's Case*, 33 Tex. Cr. Rep. 472, 26 S.

W. 987, remarks of a similar character were considered reversible error. It has been held, however, that ordinarily a charge of the court instructing the jury to disregard improper remarks made will cure the error. But of course there may be cases, on account of the violence of the remarks, and the inflammatory character of appeal used, where this would not apply. It would seem that this would be such a character of case. We can imagine no greater outrage in a court of justice than an appeal to mob law or invocation to the jury that they should hang appellant because a mob had failed to do so. The instruction of the court could hardly eradicate from the minds of the jury the effect of such an appeal to them.

Appellant insists that the court erred in refusing to instruct the jury to the effect that, if appellant believed the prosecutrix was fifteen years of age or over, to acquit him, although they might believe she was under fifteen years of age at the time of the alleged commission of the offense. The rule has been laid down otherwise in this state and we see no reason to change our holding: *Edens v. State*, 41 Tex. Cr. Rep. 522, 43 S. W. 89; *Manning v. State*, 43 Tex. Cr. Rep. 302, 96 Am. St. Rep. 873, 65 S. W. 920, 3 Tex. Ct. Rep. 566. However, the court was not authorized to give the charge it did on this subject; that is, if the jury found that appellant believed prosecutrix was over fifteen years of age at the time of the alleged offense, they might take such fact into consideration in mitigation of his punishment. They were not authorized to do this, and we do not believe the charge was calculated to benefit appellant. It is also contended that the court's charge was erroneous in the following particular: "Unless you find <sup>143</sup> from the evidence beyond a reasonable doubt that at the time of the carnal knowledge of the said Elma Walker by the defendant, if any, she, the said Elma Walker, was under the age of fifteen years, then you will find the defendant not guilty." Said charge, to say the least of it, is strangely worded, but when analyzed we do not believe it is erroneous as announcing an incorrect legal principle, or shifting the question of reasonable doubt from the state to the defendant. However, if the facts authorized it at all, appellant was entitled to have a fair affirmative charge on this subject: one that was not liable to confuse or mislead the jury. For instance, if they had been told if they believed that the prosecutrix was of the age of fifteen years or over at the time of the alleged commission of the offense, to acquit defendant; or if they had a reasonable doubt whether or not she was of the age of fifteen years, or under that age, to

give defendant the benefit of such doubt and acquit him; then there could have been no misunderstanding as to the import of the charge, and no necessity for any interpretation or analysis in order to find out what the court may have meant.

For the errors discussed, the judgment is reversed and the cause remanded.

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*The Crime of Rape* is the subject of a monographic note to Smith v. State, 80 Am. Dec. 361-375. If the prosecutrix is under the age of consent, it is no defense that the intercourse was not against her will, or that the defendant was ignorant of her age: *People v. Schoonmaker*, 117 Mich. 190, 72 Am. St. Rep. 560, 75 N. W. 439; *Manning v. State*, 43 Tex. Cr. Rep. 302, 65 S. W. 920, 96 Am. St. Rep. 873, and cases cited in the cross-reference note thereto. As to the admissibility of evidence of other acts of intercourse than the one charged in the indictment, as showing the relations or intimacy of the parties, see *Manning v. State*, 43 Tex. Cr. Rep. 302, 96 Am. St. Rep. 873, 65 S. W. 920; *People v. Abbott*, 97 Mich. 484, 37 Am. St. Rep. 360, 56 N. W. 862.

*Misconduct of Counsel in Argument* is discussed in the monographic notes to *McDonald v. People*, 9 Am. St. Rep. 559-570, and *Cleveland etc. R. R. Co. v. Pritschau*, ante, pp. 690-698. A prosecuting attorney represents the majesty of the people; and, having no responsibility except fairly to discharge his duty, should put himself under proper restraint, and not go beyond the evidence or bounds of a reasonable moderation. If he lays aside the impartiality that should characterize his official action to become a heated partisan, and by vituperation of the prisoner and appeals to prejudice seeks to procure a conviction at all hazards, he ceases properly to represent the public interest: *People v. Fielding*, 158 N. Y. 542, 70 Am. St. Rep. 495, 53 N. E. 49, 46 L. R. A. 641; *Rhodes v. Commonwealth*, 107 Ky. 354, 92 Am. St. Rep. 360, 54 S. W. 170. On a trial for murder, where the jury has a discretion to find in their verdict the punishment to be inflicted, it is improper for the district attorney to say to the jury: "If there is a man on this jury that does not believe this man ought to be hanged, then I say he is a weakling not possessed of the proper manhood, and is unfit to sit on the jury": *State v. Blackman*, 108 La. 121, 32 South. 334, 92 Am. St. Rep. 377, and see the cases cited in the cross-reference note thereto.

## WALLACE v. STATE.

[44 Tex. Cr. Rep. 300, 70 S. W. 756.]

**MURDER—Evidence—Threats.**—On a trial for murder it is competent to prove threats of the deceased against the life of the accused, although no actual demonstration has been shown on the part of the deceased to execute such threats. (p. 857.)

**MURDER—Evidence—Remarks of Judge.**—If, on the trial of a wife for the murder of her husband, she has testified that the deceased attempted to strike her at the time of the killing, evidence that the deceased had threatened to kill the accused before the week was out is clearly admissible, and it is prejudicial error for the trial court to remark or comment that he is doubtful if such evidence is admissible, but that he will admit it and give the accused the benefit of the doubt. (p. 858.)

**MURDER—Self-defense—Brutal Conduct of Deceased.**—If, on the trial of a wife for the murder of her husband, the evidence tends to show self-defense from apparent danger, evidence of previous acts of brutality and cruelty committed by her husband upon her is admissible as tending to explain the action of the parties at the time of the killing. (p. 858.)

R. A. John, assistant attorney general, for the state.

301. DAVIDSON, P. J. Appellant was convicted of murder in the second degree, and given five years in the penitentiary.

The evidence for the state discloses that deceased was the husband of appellant, and was shot by her in the field where he was hoeing cotton. There had been a previous difficulty, a day or so prior to the homicide, between the parties, in which deceased was the aggressor. On the evening of the difficulty appellant borrowed a pistol from the witness Vaughan, giving false reasons at the time for wanting said pistol. After obtaining it, she went to the place where her husband was at work. The witness Long testified that he was working with deceased at the time appellant came, and remarked to deceased, as he saw her approaching, "There comes your wife." Upon reaching the parties, defendant said to her husband that she understood that he had quit her. To this he made no reply. She further remarked, "Well, if you have quit me, I want you to give me enough money to carry me to my mother and father." This witness seems to have heard no further conversation between them, as he went off some distance, and was absent awhile. Shortly after this occurrence, the parties left that portion of the field, and went to another point, and began hoeing cotton. Just after reaching this point, appellant said to her husband, "Come, and let's go; I have got to go." Deceased



made no reply. She then asked him, "Ain't you going home? Come on, I have got to go home." While the wife was making these remarks, deceased seemed to have been silent, and continued his work. Finally he said: "How many homes have you got? Go on." At this point witness says that appellant was standing with her arms folded, and he turned his back on her, and went to hoeing. Just as he did so, he heard a gun fire, and saw deceased fall. She fired four shots, all of which seem to have taken effect. This is a sufficient statement of the state's side of the case for a discussion <sup>302</sup> of the questions raised. Defendant testified that when she went to the field where deceased and witness Long were at work she gave the usual salutation, and said to her husband, "I heard you had quit me." Witness Long said he had been trying to talk to her husband about it, and could not do anything with him, and was sorry for her. Deceased made no reply, but kept "chopping cotton." She again remarked to deceased, if he had quit her, she wanted to know it, and, if he had not, she wanted to know it; that she did not know what to do; and that her people lived a long way off, and that she had no one to depend upon but him. He replied, "Well, I have quit you." She then asked him upon what ground, and deceased replied, "You know the reason." She said, "You were beating me, and kicking me, and I had to do something." And he replied, "Well, that is not sparing me a bit." Appellant then remarked to him: "'Well, there is no use of us having any trouble. If you don't want me, just give me some money, and I will go to my people, and take my baby.' He replied that he was not going to give me a damn cent, and that I would never see my mammy and daddy any more. I told him he ought not to talk that way, and that I had not talked that way to him. I then told him I would go to Hatter's, and he asked me where the baby was, and I told him at Hatter's. He says, 'You leave the baby there, and you be damn sure you go home.' I says, 'Well, if you have quit me, why do you want me to leave the baby?' He says: 'You go home, and I will settle with you. I am going to kill you.' I says, 'Well, I don't want to go home, but will go to Prince Pendarvis,' and stay there until I can get to my people.' He says, 'I have told you you would never see your mammy and daddy any more; and if you are not going home you are not going anywhere, and I will settle with you when I get you there to-night.' Deceased and Flem Long had been chopping on rows that ran east and west, and Flem had gone on, and Flem had

started back on Sim's row, and I says, 'Well, I will go to Hatter's and stay all night, and maybe to-morrow you will be better satisfied, and won't be angry.' And he says: 'If you start away from here, I will burst your damn brains out. I told you to go home, and if you are not going there, you are not going anywhere.' At this time Flem had got back, and said something about going to the other piece of cotton to chop. I told him, 'I did not want to go up there, and that I would go home if he wanted me to.' He says, 'No, you go on with me,' and I went, and they started to chopping. I said: 'What do you intend me to do? If you want me to go home, I will do so.' He says, 'I have told you. You are not going anywhere.' I said, 'Well, I am not going where? If you want me to go home, I will go.' He said, 'It looks like you are damn hard to understand,' and started to me. I backed as quick as I could, and fired the pistol. He saw it, and whirled, and when he did I shot him in the shoulder. I was scared and nervous, and shot as fast as I could. I shot him after that, and then I went on to get my baby," etc. She further states that at the time she fired the shot deceased was <sup>303</sup> approaching her with his hoe drawn in a striking attitude; and, further, that the reason she fired the pistol was because deceased had threatened her life. The testimony further shows that prior to the fatal difficulty there had been trouble between defendant and her husband, in which he had committed a serious or violent assault upon her, and subsequent to which he had threatened to kill her. In fact, the testimony shows that their lives had not been as harmonious as they should have been for some six months prior to the homicide.

Through the witness Alf Knowles appellant proposed to prove threats against her life by the deceased. This testimony seems to have been excluded by the court because no actual demonstration had been shown on the part of deceased to execute the threat. We think this was error.

After appellant had testified that deceased had made an attempt to strike her with the hoe, the witness Pendarvis was tendered for the purpose of showing that deceased had told him (witness) that he (deceased) would kill defendant before the week was out. The court remarked, in passing upon the objection of the state, that he was doubtful if this evidence was admissible, but would give her the benefit of the doubt, and admit it. Exception was reserved to the remarks of the court, as, under the statute, he had no right to comment, and such

comment tended to prejudice the minds of the jury against this evidence. This testimony, in our judgment, was clearly admissible. In admitting or rejecting testimony the court should refrain from comment.

By the witness Wiggins appellant proposed to prove, and could have proved, that deceased, in January or February, 1902, brutally beat defendant, and that he had knocked her down, and stamped her in the face and stomach, and by such conduct had caused her to miscarry. This was excluded, on the objection of the state. Further, while witness Smith was on the stand, and after he had testified that one night in February or March, as he was passing the house of defendant, he saw deceased beating appellant with a piece of hoe handle, defendant offered to prove that on this occasion he had beaten her until she was bloody, and witness believed that, had he not interfered, deceased would have killed defendant. This testimony should have been admitted. This character of testimony comes clearly within the rule laid down by the supreme court in *Horbach v. State*, 43 Tex. 242, and in *Williams v. State*, 14 Tex. App. 102, 46 Am. Rep. 237; *Branch v. State*, 15 Tex. App. 96, and *Hall v. State*, 31 Tex. Cr. Rep. 565, 21 S. W. 368. Mr. Wharton thus states the rule: "Taking the authorities as a whole, therefore, we may hold that it is admissible for the defendant, having first established that he was assailed by the deceased, and in apparent danger, to prove that deceased was a person of ferocity, brutality, vindictiveness, and of excessive strength; such evidence being offered for the purpose of showing either (1) that the defendant was acting in terror, and hence incapable of that specific malice necessary to constitute murder in the first degree; or (2) that he was in such apparent extremity as to make out a case of self-defense; or (3) that the deceased's purpose <sup>304</sup> in encountering the defendant was deadly": Wharton on Criminal Evidence, secs. 69-84. Mr. Bishop says: "Where the defendant, to excuse or mitigate his acts, claims that they were in self-defense or passion, the particulars of the transaction being thus material, and the law judging him by the facts and necessities as they appeared to him, whatever they truly were, he may give in evidence anything known to him of the character, prior conduct, threats, or other utterances of the person with whom he was contending, which, not as showing that the man was bad, but that in the special instance and circumstances he was dangerous, might reasonably have place among the considerations guiding his ac-

tions": 2 Bishop's Criminal Procedure, sec. 610. Whether the court believed the testimony of appellant in regard to her self-defense, it was before the jury, and any testimony which tended to strengthen that defense was clearly admissible. It was further admissible to show the probable terror of the appellant's mind; and especially is this true in this case. It tended to intensify the brutal conduct of the deceased toward appellant, and the terror naturally engendered in her mind at the time of the killing by reason of these former occurrences. These occurrences between the parties as husband and wife were admissible as tending to explain the action of the parties at the time of the difficulty: Hall v. State, 31 Tex. Cr. Rep. 565, 21 S. W. 368; Medina v. State (Tex. Cr. App.), 49 S. W. 380.

For the errors indicated, the judgment is reversed and the cause remanded.

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*The Admissibility of Threats* as evidence in prosecutions for homicide is discussed in the monographic note to State v. Nelson, 89 Am. St. Rep. 691-710. The character of the deceased for violence and previous threats should be weighed by the jury in determining whether the defendant, when he did the killing, acted under a reasonable apprehension of danger to life or limb: Karr v. State, 100 Ala. 4, 46 Am. St. Rep. 17, 14 South. 851.

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## BROCK v. STATE.

[44 Tex. Cr. Rep. 355, 71 S. W. 20.]

**RAPE—New Trial.**—If, on a trial for statutory rape, the issue is as to the age of the prosecutrix, a new trial should be granted for newly discovered evidence which would be most material as tending to raise a reasonable doubt as to the age of the prosecutrix. (p. 861.)

**WITNESSES—Husband and Wife.**—A wife is not a competent witness against her husband in a criminal proceeding with or without his consent, and neither spouse can consent to the other testifying against him or her in a criminal case, except when it is an offense of one against the other. (p. 861.)

**WITNESSES—Husband and Wife.**—Neither husband nor wife can testify as to communications made by one to the other while married, except when such communication goes to extenuate or justify the offense for which either is on trial. (p. 862.)

**WITNESSES—Husband and Wife.**—In a criminal proceeding against the husband his wife cannot be permitted, either voluntarily or by force of authority be compelled, to state facts in evidence against him, which would render his character infamous. (p. 863.)



**WITNESSES—Husband and Wife.**—A wife is incompetent as a witness against her husband in a criminal proceeding even with his consent, except when the offense by him is against her personally. (p. 864.)

C. E. Duboise, Allen & Upton, and J. O. Wiley, for the appellant.

R. A. John, assistant attorney general, for the state.

**339 DAVIDSON, P. J.** The indictment is for rape, the first count charging rape upon Hattie Meads, a girl under fifteen years of age, and the second count rape upon the same girl by force, threats and fraud. Both counts were submitted to the jury, and a verdict of guilty was returned, assessing the death penalty.

The offense occurred May 28, 1902. The absent witness, Elliott, was expected to testify that he knew the age of the prosecutrix; that the date of her birth was the 25th of April, 1887; the alleged rape having occurred the latter part of May, 1902. That he was living in San Angelo, where Meads and his wife were married, during the years 1886 and 1887, and neighbor to the mother of the prosecutrix, when prosecutrix was born; that the mother's maiden name was Corintha Bell Stewart; that she married Gid Meads, father of prosecutrix, on June 14, 1886; that during the years 1886 and 1887 Gid Meads and his wife were neighbors to witness and his family; that their families visited and witness knows all the above facts to be true. This application for continuance was refused.

Attached to the motion for new trial is the affidavit of Mrs. A. J. Potter and her son Sid. Sid Potter states in his affidavit that his age is twenty-six years in September of this year; that he knew all the parties to **340** this transaction, and knows the mother of prosecutrix gave birth to a girl child, after her marriage, prior to May, 1887; in other words, fixes the date of the birth of the child more than a month prior to the 28th of May, 1887. Mrs. A. J. Potter states in her affidavit that she now lives and has resided in the town of San Angelo for twenty years continuously, and was living in the town during the years 1886 and 1887; that she was well acquainted with Corintha Bell Brock, mother of prosecutrix; that her maiden name was Stewart; that she was well acquainted with her former husband, Gid Meads, father of prosecutrix, and remembers the circumstances of the marriage of Mrs. Brock with Gid Meads, that they were married in 1886, by the Reverend A. J. Potter,

affiant's husband. That immediately after the marriage Mr. and Mrs. Meads moved on to the "same block" in which affiant then lived, at the rear of affiant's lot, and lived there the remainder of the year 1886 and the year 1887, during which time affiant was a constant visitor of the Meads family. That some time during the spring of 1887 Mrs. Meads gave birth to a female child; that this particular child was born in about ten or eleven months after the marriage of the mother to said Gid Meads; that affiant was at the residence of Mrs. Meads shortly after the birth of the child, and knows it was a female child, and, if called upon, would testify to the above facts. This is alleged to be newly discovered testimony, and is brought strictly within the rules authorizing a new trial upon such testimony. If the testimony of Elliott or the testimony of Mrs. Potter and her son is true, or would raise a reasonable doubt as to the age of the girl in the minds of the jury, then it was most material. A new trial should have been awarded upon both grounds. The wife of appellant was used as a witness by the state and gave evidence of a most damaging character against him. She was required to hold up before the jury the family quarrels, the family disturbances, alleged assaults upon her by appellant, as evidence against him. This testimony showed him to be of a cruel disposition. In fact, it shows a life of turmoil and trouble and assaults and threats by the husband against the wife and the prosecutrix, continuing for some time prior to the alleged rape. The only exception taken to her testimony was that discussed in a former portion of this opinion. The question of her competency was not raised in the trial court, but for the first time is questioned on appeal. The proposition being that, under our statute, the wife is not a competent witness against the husband in a criminal proceeding of this character with or without his consent; that neither spouse can consent to the other testifying against him in a criminal case, except where it is an offense of one against the other. So far as we are aware, for the first time this question has been presented to this court for adjudication. In *Daffin v. State*, 11 Tex. App. 76, while not discussed, it was held that objection to an illegal cross-examination of the wife came too late after trial. In *Dill v. State*, 1 Tex. App. 278, there is an intimation that the wife would not be permitted to testify against appellant <sup>341</sup> under any circumstances, unless it was an offense by her husband against her. In this particular case, she not only testified to various violations of law not in-

volved in the rape case, as well as the alleged rape, but also confidential communications and matters of that character. Article 774 of the Code of Criminal Procedure provides that "Neither husband nor wife shall in any case testify as to communications made by one to the other while married; nor shall they, after the marriage relation ceases, be made witnesses as to any such communication made while the marriage relation subsists, except in a case where one or the other is prosecuted for an offense, and the declaration or communication made by the wife to the husband or by the husband to the wife goes to extenuate or justify the offense for which either is on trial." Article 775 of the Code of Criminal Procedure further provides: "The husband and wife may in all criminal actions be witnesses for each other, but they shall in no case testify against each other except in a criminal prosecution for an offense committed by one against the other." The question as to whether or not this is a question of privilege subject to waiver by the parties, or can be waived by consent of the parties has been a matter of some discussion in the courts. In New York it was held that it could be waived; but that statute is totally unlike the Texas statute, and its language is peculiar. It provides the husband or wife of the person indicted or accused of a crime is in all cases a competent witness on the examination or trial of such person, but neither husband nor wife can be compelled to disclose a confidential communication made by the one to the other during their marital relation: N. Y. Pen. Code, sec. 715. That was the article the New York court construed in the cited cases. It would seem that in England the rule is not satisfactorily settled, but, as we understand the weight of the authorities there, the husband or wife cannot consent to the other testifying against him; and various reasons are assigned why this is true. Practically the authorities there, as well as in the United States, have agreed that the best reason for the rule is based on public policy. Courts have been driven or have resorted to reasoning why statutory rules are prescribed. What actuated the legislative body in creating certain enactments may be satisfactory to a court to understand; but whatever the reason for rules of this character may be, if the wording is plain, it is totally unnecessary to seek out reasons. It is sufficient for the court, where the language is plain, to adhere to the language employed. Usually a party upon trial may waive such matters as are usually termed rights; but it may be stated accurately that such matters as he may waive are

those that are usually known as privileged, as the relation, for instance, between attorney and client. If his rights alone were the issue, it might be perhaps held that they could be waived; but where the policy of the law enters into it and goes beyond this, or where the statute places it beyond the question of privilege of the accused, and makes the inhibition a matter of public policy, it is to be seriously questioned that the court would be justified in holding such <sup>342</sup> matters could be waived. In this particular character of case, the spouse upon the stand has a right to be protected under the statute from being required to answer. The other spouse being upon trial has a right to be protected, and society has an overshadowing right that family matters should not be dragged into the courts of the country to the subversion of the family relation, which is the paramount substratum and basic principle of society. In *Stone v. Bowman*, 13 Pet. 209, 10 L. ed. 129, the supreme court, speaking through Justice McLean, said: "The rule which protects an attorney in such a case is founded on public policy, and may be essential in the administration of justice. But this privilege is the privilege of the client, and not of the attorney. The rule which protects the domestic relations from exposures rests upon considerations connected with the peace of families. And it is conceived that this principle does not merely afford protection to the husband and wife, which they are at liberty to invoke or not, at their discretion, when the question is propounded; but it renders them incompetent to disclose facts in evidence in violation of the rule. And it is well that the principle does not rest on the discretion of the parties. If it did, in most instances it would afford no substantial protection to persons uninstructed in their rights, and thrown off their guard and embarrassed by searching interrogatories. In the present case the witness was called to discredit her husband; to prove, in fact, that he had committed perjury; and the establishment of the fact depended on his own confessions. Confessions which, if ever made, were made under all the confidence that subsists between husband and wife. It is true the husband was dead, but this does not weaken the principle. Indeed, it would seem rather to increase than lessen the force of the rule. Can the wife, under such circumstances, either voluntarily be permitted, or by force of authority be compelled, to state facts in evidence which render infamous the character of her husband? We think, most clearly, that she cannot be. Public policy and established principles forbid it. This rule is founded upon the



deepest and soundest principles of our nature—principles which have grown out of those domestic relations that constitute the basis of civil society, and which are essential to the enjoyment of that confidence which should subsist between those who are connected by the nearest and dearest relations of life. To break down or impair the great principles which protect the sanctities of husband and wife, would be to destroy the best solace of human existence.” In a late case by the same august tribunal, the case of *Stone v. Bowman* was cited with approval: See *Bassett v. United States*, 137 U. S. 496, 11 Sup. Ct. Rep. 165, 34 L. ed. 762. This opinion was delivered by Justice Brewer, and the question was whether or not one of the polygamous wives could be heard to testify against her husband. The supreme court held her incompetent. This language is found in the opinion: “Is polygamy such a crime against the wife? That it is no wrong upon her person is conceded; and the common-law exception to the silence upon the lips of husband and wife was only broken, as we have <sup>343</sup> noticed in cases of assault of one upon the other. That it is humiliation and outrage to her is evident. If that is the test, what limit is imposed? Is the wife not humiliated, is not her respect and love for her husband outraged and betrayed, when he forgets his integrity as a man and violates any human or divine enactment? Is she less sensitive, is she less humiliated, when he commits murder, or robbery, or forgery, than when he commits polygamy or adultery? A true wife feels keenly any wrong of her husband, and her loyalty and reverence are wounded and humiliated by such conduct. But the question presented by this statute is not how much she feels or suffers, but whether the crime is one against her. Polygamy and adultery may be crimes which involve disloyalty to the marital relation, but they are rather crimes against such relation than against the wife; and, as the statute speaks of crimes against her, it is simply an affirmation of the old familiar and just common-law rule. We conclude, therefore, that under this statute the wife was an incompetent witness as against her husband.”

It has been held in this state that the statute has not changed the common-law rule. If that be true, then the two cited decisions rendered by the supreme court of the United States are in point. It occurs to us that the common-law rule is rather broadened and emphasized than weakened by our statute. This line of reasoning finds support in many of the text-writers: See 3 *Rice on Evidence*, p. 282. There this language is found:

“And it is well that the principle does not rest on the discretion of the parties. If it did, in most instances it would afford no substantial protection to persons uninstructed in their rights and thrown off their guard and embarrassed by searching interrogatories”: See the Law of Evidence, by Burr W. Jones, vol. 3, sec. 757, and authorities cited in note 6; 1 Greenleaf on Evidence, sec. 340; Davis v. Dinwoodie, 4 Term Rep. 678; Sedgwick v. Watkins, 1 Ves. Jr. 49. The only English authority which has been called to our attention laying down a contrary doctrine is Pedley v. Willesley, 3 Car. & P. 558. That case does not enter into a discussion of the question, or state any reason for the holding; nor does it state whether it is under the common law, or the act of parliament, which seems to have abridged the common law in regard to this rule. Without further discussion of the question, we are of opinion that it was error, though no exception was reserved, to use the wife as a witness against appellant. In other words, under the statute she is an incompetent witness, whose evidence cannot be used even by the consent of the husband, and she can only be used when placed on the stand by her husband, except where the offense is against her personally. Offenses against the daughter are not offenses against the wife.

For the errors discussed, the judgment is reversed and the cause remanded.

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*Husband and Wife*, under the common law, are incompetent to testify against each other in criminal prosecutions: See the monographic note to State v. Boyd, 27 Am. Dec. 377-381; State v. Kodat, 158 Mo. 125, 81 Am. St. Rep. 292, 59 S. W. 73, 51 L. R. A. 509; State v. Frey, 76 Minn. 526, 77 Am. St. Rep. 660, 79 N. W. 518; Jones v. State, 38 Tex. Cr. Rep. 87, 70 Am. St. Rep. 719, 40 S. W. 807, 41 S. W. 638. As to whether this rule applies in prosecutions for adultery, see State v. West, 118 Wis. 469, 99 Am. St. Rep. 1002, 95 N. W. 521.

## EX PARTE FOSTER.

[44 Tex. Cr. Rep. 423, 71 S. W. 593.]

**CONTEMPT—Habeas Corpus.**—A person who is committed for contempt to the custody of the sheriff, who does not confine him in jail, but allows him the liberty of the city, with the understanding that he is at all times amenable to the sheriff's custody, is so deprived of his liberty and freedom of action, as to entitle him to a writ of habeas corpus to be relieved of such restraint. (p. 867.)

**HABEAS CORPUS.—Any Character or Kind of Restraint** that precludes an absolute and perfect freedom of action on the part of the relator, authorizes him to make application to the court for a writ of habeas corpus for release from such restraint. (p. 867.)

**CONTEMPT—Jurisdiction—Practice.**—It is not within the jurisdiction of the court of its own motion, without an affidavit or prohibitive order, to adjudge a person guilty of contempt for violating a verbal order of the court not to publish the testimony in a criminal case then on trial until after verdict, and then attach him to show cause why the judgment of the court should not be made final. (p. 867.)

**CONTEMPT—Constitutional Law—Liberty of Press.**—A court has no power, where the evidence is not obscene, to prohibit the publication of the testimony of the witnesses in a case, and the punishment of a person for contempt in violating an order not to publish such testimony in a newspaper is without jurisdiction and void, as being in violation of a constitutional provision guaranteeing the liberty of the press and freedom of speech. (p. 870.)

N. G. Kittrell and W. W. Walling, for the relator.

R. A. John, assistant attorney general, for the respondent.

**424 HENDERSON, J.** This is an original proceeding on habeas corpus to enlarge the relator from a commitment of the district judge of the criminal district court of Harris county on an alleged contempt, for publishing the evidence in the trial in said court of D. F. Williams et al., charged with murder, in the "Chronicle," a daily newspaper published in the city of Houston.

The state, by her assistant attorney general, has filed a motion to dismiss this case on the ground that the relator, when he sued out the writ of habeas corpus, and thereafter since that time, was not in the legal custody or restraint of the sheriff of Harris county, and evidence has been adduced before us upon that issue. The testimony, in effect, shows that relator was allowed by the sheriff the liberty of the city of Houston; and on one occasion, it seems, he left said city for a short time without leave of the sheriff, but returned to the city. The relator testified that he was told by the sheriff to consider himself under

arrest, and that his movements must be under the control of said sheriff; that the sheriff was aware of his purpose to sue out the writ of habeas corpus, <sup>425</sup> and exercised toward him liberality, in enabling him to sue out the writ without confining him actually in jail; that the understanding was that he was in the custody of the sheriff, and, unless he should be released by the writ of habeas corpus, he was amenable to that custody, and would have to pay the fine. As we understand the testimony, this comes clearly within the rule laid down in *Ex parte Snodgrass*, 43 Tex. Cr. Rep. 359, 65 S. W. 1061, 3 Tex. Ct. Rep. 588. A majority of the court in that case, after quoting certain articles of our code, used this language: "We deem it unnecessary to enter into a long discussion on these authorities, but suffice it to say that any character or kind of restraint that precludes an absolute and perfect freedom of action on the part of the relator authorizes such relator to make application to this court for release from said restraint." The motion of the state is accordingly overruled, and we hold that relator was entitled to the writ.

Relator has shown that no order of record was made in said case of state of Texas against Williams et al., prohibiting the publication of the evidence in said case, but that the judge merely, in open court, notified and ordered relator that the court would hold him in contempt of the court if said newspaper, of which he was the publisher, should publish said testimony in said case before a verdict was had. It was further shown that no affidavit was made by anyone charging relator with a violation of said verbal order; but on information, and of the court's own motion, he entered a judgment nisi against relator as for contempt, assessing his punishment at a fine of one hundred dollars and three days' imprisonment in the county jail. Notice was then issued, requiring him to come before said court and show why said judgment should not be made final. It is urged by relator that this procedure was irregular and void; that, in the first place, conceding the court had jurisdiction, an order should have been made and entered of record prohibiting the publication of said evidence; that, if same was violated by the relator, then an affidavit should have been made (the contempt being a constructive one against him), and an attachment issued, requiring him to show why he should not be adjudged guilty of contempt for a violation of said order; and that it was not competent for the court, of its own motion, and without affidavit, to have in the first instance adjudged him



guilty of contempt, and then attached him, to show cause why the said judgment should not be made final; and that such procedure on the part of the court was illegal and void. We are inclined to agree with this contention: 4 Ency. of Pl. & Pr. 776, and authorities there cited.

However, a more important question is raised, and we do not see fit to rest this decision upon the illegality of the procedure which was adopted. Relator insists (and in this he is borne out by the record) that in the publication which occurred in the Houston "Chronicle," of which he was the editor and publisher, there was nothing of a character reflecting on the judge or the court, but he merely published a true statement of the testimony adduced from the witnesses in the case; and he says he was authorized to do this, notwithstanding the order of the 426 judge, because the testimony was given in the course of a public trial in a court of justice, and the constitution guarantees a public trial, and also guarantees the freedom of the press.

We have given this subject that careful examination commensurate with its importance, mindful that, on the one hand, the dignity and authority of the courts must be maintained, while on the other, free speech, a free press, and the liberty of the citizen must be preserved. Both are equally valuable rights. If the court is shorn of its power to punish for contempts in all proper cases, it cannot preserve its authority, so that, without any constitutional or statutory guaranty, this power is inherent in the court. But the constitution itself, in our Bill of Rights, guarantees free speech and the liberty of the press. Of course, it was never intended, under the guise of these constitutional guaranties, that the power of the court should be trenched upon. Indeed, under our system of government, it was wisely intended that the authority of the court should be safeguarded and preserved, in order that all constitutional guaranties might be upheld for the safety and protection of the liberty of the citizen. We have examined a number of text-books, and in some we find it stated in general terms that the court may prohibit the publication of testimony in certain cases, but that the publication must have a tendency to embarrass, impede, or obstruct the administration of justice, and the case must be pending at the time of the publication: Rapalje on Contempts, sec. 57; 7 Am. & Eng. Ency. of Law, 2 ed., p. 60, subd. 3. And the following cases are referred to in support of this proposition: Tenney's Case, 23 N. H. 162; Sturoc's Case, 48 N. H. 428, 97 Am. Dec. 630; United States v. Holmes, 1 Wall. Jr. 1, Fed.

Cas. No. 15,383; *State v. Galloway*, 5 Cold. 326, 96 Am. Dec. 404; *Dunham v. State*, 6 Clark, 245; *Shortridge's Case*, 99 Cal. 526, 37 Am. St. Rep. 78, 34 Pac. 227, 21 L. R. A. 755; *State v. Morrill*, 16 Ark. 384; *Rex v. Clement*, 4 Barn. & Ald. 218. We have not had access to the common-law case last referred to, but it would have little, if any, bearing upon the question, as it is an old English case. *Tenney's Case* is not accessible to us. However, we have examined the other New Hampshire case, reported in 97 Am. Dec. 630, as well as the other cases named, and not one of them supports the proposition that the courts in this country have the power to restrain the publication of testimony developed in the trial of a case. *Sturoc's case* was a publication, not of evidence, but language abusive and defamatory of the court, and the proceedings thereof, calculated to obstruct the administration of justice, and was properly held a matter of contempt. The Arkansas case has no particular bearing on the subject. But in *Galloway's case*, the court say that unquestionably the power exists on the part of courts to control the publication of their proceedings while in progress, but it says: "Not, perhaps, by direct attachment of the publishing party for publication, but by the exclusion from the court of parties who are there for the purpose of reporting the testimony or proceedings of the court," etc.; following *Holmes' case*. But even this was not necessary to that decision, because the court held that <sup>427</sup> the matter complained of was not a contempt under the statutes of the state. However, in that case, in connection with the alleged testimony, the article was denunciatory and abusive of the court. Nor was the question properly before the court in *Dunham's case*. What was said by the court in that case was merely dicta. It was held in that case that the publication of the proceedings was not a contempt of the court. We also find in *Shortridge's case*, which was a divorce case, some general expressions to the effect that the courts possess the power to prohibit the publication of testimony pending the trial, where such publication would tend to obstruct the administration of justice. But the court held in that case that the publication of divorce proceedings, notwithstanding a statute of California authorizing such proceedings to be private, did not subject the party to contempt, though he made the publication in violation of the order of the court; that the publication itself was not calculated to impede or obstruct justice. The general trend of that decision, we take it, favors the proposition that, where the proceedings are not of an obscene character (and

we are not discussing that kind of a case here), the court has no power to prohibit the publication of testimony adduced on the trial. The fact that no decision can be found in support of the power on the part of the courts of this country to prohibit the publishing of evidence developed in the course of such trial is strongly persuasive of the absence of such power, for, if it had been assumed to exist, evidently somewhere some judge before this time would have attempted it, and we would have a report of the case. But even if it be conceded that some other court in some other state had decided in favor of the power of the courts to inhibit the publication of testimony, and to treat a violation of the order as a matter of contempt, then such decision, in order to be even persuasive, should afford some good and sufficient reason as its basis; otherwise it would be entitled to but little consideration, especially when we take into view our constitutional provisions which have a bearing on the subject. Section 8 of our Bill of Rights guarantees the freedom of speech and the liberty of the press. Section 10 guarantees to an accused person a speedy public trial by an impartial jury. If the constitution guarantees a public trial, is it in the power of the court to make it a private trial? If not, then where is the power of the court to prohibit spectators, or to require or enforce thereafter silence on those who may witness and hear the proceedings? If there is no power on the part of the court to prevent spectators from rehearsing evidence, by the same logic the court has no authority to prevent a publication of the testimony. Our constitution is but in accord with the genius and spirit of our free institutions, which is intended to guarantee publicity to the proceedings of our courts, and the greatest freedom in the discussion of the doings of such tribunals, consistent with truth and decency. And as has been well said: "When it is claimed that this right has in any manner been abridged, such claim must find its support, if any there be, in some limitation expressly imposed by the law-making power." 428 And this imposition must be in accord with the provisions of our constitution guaranteeing the publicity of all trials, as well as the freedom of speech and of the press. We take it that the learned judge who exercised his authority in this instance did it, as he believed, in the interest of the due administration of the law; but the argument of convenience can have no weight as against those safeguards of the constitution which were intended by our fathers for the preservation of the rights and liberties of the citizen. And even if there was a conflict here

between the authority and dignity of the court, that should yield to the plain letter of the constitution. We accordingly hold that the court had no power to prohibit the publication of the testimony of the witnesses in the case, and that his act in punishing the relator for contempt for violating that order was without jurisdiction, and was consequently void.

The relator is ordered discharged.

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*Contempt of Court* by libelous newspaper publications is discussed in the monographic note to *Percival v. State*, 50 Am. St. Rep. 572-585. Courts have power to prevent the publication of testimony and other proceedings during the progress of a trial. But this power should be rarely exercised, and only to promote the ends of justice; and the mode of preventing the publication must rest largely in the discretion of the trial judge: *State v. Galloway*, 5 Cold. 326, 98 Am. Dec. 404. It is held in *Re Shortridge*, 99 Cal. 526, 37 Am. St. Rep. 78, 34 Pac. 227, 21 L. R. A. 755, that a person violating the order of a court in publishing the testimony in a divorce case was not punishable for contempt.

*Habeas Corpus* to release a prisoner after judgment and sentence is discussed in the monographic note to *Koepke v. Hill*, 87 Am. St. Rep. 167-203. The efficacy of this writ to relieve from commitment for contempt is considered at pages 179-184 of this note and at pages 422-425 of the monographic note to *Mullin v. People*, 22 Am. St. Rep. 414.

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## FULLER v. STATE.

[44 Tex. Cr. Rep. 463, 72 S. W. 184.]

**ASSAULT**—"Kissing Sign."—If a man makes a kissing sign at a woman by puckering up his lips and smacking them, without showing any intent to lay hands on her and kiss her without her consent, he is not guilty of an assault. (p. 872.)

Kuteman & McKinney, for the appellant.

R. B. Wood and H. Martin, assistant attorney general, for the state.

**464** HENDERSON, J. Appellant was convicted of an aggravated assault, and his punishment assessed at a fine of twenty-five dollars; hence this appeal.

The only question involved in this case is whether or not the facts show an assault. The prosecutrix, a girl about fourteen years of age, was the only eye-witness to the transaction. Appellant, who was a married man, lived a near neighbor, and



some intimacy existed between the families, and prosecutrix was in the habit of visiting his house. On the particular occasion appellant called at the house where prosecutrix lived, to return a saw which he had borrowed. Prosecutrix was engaged in sweeping the room. Appellant had some conversation with her, and while she was near a table, sweeping, he walked up to the table, and, as she states, made a "kissing sign at her"—that is, "he puckered his lips and smacked them." That he did this twice, but did not touch her, and made no effort to kiss her or use any violence. She says that she stepped back and said: "Now, look what you have caused me to do. I nearly broke ma's specks. If that is the best you can do, you had better go home." The specks were lying on the floor. After this he left, but he states that he came back where she was, and told her to say nothing about it; that it might make trouble. Witness further states that appellant made no improper act or remark to her, and had never said anything improper to her. At the time this occurred he was standing at the side of the table, and she was standing at the end of it. This put them some three or four feet apart. An assault is defined to be "any attempt to commit a battery, or any threatening gesture showing in itself, or by words accompanying it, an immediate intention, coupled with the ability, to commit a battery." If appellant by his acts had manifested any intention at the time to lay hands on prosecutrix and to kiss her without her consent, his acts and conduct would unquestionably have made an assault; but we fail to gather from the statement of what occurred, as contained in the record, that he did <sup>465</sup> anything at the time showing that he intended to take a kiss without the consent of the prosecutrix. What he did could not be construed into any more than asking prosecutrix to give him a kiss, and even if he had done this, without manifesting some ulterior purpose to use violence to force her to comply with his request, it would not amount to an assault, for there would be lacking the essential element, "showing by his acts and conduct an immediate intention to commit a battery." It may have been, and doubtless was, improper for him to make the "kissing sign" to prosecutrix, as she terms it, or suggest that he would like to kiss her; but this, under the circumstances, did not render him guilty of an assault: *Flournoy v. State*, 25 Tex. App. 244, 7 S. W. 865; *Lee v. State*, 34 Tex. Cr. Rep. 519, 31 S. W. 667.

The judgment is reversed and the cause remanded.

*To Constitute an Assault*, there must be an unlawful attempt and a present ability to inflict the injury attempted: *State v. Godfrey*, 17 Or. 300, 11 Am. St. Rep. 830, 20 Pac. 625; *People v. Lee Kong*, 95 Cal. 666, 29 Am. St. Rep. 165, 30 Pac. 800, 17 L. R. A. 626; *Klein v. State*, 9 Ind. App. 365, 53 Am. St. Rep. 354, 36 N. E. 763; *Nelson v. Crawford*, 122 Mich. 466, 80 Am. St. Rep. 577, 81 N. W. 335.

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## BARNETT v. STATE.

[44 Tex. Cr. Rep. 592, 73 S. W. 399.]

**RAPE—Evidence.**—In a case of rape, where the prosecutrix is under the age of consent, evidence of former acts of intercourse between the accused and the prosecutrix is not admissible, unless it tends to solve some disputed fact or issue in the case. (p. 874.)

**RAPE—Evidence of Prior Rapes.**—On the trial of one for the rape of his stepdaughter under the age of consent, committed with her consent, where the testimony of the prosecutrix is positive, and the defendant's confession of the offense is proved, evidence of other prior rapes committed by the defendant on the prosecutrix is not admissible. (p. 874.)

**RAPE—Evidence of Batteries.**—On the trial of one for rape of his stepdaughter, under the age of consent, evidence of prior assaults and batteries by the accused upon the prosecutrix is not admissible. (p. 875.)

T. E. Johnson and J. B. Warren, for the appellant.

H. Martin, assistant attorney general, for the state.

**593** HENDERSON, J. Appellant was convicted of rape on his stepdaughter, a girl under the age of fifteen years, and his punishment assessed at confinement in the penitentiary for a term of ten years.

The rape was alleged to have been committed on Ruthie Walker on or about the sixteenth day of March, 1902, with her consent. The prosecutrix and conviction were had on a rape, which the testimony for the state showed was committed on or about the sixteenth day of March. During the trial, and while the testimony was being developed, the state introduced a number of other rapes shown to have been committed by appellant on prosecutrix; the first rape having been committed some four years before, when prosecutrix was only nine years of age. The details of this offense were gone into, and it was shown to have been done by force, against the will and consent of prosecutrix. This was followed by a number of other rapes and cruel treat-

ment on the part of appellant toward prosecutrix, the details of some of which were gone into. Appellant objected to all this testimony on the ground that it was not connected with the rape in question, and did not tend to solve any issue in the case, but merely served the purpose of prejudicing the jury against him. In *Hamilton's Case*, 36 Tex. Cr. Rep. 372, 37 S. W. 431, this character of testimony was held admissible under the facts of that case, and that case appears to have been subsequently followed: *Manning v. State*, 43 Tex. Cr. Rep. 302, 96 Am. St. Rep. 873, 65 S. W. 920, 3 Tex. Ct. Rep. 566; *Cooksey v. State* (Tex. Cr. App.), 58 S. W. 103. Without discussing the relevancy of the testimony under the peculiar facts of said cases, so far as they conflict with the principle here announced, they are overruled, and we here hold that in a case of rape, where the prosecutrix is under the age of consent, such testimony is only admissible where it tends to solve some disputed fact or issue in the case. In other words, <sup>594</sup> we can see no difference, in the introduction of testimony as to other offenses, between a case of rape and any other criminal charge. Indeed, the reason of the rule excluding such testimony would appear to be stronger in a rape case than in any other character of offense, inasmuch as evidence of such extraneous crimes is more calculated to inflame the minds of the jury in a rape case than in any other. With regard to the admission of extraneous crimes in evidence the rule is stated thus in the authorities: "If the evidence tends to establish the *res gestae*, or to prove a relative or competent fact or circumstance connecting defendant with the crime charged, or to explain the intent of defendant in connection with the property he is charged with stealing, or to make out his guilt by circumstances, it is competent for the state to adduce evidence of such extraneous crimes": *Kelley v. State*, 31 Tex. Cr. Rep. 211, 20 S. W. 365, and authorities there cited. We would be understood as holding that in a trial of a case of rape, where prosecutrix is under the age of consent, testimony of former acts of intercourse between the parties is not admissible, unless it has some unmistakable bearing on the case, and tends to solve some issue presented by the state or made by defendant. We have examined the facts of this case, and, in our opinion, the admitted testimony has no particular bearing on any issue in the case. The evidence of the prosecutrix as to the offense alleged to have been committed on the 16th of March, 1902, was of a positive character. And we understand, also, that it was proven by the state that appellant confessed to this

act of carnal intercourse with prosecutrix. Of course, appellant entered the plea of not guilty, and this brought in issue the truth of her testimony, in contradiction of the testimony of appellant; but proof of prior offenses between the same parties would be no more admissible here, in order to show the likelihood that the alleged offense was committed, than, in a case where a party is on trial for the theft of a horse, it could be shown that he previously stole another horse from the same party. We would not be understood as holding that the relationship between the parties could not be shown or that evidence indicating a domination and control of the will of prosecutrix by appellant might not, under certain circumstances, be adduced. But there is nothing in this case to suggest any reason for departing from the rule; that is, that extraneous offenses should not be introduced in the trial of a case, unless such testimony is pertinent and relevant as tending to shed light upon or solve some disputed issue. In the absence of such showing, the admitted testimony could serve but one purpose; that is, to inflame the minds of the jury against appellant, and enhance his punishment, and so prove hurtful to him. The testimony in this case of other offenses of like character between the same parties, and the details thereof, should not have been admitted. We also hold, in this same connection, that the testimony showing assaults and batteries by appellant on prosecutrix some time prior to the alleged offense was not admissible.

Appellant complains that the court rejected certain testimony offered <sup>595</sup> by him as indicating a conspiracy on the part of his wife and others of the family to send him to the penitentiary. It does not occur to us that the rejected testimony tended to show this, and the court did not err in refusing to admit it.

There are other assignments, but we do not deem it necessary to pass upon them. The judgment is reversed and the cause remanded.

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*The Crime of Rape* is the subject of a monographic note to Smith v. State, 80 Am. Dec. 361-375. In a prosecution for rape upon an infant, prior acts of intercourse are admissible, not to make it more probable that the crime was committed, but to show the relations of the parties and their opportunities for meeting: *People v. Abbott*, 97 Mich. 484, 37 Am. St. Rep. 360, 56 N. W. 862. See, too, *Manning v. State*, 43 Tex. Cr. Rep. 302, 96 Am. St. Rep. 873, 65 S. W. 920.



CASES  
IN THE  
SUPREME COURT  
OF  
WISCONSIN.

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McCARTHY v. MURPHY.

[119 Wis. 159, 96 N. W. 531.]

**NAVIGABLE STREAMS—Riparian Owner's Right to Build Wharves and Piers.**—An owner of land abutting on a navigable inland lake has the right to build piers and wharves in front of his land out to navigable waters in aid of navigation and not interfering with the public use. (p. 877.)

**NAVIGABLE STREAMS—Riparian Owner's Right to Remove Piers Erected by Others.**—A riparian owner has the right to remove from the front of his land a pier erected there by another person without his consent, because this is in the nature of a private nuisance which may lawfully be removed to prevent injury from its continuance. (p. 877.)

**TROVER AND CONVERSION.**—One who carefully removes a pier standing in front of his land without his consent and places it by the shore of the lake, where the materials are taken possession of by the person who erected the pier, is not guilty of conversion. (p. 878.)

Action to recover damages for removing a pier which the plaintiff had erected in front of lands fronting on a navigable lake of which the defendants were lessees. The pier had been erected without the consent of the defendants or their lessor, and the plaintiff refused to remove it when requested. Judgment for the defendants; plaintiff appealed.

M. E. Burke, for the appellant.

North & Lindley and M. L. Lueck, for the respondents.

161 SIEBECKER, J. Many of the errors assigned pertain to questions of fact. Upon an examination of the evidence, we find there was conflicting evidence on material issues, and that

the conclusions of the court were supported by evidence. It would serve no useful purpose to point out such evidence in the record; the conclusions of fact must stand.

The claim is made that respondents had no rights or privileges, extending beyond the high-water mark on the land occupied by them, different from and in addition to those of the public. This contention is without merit in the law of this state. It has been adjudged by this court as to the shore owner: "As proprietor of the adjoining land, and as connected with it, he has the right of exclusive access to and from the waters of the lake at that particular place; he has the right to build piers and wharves in front of his land out to navigable waters, in aid of navigation, not interfering with the public use. These are private rights, incident to the ownership of the shore, which he possesses, distinct from the rest of the public. All the facilities which the location of his land with reference to the lake affords he has the right to enjoy for purposes of gain or pleasure; and they oftentimes give property thus situated its chief value. It is evident from the nature of the case that these rights of user and of exclusion are connected with the land itself, grow out of its location, and cannot be materially abridged or destroyed without inflicting an injury upon the owner, which the law should redress. It seems unnecessary to add the remark that these riparian rights are not common to the citizens at large, but exist as incidents to the right of the soil itself, adjacent to the water. . . . In such ownership they have their origin. They may <sup>162</sup> and do exist, though the fee in the bed of the river or lake be in the state": *Delaplaine v. Chicago etc. Ry. Co.*, 42 Wis. 214, 24 Am. Rep. 386; *Priewe v. Wisconsin State etc. Co.*, 93 Wis. 534, 67 N. W. 918, 33 L. R. A. 645, and cases cited.

When such owner exercises these rights, he cannot invade the riparian rights of other bank owners. As to them, he has the same rights as the public. An intrusion of another's riparian rights is a legal wrong, which the law will redress. Nor can a stranger, by such intrusion on the bed of the water, acquire any vested rights or interests as against the riparian owners. Any structure erected by him, under such circumstances, is a private nuisance. The proprietor of such rights has the legal authority to protect them in a lawful and peaceable manner, to the extent of removing a structure, such as a pier, erected on the bank and bed of the waters in front of his lands: *Diedrich v. Northwestern Union Ry. Co.*, 42 Wis.

248, 24 Am. Rep. 399; Cohn v. Wausau B. Co., 47 Wis. 322, 2 N. W. 546; Yates v. Milwaukee, 10 Wall. 497, 19 L. ed. 984.

Appellant had acquired no right to maintain this pier at the point of its location by grant or license. It is assigned that the facts fail to support the conclusions of the trial court upon this issue. The evidence is conflicting whether Kennedy, the owner of the bank of the lake, at any time gave appellant a license to build the pier at the place located or not. The trial court found the fact against this contention, upon the disputed evidence, which sets the question at rest. When appellant erected and sought to maintain this pier, he did an injury to respondents, in the nature of a private nuisance, which they had a right to remove, to prevent injury from its continuance: Cooley on Torts, 2d ed., p. 48; Larson v. Furlong, 50 Wis. 681, 8 N. W. 1.

It is further contended that respondents, after removing the pier, appropriated the material to their own use. Nothing is disclosed to justify this charge. Upon the evidence adduced, the court found that respondents carefully removed <sup>163</sup> the pier, placed the material upon the shore of the lake, and that appellant took possession of such material. There is evidence to sustain this conclusion. We find no error in the record.

By the Court. The judgment of the circuit court is affirmed.

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A *Riparian Proprietor* ordinarily has the right to connect himself with navigable waters by means of wharves or docks, so long as he does not interfere with the rights of others or of the public: Chicago v. Van Igen, 152 Ill. 624, 43 Am. St. Rep. 285, 38 N. E. 894; Prior v. Schwartz, 62 Conn. 132, 36 Am. St. Rep. 333, 25 Atl. 598, 18 L. R. A. 668; Rumsey v. New York etc. Ry. Co., 153 N. Y. 79, 28 Am. St. Rep. 600, 30 N. E. 654, 15 L. R. A. 618; Lewis v. Portland, 25 Or. 133, 42 Am. St. Rep. 772, 35 Pac. 256, 22 L. R. A. 736; Janesville v. Carpenter, 77 Wis. 288, 20 Am. St. Rep. 123, 46 N. W. 128. And the owner of submerged land has the right to say whether he will allow the owner of adjoining dry land to build out a wharf into the water on the soil of the latter: Cobb v. Commissioners of Lincoln Park, 202 Ill. 427, 95 Am. St. Rep. 258, 67 N. E. 5. On the rights of land owners generally in navigable waters fronting their property, and in the soil thereunder, see the monographic note to Miller v. Mendenhall, 19 Am. St. Rep. 226-235.

## PETERSON v. CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

[119 Wis. 197, 96 N. W. 532.]

**A RAILWAY COMPANY may by contract Relieve Itself from Liability to an Express Messenger for Personal Injuries Suffered by Him** while riding on its trains in the performance of his duty, though such injury was due to the ordinary negligence of the employés of the railway. (p. 881.)

**RAILWAYS, Passenger on, Who is not.—An Express Messenger** is not a person who has applied to a common carrier for transportation and is not entitled to that transportation without condition upon payment of fare, but is one who voluntarily goes upon the train to transact business for his employer, not because the railway company is a common carrier, but because by contract between it and his employer the latter has been granted rights which the railway could not be compelled to grant as a common carrier. (p. 882.)

**RAILWAYS, When may rely upon an Agreement with a Third Person.**—If a messenger, upon entering the employment of an express company, agrees to exempt it and all the transportation companies with which it deals from liability for personal injuries, whether arising from negligence or otherwise, and that such agreement is to inure to the transportation companies as fully as if made with them personally, this is a promise, upon sufficient consideration, made to one person for the benefit of another which can be enforced by the railway company, whether it knew of or consented to the promise before the commencement of the action or not. (p. 882.)

Action against the defendant railway corporation for injuries received by plaintiff while riding on its lines as a messenger in the employ of the American Express Company, and due to the negligence of the defendant's employés. The answer pleaded (1) a contract in writing between the defendant and the American Express Company whereby the latter agreed to save defendant harmless from all actions for loss or damage resulting to any of its officers or employés while traveling over the defendant's lines, and (2) a contract between plaintiff and the American Express Company containing a provision as follows:

"Now, therefore, in consideration of the premises and of my said employment, I do hereby assume all risk of accidents and injuries which I shall meet with or sustain in the course of my employment, whether occasioned or resulting by or from the gross or other negligence of any corporation or person engaged in any manner in operating any railroad or vessel, or vehicle, or of any employé of any such corporation or person or otherwise, and whether resulting in my death or otherwise. And I hereby agree to indemnify and save harmless the Ameri-



can Express Company of and from any and all claims which may be made against it at any time by any corporation or person under any agreement which it has made or may hereafter make, arising out of any claim or recovery upon my part, or on the part of my representatives, for damages sustained by reason of my injury or death, whether such injury or death result from the gross negligence of any person or corporation or of any employé of any person or corporation, or otherwise. And I hereby bind myself, my heirs, executors and administrators with the payment to such express company, upon demand, of any sum which it may be compelled to pay in consequence of any such claims, or in defending the same, including all counsel fees and expenses of litigation connected therewith. I do further agree that in case I shall at any time suffer any such injury, I will at once, without demand, and at my own expense, execute and deliver to the corporation or persons owning or operating such railroad, stage or steamboat line upon which I shall be injured, a good and sufficient release under my hand and seal of all claims, demands and causes of action arising out of such injury or connected with or resulting therefrom. And I do hereby ratify all agreements heretofore made by said express company with any corporation or persons operating any railroad, stage or steamboat line in which said express company has agreed in substance that its employés shall have no cause of action for injuries sustained in the course of their employment upon the line of such contracting party, and I agree to be bound by each and every of such agreements in so far as the provisions thereof relative to injuries sustained by employés of the company are concerned, as fully as if I were a party thereto. And I do hereby authorize and empower said express company at any time while I shall remain in its service, to contract for me and on my behalf in its own name or in mine with any corporations or persons operating any railroad, stage or steamboat line, for my transportation as messenger or employé free of charge upon the condition and consideration that neither I nor my personal representatives, nor any person claiming under me, will make any claim for compensation because of any injury sustained by me, whether resulting from the gross negligence of such corporations or persons or of any employé of such corporations or persons or otherwise, and the contract so made shall be as binding and obligatory upon me as if signed and delivered by me. And I do hereby further agree that the provisions of this agreement shall

be held to inure to the benefit of any and every corporation and to all persons upon whose railroad, stage or steamboat line the American Express Company shall forward merchandise, as fully and completely as if made directly with such corporations or persons."

The plaintiff demurred to the answer, and the demurrer having been overruled, appealed.

Sheridan & Evans, for the appellant.

Miller, Noyes & Miller and Green, Fairchild, North & Parker, for the respondent.

**202 WINSLOW, J.** The general question presented in this case is whether a railway company can be relieved by contract from liability to an express messenger for personal injuries suffered by him while riding on its train in performance of his duty, such injuries being proximately caused by the ordinary negligence of the employés of the company.

The question is new in this state. This court has held that a common carrier may by contract exempt itself from liability to a person traveling on a free pass for injuries caused by the ordinary negligence of its employés, but not from the consequences of their gross negligence: *Annas v. Milwaukee etc. Ry. Co.*, 67 Wis. 46, 58 Am. Rep. 848, 30 N. W. 282. Also that it is against public policy to allow a common carrier to stipulate for exemption from liability for negligence of its employés resulting in loss or injury to a passenger for hire: *Abrams v. Milwaukee etc. Ry. Co.*, 87 Wis. 485, 41 Am. St. Rep. 55, 58 N. W. 780. Neither of these cases however, touches the exact question before us, nor does the early case of *Chamberlain v. Milwaukee etc. Ry. Co.*, 7 Wis. 425, 11 Wis. 248, throw any light upon it.

The question is an interesting one, and might be discussed at great length. It seems doubtful, however, whether any good result would be reached by such a discussion. The exact question here presented has been discussed with great learning and ability by the supreme court of the United States in the case of *Baltimore etc. R. R. Co. v. Voigt*, 176 U. S. 498, 20 Sup. Ct. Rep. 385, 44 L. ed. 560, and the result there reached was that an express messenger, under the facts here presented, was not a passenger for hire, and that for that reason the contracts exempting the railroad company from liability were not against public policy, but valid. We entirely agree with that result.

It commends itself to our judgment, not <sup>203</sup> only upon reason, but upon the great weight of authority. The express messenger is not a person who has applied to a common carrier for transportation and is entitled to that transportation without condition, upon payment of his fare, but a person who voluntarily goes upon a train, not for transportation, but to transact certain business for the express company which it is allowed to transact, not because the railroad company is a common carrier, but because of a contract between the express company and the railroad company by which the express company and its messengers were granted rights which the railroad company could not be compelled to grant as a common carrier. We could add nothing to the discussion in the Voigt case; and hence we content ourselves with announcing our concurrence with the doctrines there laid down,

It is said that there is a distinction between this case and the Voigt case, in that by the contract between the railway company and the express company in the Voigt case the express company agrees to indemnify the railway company from all liability, whether resulting from negligence or otherwise, whereas in the case at bar the agreement is simply to indemnify against damage resulting in any manner whatever. It is said that such contracts are strictly construed against the railway company, and that there must be an express stipulation exempting the company from the results of negligence in order to effect that result, and *Black v. Goodrich T. Co.*, 55 Wis. 319, 42 Am. Rep. 713, 13 N. W. 244, is relied upon. It is not necessary in the present case either to affirm or deny that the agreement between the express company and the railway company covered injuries resulting from negligence, because in this case the plaintiff himself, when he entered on his employment, agreed to exempt the express company and the transportation companies with which it dealt from all liability for personal injuries whether arising from negligence or otherwise, and also agreed that this stipulation should <sup>204</sup> inure to the benefit of all such transportation companies as fully as if made directly with them. This was a promise, upon sufficient consideration, made to one person for the benefit of a third person, which could be enforced by such third person whether such third person knew of or assented to the promise before the commencement of the action or not: *Tweeddale v. Tweeddale*, 116 Wis. 517, 96 Am. St. Rep. 1003, 93 N. W. 440, and cases cited.

By the Court. Order affirmed.

*The Relation of Express Companies and their employés to other carriers* is discussed in the monographic note to Pittsburgh etc. Ry. Co. v. Mahoney, 62 Am. St. Rep. 513-525. It has been held that a railway company may, by contract with an express company and its messengers, exempt itself from liability for injury to such messengers, however caused, while they are in charge of express matter on its trains: Louisville etc. Ry. Co. v. Keefer, 146 Ind. 21, 58 Am. St. Rep. 348, 44 N. E. 796, 38 L. R. A. 93. But see Blair v. Erie Ry. Co., 66 N. Y. 313, 23 Am. Rep. 55. And it has also been held that a contract between a sleeping-car company and its employé, releasing transportation companies over whose lines its coaches may operate from all liability for personal injuries to him, is valid, and inures to the benefit of a railroad company hauling a coach in which the employé is injured: Russell v. Pittsburgh etc. Ry. Co., 157 Ind. 305, 87 Am. St. Rep. 214, 61 N. E. 678, 55 L. R. A. 253. As to whether express messengers are passengers, see the monographic note to Illinois Cent. R. R. Co. v. O'Keefe, 61 Am. St. Rep. 98, on who are passengers.

## GRANT v. KEYSTONE LUMBER COMPANY.

[119 Wis. 229, 96 N. W. 535.]

**MASTER AND SERVANT—Assumption of Risk.**—The head sawyer in a sawmill who is struck and injured by a piece of timber caught and thrown by an edger, with the operation of which he had nothing to do and which was distant fifty-seven feet from the place where he was at work, cannot be held to have been guilty of contributory negligence nor to have assumed the risk, where he is not shown to have had any familiarity with the edger or to have passed closer than twenty-five feet from it as he went to and from his work, and neither saw nor knew of any boards coming back from the edger or being thrown by it before that by which he was hurt. (p. 885.)

**CONTRIBUTORY NEGLIGENCE** is want of ordinary care on the part of a party injured which contributes to produce the injury. (p. 885.)

**MASTER AND SERVANT.—An Employé cannot be Said, as a Matter of Law, to Have Assumed the Risk of His Employment** unless such assumption is shown by undisputed evidence and is so clearly proven that no reasonable inference can be drawn to the contrary. (p. 885.)

**MASTER AND SERVANT.—To Constitute Fellow-servants** it is not necessary that the negligent workman causing the injury and the one injured both be engaged in the very same particular work. It is sufficient that both are employed by the same master, under the same control, and perform duties and services for the same general purpose. (pp. 885, 886.)

**MASTER AND SERVANT—Fellow-servants.**—The Head Sawyer in a Sawmill and the Man in Charge of an Edger Therein are fellow-servants. Hence the former cannot recover of the common master for an injury due to the negligence of the latter. (p. 886.)

**MASTER AND SERVANT—Fellow-servants—Injury, When cannot be Held to be Due to the Negligence of.**—Where the head sawyer is injured by a board thrown by an edger, and some of the evidence tends to show that the accident may have been due to some



of the appliances being out of repair, it cannot be held, as a matter of law, that the injury resulted solely from the negligent manner in which the edger-man put the boards from between the saws. (p. 886.)

**MASTER AND SERVANT—Injuries Due to Defective Machinery and the Negligence of a Fellow-servant.**—An employer who has negligently permitted the use of a machine in doing his work, which by reason of its defects is unnecessarily dangerous to his employés, is liable if an injury results from its use to an employé who is not himself negligent, though a coemployé was guilty of contributory negligence in managing a machine, and if it had been rightly managed, the accident would not have occurred. (p. 888.)

**NEGLIGENCE—Proximate Cause.**—If an edger in a sawmill was defective and out of repair, and to this condition was due the throwing of a board by it which struck and injured the head sawyer working fifty-seven feet away, the jury should be permitted to decide whether the injury was the natural and probable consequence of such defect, and whether injury to any person ought to have been foreseen in the light of attending circumstances by persons of ordinary knowledge and prudence. (pp. 888, 889.)

Action to recover for injuries sustained by the plaintiff while in the employ of the defendant as head sawyer, in being struck and injured by a board being thrown against him by an edger situate fifty-seven feet from where he was at work.

The plaintiff's duties consisted in handling levers which controlled the action of a circular saw and carriage. He stood behind and to the right of the saw and carriage with his back toward a double gang edger located about fifty-seven feet from where he stood. The levers and edger were handled by three edger-men. All lumber was put through a gang edger. One bunch of lumber was being put through which needed no trimming or edging. A four inch strip broke from the bunch, and, swinging around, was struck by the saw and thrown against plaintiff, inflicting serious injuries. The trial court directed a verdict for the defendant and the plaintiff appealed.

Victor T. Pierrelee, for the appellant.

George F. Merrill, for the respondent.

**233 CASSODAY, C. J.** It is said that the trial court directed the verdict in favor of the defendant on the ground that it appears from the undisputed evidence that the plaintiff was guilty of contributory negligence or assumed the risk. The accident occurred about 2 o'clock in the afternoon of April 30, 1902. There is evidence tending to prove that the duties of the plaintiff as such head sawyer did not require him to have anything to do with the operation of the gang edger; that he never worked upon that edger, and had nothing to do with the

men running that edger; that his work was different work, and was independent and away from the edger; that when at work his back was toward the edger and fifty-seven feet away from it; that he knew nothing about the construction of the edger; that he never looked at the edger, particularly, before he was hurt; that he never saw or knew of pieces of lumber or things coming back from the edger before he was hurt; that in going to and coming from his work he went within twenty-five feet of the edger, and could see the frame and edger when it worked, but never examined it; that he did not know that there were any appliances to keep boards or other <sup>234</sup> things from coming back; that he did not know that the fingers would spread apart, nor how long they were, nor how long they had been out of order. For the purposes of this appeal we must assume such evidence to be true. If it is true, there is no ground for holding that the plaintiff was guilty of contributory negligence, nor that he assumed the risk. Of course, contributory negligence is a want of ordinary care on the part of the party injured which contributes to produce the injury. There is nothing to indicate that the plaintiff failed to exercise such care. "It is a general rule that, where unusual dangers are known to the employé, and he voluntarily assumes them, if he is thereby injured he cannot recover, because of his contributory fault, even though the master at the same time is guilty of negligence which, without such assumption of risk, would have rendered him liable": *Powell v. Ashland Iron etc. Co.*, 98 Wis. 36, 73 N. W. 573. Here it does not appear from the undisputed evidence that the plaintiff knew or ought to have known of the danger to which he was thus exposed. "An employé cannot be said, as a matter of law, to have assumed the risk incident to his employment, unless such assumption is shown by undisputed evidence or is so clearly proven that no reasonable inference can be drawn to the contrary": *Revolinsky v. Adams Coal Co.*, 118 Wis. 324, 95 N. W. 122.

2. Counsel for the defendant insists that the plaintiff's injury was the result of the negligence of a coemployé of the plaintiff, and hence that the plaintiff cannot recover. The general rule deducible from the adjudications of this and other courts, as stated by the late Chief Justice Cole, is that: "To constitute fellow-servants, it is not necessary that the negligent workman causing the injury and the one injured should both be engaged in the very same particular work. It is suf-

ficient if they are employed by the same master, under the same control, and performing duties and services for the same general purpose": *Toner v. Chicago etc. Ry. Co.*, 69 Wis. 198, 31 N. W. 104, 33 N. W. 433, and numerous cases there cited.

**235** In a late case it is said that fellow-servants are defined as "those engaged in the same common pursuit, under the same general control"—as "persons employed in the same general business by a common employer"; that the question is not "controlled by the fact that different parts of the work necessary to the general enterprise are placed in hands of employé's remote from each other, and receiving immediate command from different superiors, or, indeed, one from the other": *Okonski v. Pennsylvania etc. Fuel Co.*, 114 Wis. 453, 90 N. W. 429, citing numerous cases. We must hold that the edger-men were fellow-servants with the plaintiff.

The question, therefore, is whether the plaintiff was injured solely by reason of the improper or negligent manner in which the edger-men put the boards through between the gang saws. That is necessarily a question of fact. A witness on behalf of the plaintiff testified to the effect that an armful of strips, from four to six inches wide, which needed no edging, were, at the time of the accident, being merely shoved by the edger-men through and over the rollers in the space between the gang saws, which were forty inches apart; that the top strip, which was white pine, fourteen feet long, an inch thick, and four inches wide, swung and jerked on the saw, and it came back and swung half across, and when it started to go it was pointed toward the gang saws; but it swung off—half way across—so that it went over and struck the plaintiff; that he thought it was caused by the third finger being badly bent—crooked—because a strip got in between, and there was nothing to hold it; that when there is no finger catching the board it has got to go back; that the fingers play sideways, and lift up when boards are put through; that he was not sure how much of the board had gone in the roller when it began to swing, but he should say about a foot. The edger-man who was so putting through the strips at the time testified quite similarly, and also to the effect that there were some spikes in the feed rollers that carried some of these four-inch strips out, and so this board was only about two feet behind **236** the saw when it swung; that it was not heavy enough to go through; that there were no press rollers on it, so when the saw got hold of it it went onto the saw to the side, and he was trying to get the pile through when he

saw the board lay there, and he then pulled on the east press roller and shoved on it, but could not make it go, and then he got hold of the long rope, and then the board came before he pulled on it; that the board that went back was on the east side, and laid clear down on the roller; that the other boards were probably ten inches from this one; that he never counted the fingers or teeth on the shaft, and could not tell how many there were, nor how far they were apart at the top; that they were from four to six inches apart at the bottom, and they could be spread an inch or so—should say seven or eight inches, but he did not think nine inches; that he did not think there was a finger on the board when it went back; that the fingers were for holding the boards from coming back; that he did not know how the board got by the fingers, but supposed it went between them; that, had a finger gone onto the board, it certainly would have held it, and one would have been on the board if the fingers had not been more than three or four inches apart. There was other testimony tending to prove that at the time of the injury some of the fingers on the edger were gone from the left-hand side; that the fingers on the edger were loose and would spread out; that the fingers had been out quite a while—because they were old and rusted and broken off close to the shaft, the breaks being old; that the fingers would spread—one would spread out or bend about nine inches; that the crooked finger caused the strip to come back; that the edger had been in the same condition for some time prior to the accident; that the fingers should not be more than four inches apart; that the fingers in question were very old; that most edgers now have no fingers, but rollers instead; that fingers, properly made, are a complete protection against lumber coming back; that they ought not to be more than two <sup>237</sup> inches apart; that the saw would shake, because it was worn; that the saws were old, did not run true, and would move, and be wider sometimes than others. In view of such evidence, we cannot say, as a matter of law, from the undisputed evidence, that the injury to the plaintiff was caused wholly by the improper or negligent conduct of the edger-men: *Craven v. Smith*, 89 Wis. 119, 61 N. W. 317.

3. Assuming that the conduct of the edger-men was improper or negligent, still the question is presented whether the negligence of the defendant in furnishing defective machinery concurred in producing the injury. It was held by this court several years ago, that: "An employer who has negligently per-



mitted the use of a machine in doing his work, which, by reason of its defects, is unnecessarily dangerous to his employé, is liable for an injury resulting from its use to an employé who was not himself negligent, even though a coemployé was guilty of negligence in managing the machine, and if it had been carefully handled the accident would not have occurred": *Sherman v. Menominee R. L. Co.*, 72 Wis. 122, 128, 39 N. W. 365, 1 L. R. A. 173, and cases there cited.

That case is quite similar in its facts to the case at bar. In that case the plaintiff was injured by a plank thrown by an edger, and the court directed a verdict in favor of the defendant, and one of the defenses was that the injury was caused by the negligence of a coemployé. In a later case it was held that: "Where the injury to a servant is caused by the negligence of the master and that of a fellow-servant together, the master is liable therefor": *Cowan v. Chicago etc. Ry. Co.*, 80 Wis. 284, 291, 50 N. W. 180. See *Jones v. Florence Mining Co.*, 66 Wis. 268, 57 Am. Rep. 269, 28 N. W. 207. The reason for the rule is that the master is bound to furnish his servants with reasonably safe machinery and appliances with which to work, and a reasonably safe place for doing his work; and, if he fails to do so, he cannot escape liability by delegating such duty to one who in other respects may be a fellow-servant of **238** the person injured: *Brabbitts v. Chicago etc. Ry. Co.*, 38 Wis. 289; *Wedgwood v. Chicago etc. Ry. Co.*, 41 Wis. 478, 44 Wis. 44; *Bessex v. Chicago etc. R. Co.*, 45 Wis. 477; *Schultz v. Chicago etc. R. Co.*, 48 Wis. 375, 4 N. W. 399; *Cadden v. American etc. Barge Co.*, 88 Wis. 409, 60 N. W. 800; *Renne v. United States Leather Co.*, 107 Wis. 312, 83 N. W. 473; *Okonski v. Pennsylvania etc. Fuel Co.*, 114 Wis. 453, 90 N. W. 429. As indicated, there is evidence in the case at bar tending to prove that the gang edger was defective and out of repair in the particulars which have been mentioned. If such defect and want of repair was, by reason of the defendant's negligence, the proximate cause of the plaintiff's injury, then the defendant cannot escape liability by the mere fact that the negligence of the edger-men concurred in causing the injury.

4. Assuming that the gang edger was defective and out of repair in the particulars mentioned, the question recurs whether the defendant was negligent in respect to the same, and, if so, whether such negligence was the proximate cause of the plaintiff's injury. The essential elements of proximate cause have been defined so often and so recently as not to require repeti-

tion: Deisenrieter v. Kraus-Merkel M. Co., 97 Wis. 279, 72 N. W. 735; Maitland v. Gilbert Paper Co., 97 Wis. 476, 487, 65 Am. St. Rep. 137, 72 N. W. 1124; McFarlane v. Sullivan, 99 Wis. 361, 363, 364, 74 N. W. 559, 75 N. W. 71; Hudson v. Northern Pacific Ry. Co., 107 Wis. 620, 624, 83 N. W. 769. The important question is whether the injury to the plaintiff was the natural and probable consequence of the negligence of the defendant, and whether an injury to any person ought to have been foreseen in the light of attending circumstances by persons of ordinary intelligence and prudence. We are constrained to hold that the evidence was sufficient to take the case to the jury on the questions suggested.

By the Court. The judgment of the circuit court is reversed, and the cause remanded for a new trial.

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*The Liability of an Employer* to his employé for injuries resulting from defective appliances and machinery is discussed in the monographic note to Brazil Block Coal Co. v. Gibson, 98 Am. St. Rep. 289-325. A reference to page 320 of this note will show that the concurring negligence of an employer in furnishing defective tools and appliances and of a fellow-servant does not bar a recovery by an injured employé, although the injury would not have resulted but for the negligence of the fellow-servant.

*The Doctrines of Assumption of Risks* and contributory negligence, as affecting the liability of employers, are discussed in the monographic notes to Brazil Block Coal Co. v. Gibson, 98 Am. St. Rep. 314-321; Houston etc. Ry. Co. v. De Walt, 97 Am. St. Rep. 886-896; Wellston Coal Co. v. Smith, 87 Am. St. Rep. 573-584.

*As to Who is a Fellow-servant* and who a vice-principal, see the monographic notes to Mast v. Kern, 75 Am. St. Rep. 584-640; Fisk v. Central Pac. R. R. Co., 1 Am. St. Rep. 31-33; Fox v. Sandford, 67 Am. Dec. 588-597. Tests for determining this question are given in Chicago City Ry. Co. v. Leach, 208 Ill. 198, 70 N. E. 222, ante, p. 216, and cases cited in the cross-reference note thereto; Kelly Island Lime etc. Co. v. Pachuta, 69 Ohio St. 463, 69 N. E. 988, ante, p. 706, and cases cited in the cross-reference note thereto.

## GRAEBNER v. POST.

[119 Wis. 392, 96 N. W. 783.]

**CORPORATIONS.—By-laws May be Adopted by the Acts and Conduct of the Corporation** as well as by express vote or adoption in writing, unless it is otherwise provided. (p. 891.)

**CORPORATIONS.—By-laws Prepared and Approved at a Stockholders' Meeting Held Before Recording the Articles of Incorporation**, if they are afterward relied on and treated as by-laws of the corporation by the directors and stockholders, must be regarded as in law the by-laws of the corporation. (p. 891.)

**CORPORATIONS—Subscriptions to Stock, Waiver of Irregularities in Calls for.**—A subscriber to stock may by his acts or express agreement waive a call itself, or informalities in its making, or notice thereof. (p. 892.)

**CORPORATIONS—Subscriptions and Calls—Estoppel to Urge Irregularities.**—The failure to provide the notice to be given stockholders of a call for unpaid stock subscriptions cannot be urged by one who is a stockholder and directly participated in all the proceedings and attended the meeting at which the call was ratified and another meeting at which the time for payment was extended, and at no time interposed any objections. (p. 892.)

**CORPORATIONS—Setoff Against, When Will be Allowed.**—Where One Sued Upon a Subscription to the Stock of a Corporation had employed counsel to represent it and paid the fees of such counsel, and the amount so paid was ordered by the board of directors to be credited on his subscription, it is error to refuse to set off such amount in an action brought by a receiver of the corporation on a call on such subscription. (p. 893.)

Action by the receiver of the Blue Mound Investment Company to recover on a stock subscription. The action was resisted on grounds which sufficiently appear in the opinion of the court. Judgment for the plaintiff for the amount sued for and denying the defendant's claim to be allowed a setoff.

E. L. Wood and O. W. Bow, for the appellant.

Austin, Fehr & Gehrz, for the respondent.

**395 SIEBECKER, J.** Appellant contends the court erred in directing a verdict upon all the issues in respondent's favor, because no valid call was made for the unpaid stock subscriptions, and because his claim for a setoff was denied. It is asserted that no by-laws were ever adopted under the power expressly given to the board of directors by the articles of incorporation. A set of by-laws were prepared and approved at a stockholders' meeting, which was held before the articles of incorporation had been recorded. No other by-laws were there-

after prepared or formally adopted by the board of directors. It appears, however, that the set of by-laws so prepared were referred to and considered as the by-laws during the existence of the corporation. The evidence discloses that they were treated as the by-laws of the corporation at meetings of the board of directors, of which appellant was a member and its president from the time of the organization of the board. The conduct of the board of directors indicates that they regarded them as the by-laws of the corporation, and they should therefore be so regarded in law.

“By-laws may be adopted as well by the acts and conduct of the corporation as by express vote or adoption in writing, unless it is otherwise provided”: *Germania etc. Mining Co. v. King*, 94 Wis. 439, 69 N. W. 181, 36 L. R. A. 51.

It is further objected that the call for payment of unpaid stock subscriptions has no validity, in that the proceedings taken for such call, under the by-laws, failed to provide the notice to stockholders as required by section 1754 of the Statutes of 1898. This question becomes immaterial in the case, since we are persuaded that it abundantly appears appellant must be bound by the action of the corporation in making this call on stock subscriptions. He was a stockholder from the time of the organization of the corporation, and a member of the <sup>396</sup> board of directors and acted as its president from the time of its organization to the commencement of this action. He participated in making five calls for stock subscription without objection under a like resolution and notice to stockholders before this one of January 18, 1899. He took part in the proceedings of the board of directors in making this call by resolution and prescribing the notice to be given. He received printed notice thereof, accompanied by a copy of the resolution. He attended a meeting of the board of stockholders February 8, 1899, at which the call was ratified, and a like meeting at which payment under this call was extended to December 15, 1899. He made no objections at any of these times that the call was irregular or illegal, but assented to the proceedings taken in relation thereto. He made, executed, and delivered his promissory notes to the secretary payable December 15, 1899, for the amount due from him on his stock under this call, and acted as president of the meeting of the directors May 21, 1900, when the board, by resolution, voted to apply the two hundred and fifty dollars advanced by him as counsel fees for the corporation on the unpaid portion of his stock subscription. Appellant's participation in



all of these proceedings as stockholder, director, and officer of the board affords ample ground for an effective waiver of any irregularity in the call and notice thereof, and estops him from raising any objection as to their validity.

"A subscriber of stock may, by his acts or express agreement, waive a call itself, or informalities in its making, or notice thereof": *Kansas City Hotel Co. v. Harris*, 51 Mo. 464; *Stone v. Great Western O. Co.*, 41 Ill. 85; *Danbury etc. Ry. Co. v. Wilson*, 22 Conn. 435; *Wisconsin River Lumber Co. v. Walker*, 48 Wis. 614, 4 N. W. 803; *State Bank B. Co. v. Pierce*, 92 Iowa, 668, 61 N. W. 426; *Cook on Corporations*, sec. 120. Such waiver and estoppel have been held binding on a stockholder in case of informalities under statutory requirements in making **397** calls and giving notice thereof: *Williamette F. Co. v. Stan-nus*, 4 Or. 261.

It is further argued that the court erred in not awarding judgment allowing appellant credit for the sum of three hundred and fifty dollars, with interest, by way of setoff to any amount due from him to the respondent. The appellant, as president, employed counsel on May 19, 1900, to represent the corporation in litigation then threatened, before action was actually taken to declare the corporation insolvent and for the appointment of a receiver. He paid them the sum of two hundred and fifty dollars counsel fee upon the ground that it could not be procured from the treasurer, and that no other funds were available for that purpose. At a meeting of the board of directors May 21st following, this employment of counsel, and the sum advanced by him, were, by resolution of the board, directed to be applied as a payment on his unpaid stock subscription. The services performed by counsel under this retainer appear to have been exclusively for the benefit of the corporation. Respondent thereafter advanced an additional sum of one hundred dollars for services of counsel in the said litigation. It seems that the money so advanced and paid by appellant for counsel fees was, under the facts, a proper credit to be applied on his unpaid stock subscription, and should be allowed as a setoff in his favor in this action. Under the ruling of the court, such a setoff was erroneously denied. For such error the judgment must be reversed and a new trial ordered. This result makes any further discussion unnecessary.

By the Court. Judgment reversed and a new trial ordered.

*By-laws of a Corporation* need not be in writing. They may be adopted as well by the company's conduct, and the acts and conduct of its officers, as by an express vote or an adoption in a meeting: *Bank of Holly Springs v. Pinson* 58 Miss. 421, 38 Am. Rep. 330. See, in this connection, *Durkee v. People*, 155 Ill. 345, 46 Am. St. Rep. 340, 40 N. E. 626.

A *Stockholder* may waive irregularities in the making of a call or assessment, or be estopped to contest its legality: *Bucksport etc. R. R. Co. v. Buck*, 68 Me. 81; *Macon etc. R. R. Co. v. Vason*, 57 Ga. 314; *Danbury etc. R. R. Co. v. Wilson*, 22 Conn. 435; *Hambleton v. Glenn*, 72 Md. 351, 20 Atl. 121; *Willamette Freighting Co. v. Stannus*, 4 Or. 261. And irregularities in calling a corporate meeting may be waived by stockholders: *Benbow v. Cook*, 115 N. C. 324, 44 Am. St. Rep. 454, 20 S. E. 453.

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## DALY v. MILWAUKEE ELECTRIC RAILWAY AND LIGHT COMPANY.

[119 Wis. 398, 96 N. W. 832.]

**A STREET RAILWAY Corporation Running Cars on a Public Street** without authority and in violation of law, though without negligence, is liable to a traveler for injuries sustained by him on such street from such cars. (p. 894.)

Action by an infant eight years of age to recover for injuries sustained by being run over by a freight train of the defendant at the crossing of public streets in the city of Milwaukee. A demurrer to the complaint was overruled, and the defendant appealed.

Spooner & Rosencrantz, for the appellant.

Winkler, Flanders, Smith, Bottum & Vilas, for the respondent.

**400** CASSODAY, C. J. Counsel for the defendant contend that the complaint fails to state a cause of action because it does not specifically allege any negligence of the defendant in operating the train or in the construction of the cars or the track or otherwise. It does allege that the defendant was only authorized to use its tracks and railway for transporting passengers. Had the injury resulted from the use of such passenger cars, there might have been some force in the objection: *Chicago etc. R. R. Co. v. Loeb*, 118 Ill. 203, 59 Am. Rep. 341, 8 N. E. 460; *Randle v. Pacific R. R.*, 65 Mo. 325. But the gravamen of the complaint is that the plaintiff was injured by reason of the defendant running freight-cars upon its tracks without

authority and in violation of law. The question whether an indictment would lie at common law against a corporation for a misfeasance was answered in the affirmative by the queen's bench many years ago: *Queen v. Great North of England Ry. Co.*, 8 Q. B. 315, 325. In that case it was said by Lord Denman, C. J., that "a corporation . . . may be guilty as a body corporate of commanding acts to be done to the nuisance of the community at large": *Queen v. Great North of England Ry. Co.*, 9 Q. B. 326. Thus, it has been held in Massachusetts that "a railroad laid out over and along a highway in such a manner as to obstruct it, without express statute authority or necessary implication, is liable to indictment as a nuisance": *Commonwealth v. Old Colony etc. R. R. Co.*, 14 Gray, 93. See, also, *State v. Troy-etc. R. R. Co.*, 57 Vt. 144; *Evans v. Chicago Ry. Co.*, 86 Wis. 597, 603, 39 Am. St. Rep. 908, 57 N. W. 354. So it is well settled that if an individual, without fault on his part, suffers special damage by any unlawful <sup>401</sup> act in obstructing a highway, he has a right of action therefor, although the party doing the act is also liable to an indictment for the same: *Thayer v. Boston*, 19 Pick. 514, 31 Am. Dec. 159; *Zettel v. West Bend*, 79 Wis. 316, 319, 24 Am. St. Rep. 715, 48 N. W. 379, and cases there cited. Thus it has been held in New York that "the construction and maintenance of a street railway by any individual or association of individuals without legislative authority is a public nuisance, and subjects those maintaining it to a private action in favor of any person sustaining special injury therefrom": *Fanning v. Osborne*, 102 N. Y. 441, 7 N. E. 307. To the same effect, *Beekman v. Third Ave. R. R. Co.*, 153 N. Y. 144, 152, 47 N. E. 277; *Stamford v. Stamford Horse Ry. Co.*, 56 Conn. 381, 15 Atl. 749, 1 L. R. A. 375; *Wellcome v. Leeds*, 51 Me. 313, 315. To the extent that the defendant exceeded its authority by running freight-cars over its tracks without legislative permission, express or implied, it must be regarded as acting in violation of law, and hence answerable accordingly. This has, in effect, been repeatedly held by this court: *Evans v. Chicago etc. Ry. Co.*, 86 Wis. 597, 603, 39 Am. St. Rep. 908, 57 N. W. 354; *Linden Land Co. v. Milwaukee El. Ry. etc. Co.*, 107 Wis. 493, 513, 83 N. W. 851; *Allen v. Clausen*, 114 Wis. 244, 90 N. W. 181. Thus it is stated by a standard text-writer that "for personal injuries sustained by a person by reason of any nuisance in a highway, or injuries thereby inflicted upon his team or property, the person creating the nuisance, as well as the person maintaining it, is always liable in a civil action, if

the person injured was in the exercise of ordinary care when the injury was inflicted; and no degree of care on the part of the person erecting or maintaining the nuisance will exempt him from liability": 2 Wood on Nuisances, 3d ed., sec. 703.

The theory is that, the act being wrongful, the party doing it is answerable for all the consequences that flow therefrom to a person who is not chargeable with negligence by reason of which the injury is inflicted: 2 Wood on Nuisances, 3d ed., sec. 703. The allegations of the <sup>402</sup> complaint, if true, are sufficient to authorize a jury to find that the plaintiff's injuries were without fault on his part, and were actually caused by the running of the freight-cars on the defendant's tracks in violation of law; and hence the complaint states a cause of action.

By the Court. The order of the circuit court is affirmed.

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A *Railroad* constructed without authority of law in a public highway has been held to be a nuisance: *Attorney General v. Morris etc. R. R. Co.*, 19 N. J. Eq. 586; *People v. New York etc. R. R. Co.*, 26 How. Pr. 44, 45 Barb. 73; *Commonwealth v. Erie etc. R. R. Co.*, 27 Pa. St. 339, 67 Am. Dec. 471. See, also, *Rogers v. Philadelphia Traction Co.*, 182 Pa. St. 473, 61 Am. St. Rep. 716, 38 Atl. 309. And the nonperformance by a railroad company of a duty commanded by statute has been held negligence as a conclusion of law: *Chicago etc. R. R. Co. v. Mochell*, 193 Ill. 208, 86 Am. St. Rep. 318, 61 N. E. 1028. See, too, *Kilpatrick v. Grand Trunk Ry. Co.*, 74 Vt. 288, 93 Am. St. Rep. 887, 52 Atl. 531; note to *Houston etc. Ry. Co. v. De Walt*, 97 Am. St. Rep. 891.

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## BURNHAM v. BURNHAM.

[119 Wis. 509, 97 N. W. 176.]

**FRAUD—Evidence Required to Prove.**—Where relief is sought on the ground that a conveyance was procured by fraud in obtaining it from the defendant when he was incapable of comprehending and transacting his business, on the ground of mental impairment due to the excessive use of intoxicating liquors, the fraud must be proved by clear and satisfactory evidence leaving no substantial doubt. (p. 897.)

**A PERSON Addicted to the Habitual and Excessive Use of Intoxicating Liquors** is not Incompetent to enter into contracts and convey property, unless it appears that actual intoxication dethroned his reason, or that his understanding was so impaired as to render him mentally unsound when the act was performed. (pp. 897, 898.)

**ATTORNEY AND CLIENT.**—A husband cannot escape from a conveyance or agreement in favor of his wife, on the ground that the attorneys who acted for her in the transaction fraudulently represented to him that they were acting for him, and that he relied on them to protect his interests, where it appears that such attorneys had at times acted for him, that he was informed that they were act-



ing for his wife prior to his making the settlement with her, and he in fact fully understood all the terms of such settlement before executing it. (p. 898.)

**CONSPIRACY to Cheat and Defraud.**—A finding that the defendant entered into a conspiracy to cheat and defraud plaintiff of his property cannot be sustained if it appears that he was capable of transacting and comprehending his business and affairs. (p. 899.)

**CONTRACT Procured by Fraud, Ratification of.**—If a plaintiff claims that a contract and conveyance were procured by fraud, still if it appears that he had taken counsel, insisted on having certain terms of the agreement carried out, and treated the whole matter in controversy as satisfactorily arranged, he must be deemed to have irrevocably ratified such contract and conveyance, although it be assumed that he was induced to make them through the wrong of another. (pp. 899, 900.)

Suit to annul a conveyance made by the plaintiff to his wife and a mortgage given by them to her codefendants, D. G. Rogers and Charles D. Mann. The plaintiff and his wife married in 1894, and had various departures and reunions up to February, 1901. In January of that year, they were living separate, but she took steps with a view of securing a settlement, and failing in that, a divorce. She employed her codefendants, who were attorneys at law, and on February 6th, with their aid, a settlement was procured, as a result of which matrimonial relations between husband and wife were resumed, and he executed to her a conveyance of the undivided one-half of certain real property, both agreeing to execute a mortgage on such property in a sum not in excess of forty-six thousand dollars, to secure his existing indebtedness. They negotiated a loan for that amount and executed the mortgage to secure it. Subsequently they united in a mortgage to the attorneys to secure the amount due for their services. Decree granting the relief prayed for, and the defendants appealed.

W. J. Turner, Rogers & Mann and Miller, Noyes & Miller, for the appellants.

Fiebing & Killilea, for the respondent.

512 **SIEBECKER, J.** This action is brought to set aside a certain contract and deed which it is alleged defendants procured from plaintiff by fraud, when he was incapable of comprehending and transacting his business, on account of mental impairment induced by the excessive use of intoxicating liquors. Many errors are assigned upon the ground that the findings of fact by the trial court are not supported by the evidence. This is a case wherein relief is sought for a fraud in fact, which it is

alleged infected the transaction and rendered it voidable in law. In such cases the fraud must be proven by clear and satisfactory evidence.

"Solemnly executed instruments are not to be set aside or reformed except on evidence sufficient to establish mistake <sup>513</sup> or fraud so clearly as to leave no substantial doubt": *Baumann v. Lupinski*, 108 Wis. 451, 84 N. W. 836; *Lavassar v. Washburne*, 50 Wis. 200, 6 N. W. 516, and cases cited; *Fillingham v. Nichols*, 108 Wis. 49, 84 N. W. 15.

After a careful examination and scrutiny of the evidence, we come to the several inquiries presented on this appeal:

1. Did the court err in finding that the plaintiff had been so excessively addicted to the use of intoxicating liquors that his mind and memory were impaired to an extent which made him unable to fully comprehend his business affairs? Much evidence was adduced upon this inquiry by both parties. It is shown that plaintiff had been addicted to the excessive use of intoxicating liquors for a number of years before the contract and deed in question were executed and that such excesses had produced attacks of sickness of body and mind, incapacitating him at such times from transacting business. The evidence also shows that, when not sick and free from intoxication, he possessed his mental faculties and understood, comprehended and attended to his business affairs. At such times his conduct pertaining to his personal and business affairs was characterized by intelligence, understanding, and common sense, and he assumed to manage his business without the aid of others or reliance on their judgment. The evidence tends to show that plaintiff was actually intoxicated at the first interview between the parties, which occurred several days prior to February 6th, the date of the contract and deed. All negotiations were postponed, and resumed a few days thereafter, when plaintiff appeared perfectly natural and free from intoxication. His testimony indicates that he fully understood the nature, import and importance of the settlement with his wife, and that he remembered the details thereof with considerable accuracy. We are persuaded that the evidence clearly establishes that plaintiff was free from intoxication when the settlement was negotiated <sup>514</sup> and the deed was executed and delivered; that he fully understood the nature and import of the transaction, and was competent to make a contract.

A person addicted to the habitual and excessive use of intoxicating liquor is not incompetent to enter into contracts and

convey property, unless it appears that actual intoxication dethroned his reason, or that his understanding was so impaired as to render him mentally unsound when the act was performed: *Johnson v. Harmon*, 94 U. S. 371, 34 L. ed. 271; *Van Wyck v. Brasher*, 81 N. Y. 260; *Reinskopf v. Rogge*, 37 Ind. 207.

2. Error is also assigned upon the finding of the trial court that defendants, Rogers & Mann, fraudulently represented to plaintiff that they were acting as his attorneys in negotiating this settlement, and that he relied upon them to protect his interests and legal rights. In support of this finding, it is argued that Mr. Rogers is shown by the evidence to have been the attorney and counselor of members of the Burnham family for many years; that he settled the father's estate; that the firm of Rogers & Mann had for years been attorneys for plaintiff in various matters and was so employed at the time of these negotiations. True they had been attorneys for him at various times, and as such represented him on different occasions. The proof, however, discloses nothing which tends to show they were generally retained as his attorneys for his legal business. The evidence on this subject shows that whenever he desired their services he specifically employed them. It is without dispute that they were not employed by him as attorneys in litigation with his wife at former times, and that he had at various times employed other counsel to attend to legal matters for him. In a letter written to him on January 19, 1901, he was informed by them that they had been retained by Mrs. Burnham to secure a possible settlement with him, and, if not successful, that she would commence action. We cannot perceive how plaintiff, **515** under such circumstances, could be deceived or misled on the subject of their acting as attorneys for Mrs. Burnham. The evidence fails to show that Rogers & Mann were plaintiff's attorneys in any matter pending at the time of the settlement. It is insisted, however, that Mr. Rogers led him to believe that they would protect his legal rights and interests, and that he relied thereon. The specific proof relied on to support this contention is the evidence of plaintiff that Mr. Rogers so stated to him, and an inference from a statement said to have been made by Mr. Rogers to plaintiff's brothers while negotiations were progressing. This is denied by Mr. Rogers and by Mrs. Burnham and Mr. Mann, who were present at the interview. It also appears that the negotiations were conducted by Mr. Mann in his separate office, and that plaintiff suggested and insisted that certain terms and conditions for his protection

and interest be inserted as stipulations of the settlement, before he assented to execute the written instruments. After the settlement he asserted that he fully understood its terms, and that it complied with his intention and understanding in settling all controversies between himself and wife. In the light of all these facts and circumstances, plaintiff must be held to have exercised a reasonable amount of intelligence and judgment. His claim that he was misled by Mr. Rogers to rely upon him as his attorney is clearly without foundation. The evidence fails to furnish any reasonable basis for holding that any deception or undue influence was used to deceive or mislead him.

3. Further error is assigned upon the finding that the defendants entered into a conspiracy to cheat and defraud plaintiff of his property. Having found that plaintiff fully comprehended and was capable of transacting his business affairs, and that the evidence fails to show that he was misled into the belief that Messrs. Rogers & Mann were acting as his attorneys in the matter, and that he was informed that they were acting as the attorneys of Mrs. Burnham, no <sup>516</sup> grounds remain for asserting that she and her attorneys had conspired to cheat and defraud him out of his property.

4. Defendants contend that the court erred in refusing to find, as requested by them, that plaintiff had ratified the agreement and deed. It is not seriously contested but that plaintiff, by acts, conduct, and declaration, expressed his approval of the settlement between February 6 and May 21, 1901, the day when he and Mrs. Burnham executed the mortgage to secure a loan of forty-six thousand dollars, under the settlement, to pay his debts. It appears that he had taken counsel pertaining to the very question litigated upon this trial some time before this mortgage was executed, yet he insisted on having the mortgage made under the agreement, and it was so made. It appears that during the months of February, March, April, and May he fully understood the terms of this settlement, and that he treated the matter as satisfactorily arranged and concluded. Had the agreement been infected with any legal wrong, these acts would have purged it, and he would be deemed to have adopted and reaffirmed the settlement as originally made. A party to a contract, complaining that he was induced to make it through the wrong of another, cannot assert its invalidity, and at the same time insist that it be carried out and performed. Under such circumstances, in-



sistence on performance is an affirmance and adoption of the agreement, and a waiver of any right to revoke and annul it: Story's Equity, sec. 1551; Grymes v. Sanders, 93 U. S. 55, 23 L. ed. 798; Conrow v. Little, 115 N. Y. 387, 22 N. E. 346, 5 L. R. A. 693; Pence v. Langdon, 99 U. S. 578, 25 L. ed. 420; Moller v. Tuska, 87 N. Y. 166.

We must hold that the findings of the trial court upon the main issues above specified are contrary to the clear preponderance of the evidence, and therefore erroneous.

By the Court. Judgment reversed, and cause remanded with directions to enter judgment dismissing the complaint, the judgment in this court to that effect to be entered as of the time the cause was submitted, to wit, October 21, 1903.

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*A Drunkard* is not an incompetent, like an idiot, or one generally insane. His incompetency can be established only by showing that at the time of the act in question his understanding was clouded or his reason dethroned by actual intoxication: Wright v. Fisher, 65 Mich. 279, 8 Am. St. Rep. 886, 32 N. W. 605. As to whether the contracts of an intoxicated person are void or voidable, see Loftis v. Marshall, 134 Cal. 394, 66 Pac. 571, 86 Am. St. Rep. 286, and cases cited in the cross-reference note thereto; Cooney v. Lincoln, 21 R. I. 246, 79 Am. St. Rep. 799, 42 Atl. 867.

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## MEYER v. HAFEMEISTER.

[119 Wis. 539, 97 N. W. 165.]

**PAYMENT—Evidence Sufficient to Establish.**—An instruction to a jury that a defendant alleging payment must establish it by clear and satisfactory evidence is erroneous and prejudicial. It is sufficient that such allegation be established by a fair preponderance of the evidence. (p. 902.)

**TRIAL BY JURY—Reversal for Conflicting Instructions.**—An instruction that the plea of payment must be established by clear and satisfactory evidence is not rendered harmless by another instruction that such plea must be established by a fair preponderance of the evidence. The appellate court cannot know by which instruction the jury were controlled. (p. 902.)

**EVIDENCE—Transactions of Deceased Agent.**—Under the statutes of Wisconsin a defendant will not be permitted to testify to conversations between himself and an agent of the plaintiff who died prior to the trial. (p. 902.)

**EVIDENCE—Cross-examination.**—Where the question before the jury was whether a mortgage had been received in satisfaction of certain pre-existing indebtedness, the defendant, in cross-examining the plaintiff, should be permitted to question him concerning all the negotiations and conversations respecting payment and satisfac-

tion of such indebtedness and what took place when the securities and property were deposited with and conveyed to the plaintiff. (pp. 902, 903.)

Action to recover a balance claimed to be due the plaintiff on a judgment against the defendant and others. The judgment amounted to thirteen thousand one hundred and fifty-two and ninety-three one-hundredths dollars, and it was conceded that a mortgage had been given to the plaintiff for thirteen thousand dollars, and the question was whether it had been accepted in full satisfaction. Judgment for the plaintiff after a trial before a jury. The defendant appealed.

Doerfler, McElroy & Eschweiler, for the appellant.

Miller, Noyes & Miller, for the respondent.

**540** SIEBECKER, J. Defendant contends that the circuit court committed error in instructing the jury upon the rule of the burden of proof applicable to the defense of payment. The court instructed the jury at length upon the burden of proof and the preponderance of evidence. The following instruction was given as bearing on the defense of payment: "The burden of showing the thirteen thousand dollar mortgage given by the defendant to the plaintiff as trustee was a payment in full of the entire amount due under the judgment against the defendant is upon the defendant, and he must satisfy you by a fair preponderance of the evidence that the giving and acceptance of such mortgage constituted a payment in full of the one hundred and fifty-two dollars and sixty-three cents sued for in this action."

**541** The court then instructed the jury in what issues the burden of proof rested on the plaintiff, and that it devolved on him to establish his case by a fair preponderance of the evidence. The court, however, did not submit the case upon these instructions, which directed the jurors' attention to the rules of law upon this subject, but proceeded further to inform the jury as to the burden resting upon defendant to establish his claim of payment, in the following language: "The burden of proof is on the defendant herein as to all the material facts necessary to sustain his contention that he has satisfied and paid the same, and it is incumbent upon the defendant to establish those allegations by clear and satisfactory evidence."

The first instruction above referred to correctly charges that the burden was on the defendant to establish payment of plain-

tiff's claim and that the fact of payment must be established "by a fair preponderance of the evidence"; but the instruction which followed on the subject modified this rule in a material respect, in that it informed the jury that it was incumbent on the defendant to establish the fact of payment "by clear and satisfactory evidence," which negatives the idea that a mere preponderance of evidence is sufficient to warrant the jury in finding that payment was made as claimed. The last instruction given informed the jury that the fact of payment must be shown by evidence establishing it to a higher degree of certainty than its mere preponderance. It is argued, though this rule be erroneous, it should not be held prejudicial, because the court also instructed the jury correctly upon the subject. But what rule did the jury follow? It is fully as probable they followed the one rule as the other in their determination of the issues. They found payment was not established as alleged by defendant. This may have resulted because they believed the proof failed to show payment to that degree of certainty as defined and required by the last instruction, though believing that the <sup>542</sup> weight of the evidence adduced preponderated in defendant's favor. Since the instructions may have prejudiced the defendant upon this issue, it must be held to constitute reversible error.

Numerous errors are assigned upon the court's rulings on objections as to the admission and rejection of testimony. An exception is argued upon the ruling excluding any conversation between defendant and plaintiff's attorney George H. Wahl, who, it appeared, was deceased, upon the ground that defendant was not competent to establish any transaction with plaintiff's deceased agent. No evidence had been offered by plaintiff concerning the transactions between the deceased and defendant, to remove the bar of the statute covering the subject. This precluded defendant from giving any such conversation when objected to by the adverse party. We perceive no error in the ruling.

Many of the exceptions to these rulings pertain to the exclusion of evidence tending to show the nature and amount of the original liability out of which this claim arose, and the negotiations pertaining to its payment, and the insolvency of Mr. Kretschmar. We find it unnecessary to discuss each exception in detail, since a new trial must be directed upon other grounds. The record, however, shows that the trial court limited the cross-examination of plaintiff too strictly. The jury

should have been informed of the facts and circumstances surrounding these negotiations, to give them a proper understanding of their significance and aid them in properly applying the evidence to the controverted issues. For this purpose, it was proper to elicit from the plaintiff the negotiations and conversations actually had with him concerning the payment and satisfaction of the original judgment, and what took place when the securities and property were deposited and conveyed by him to apply on this liability.

By the Court. The judgment is reversed, and the cause remanded for a new trial.

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*When the Evidence*, on the plea of payment, is equally balanced, the plaintiff is entitled to a verdict: *Shulman v. Brantly*, 50 Ala. 81. The plea of payment, being an affirmative defense, must be supported by a preponderance of the evidence: *Perot v. Cooper*, 17 Colo. 80, 51 Am. St. Rep. 258, 28 Pac. 391. It has been said that payment must be shown with reasonable certainty: *Succession of Moreira*, 16 La. Ann. 368.

*As to Evidence of Transactions with Deceased persons*, see *Mallow v. Walker*, 115 Iowa, 238, 91 Am. St. Rep. 158, 88 N. W. 452; *Minnis v. Abrams*, 105 Tenn. 662, 80 Am. St. Rep. 913, 58 S. W. 645; *Furenes v. Eide*, 109 Iowa, 511, 77 Am. St. Rep. 545, 80 N. W. 539; *Sloan v. Hunter*, 56 S. C. 385, 76 Am. St. Rep. 551, 34 S. E. 658; *Witte v. Koeppen*, 11 S. Dak. 598, 74 Am. St. Rep. 826, 79 N. W. 831. A person who makes a contract with two partners, together with the surviving partner who was present when the contract was made, is competent to testify about such contract after the death of the other partner: *Vandergrif v. Swinney*, 158 Mo. 527, 81 Am. St. Rep. 325, 59 S. W. 71.

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## IN RE STREIFF.

[119 Wis. 566, 97 N. W. 189.]

**EVIDENCE—Proving Incompetency.**—In an application for the appointment of a guardian for an adult, it is proper to receive evidence tending to prove that those with whom she resided had, because of her broken-down condition, been able to keep her in subjection and had exercised that power to obtain a conveyance of her property without consideration. (p. 905.)

**GUARDIAN AND WARD.**—The power to appoint a guardian depends on the statute, and cannot be exercised unless the conditions prescribed by the statute exist, though it may appear that the person for whom the guardian is sought is not capable of caring for his property judiciously. (p. 906.)

**GUARDIAN AND WARD.**—It is not Essential to Justify the Appointment of a Guardian for an Adult that he be shown to be



insane or imbecile in the technical sense. It is sufficient that he is as incapable of managing his affairs as if he were insane. (p. 906.)

**GUARDIAN AND WARD.**—Mental incompetency of one to manage his property, as distinguished from insanity in the ordinary sense, gives the court jurisdiction to appoint a guardian of an adult. (p. 906.)

**GUARDIAN AND WARD.**—The Rule of the English Courts of Chancery Concerning the Appointment of a Guardian for an Adult is, that where the party, though not absolutely insane, is unable to act with prudent management and is liable to be robbed by anyone, a guardian should be appointed. (pp. 906, 908.)

**GUARDIAN AND WARD.**—Appointment of Guardian for an Adult, When Sustainable.—The appointment of a guardian for an adult is proper when it appears that she is of extreme age and so weak in mind that she submits to the will of others to the extent of depriving herself of her property without making any provision for her own support, and has no power to assert her rights in her own home, nor to disassociate herself from her surroundings and obtain assistance and care from others. (pp. 907, 908.)

Application for the appointment of a guardian for Martha Streiff. The application was granted by the county court, after which the cause was appealed to and retried in the circuit court, which found that she was about eighty-five years of age and incompetent, and had property upon which she resided of the value of about nine thousand five hundred dollars; that her heirs at law were her son, Henry Streiff, and her grandchildren, Emma and Albert Fink; that the son was a weak-minded man, and had a family consisting of his wife, Agnes, and two children; that the son and his wife had, since their marriage and during a period of twenty years, lived with the mother upon her property and been supported chiefly out of its income, doing nothing for the support of the alleged incompetent and paying nothing for the use of her property; that the grandchildren, who for twenty years had been in the habit of visiting their grandmother and paying her loving attention, had been prevented from seeing her by Henry's wife; that the latter was strong-minded and of violent temper, and abused and ill-treated the incompetent, keeping her in a state of fear and subjection, and the ill-treatment was increased after receiving the conveyance of her property.

Nath. Pereles & Sons and G. D. Goff, for the appellant.

Kronshage & McGovern, for the respondent.

568 **MARSHALL, J.** The main contentions of appellant's counsel are, that the evidence introduced, of which there was much, as to undue influence by Henry Streiff and his wife

569 to obtain from appellant the deed of her property, and the evidence showing ill-treatment of appellant, was incompetent; that such evidence had no bearing on the real subject for investigation—the mental competency of Martha to have the charge and management of her property; that the findings of fact based specifically thereon are immaterial to the real subject of inquiry and should not and would not have been made but for the admission of such incompetent evidence; and that such findings were the real basis for the ultimate conclusion of fact that Martha Streiff was mentally incompetent as alleged in the petition.

We are unable to agree with counsel. That Martha Streiff, by reason of mental weakness produced by old age and her infirmities, required tender care from others at all times; that those with whom she resided, because of her broken-down condition, were able to keep her in a state of subjection to their will; that they exercised their power in that regard; that they kept her relatives from her and ill-treated her in many ways; that she was too weak and infirm to protect herself therefrom; that they obtained from her all of her property without consideration and then increased the severity of their treatment; and that she was mentally and physically powerless to resist such treatment or to escape from it—bore very strongly upon the ultimate issue of fact to be solved—whether she was, by reason of extreme old age or other cause, mentally incompetent to have the charge and management of her property: Stats. 1898, sec. 3976. Certainly, evidence showing that she was incapable of protecting herself in any way from the abuse of others in her own home, and that she was controlled by the will of others in giving them all her property, leaving her without any means of support in her old age, there being nothing in the conduct of such others that would influence one so circumstanced, capable of acting with any degree of prudence, to rely upon mere moral obligations to secure in return for the property some reasonable equivalent 570 in care and attention, may well be viewed, as the trial court evidently deemed the same, as strongly indicating mental incompetence to have the charge and management of her property.

True, as suggested by appellant's counsel, the power to appoint a guardian in the circumstances of this case depends upon the statute. Unless the statutory conditions requisite to the exercise of such power are shown to exist by the evidence the court is powerless to act, however clear it may ap-

pear by proof that the subject for whom a guardian is sought is not capable of caring for his property judiciously. But such conditions do not call for imbecility or insanity in a technical sense. It is sufficient if the subject is as incapable of managing his affairs as if he were insane. That is plain. Our statute should not be confused with those which are worded differently, and the decisions under the same. The term "mentally incompetent to have the charge and management of his property" means mental incapability to do so: In *re Leonard's Estate*, 95 Mich. 295, 54 N. W. 1082. True, the incapability must be, as before indicated, substantially total, as in case of imbecility or insanity; not that partial incapability often seen in persons so intellectually weak that they are capable of managing their affairs with very little judgment. Nevertheless, the subject need not be necessarily classed as either insane or an idiot in the ordinary meaning of those terms. Counsel cite In *re Storick*, 64 Mich. 685, 31 N. W. 582, construing the Michigan statute, which is like our own, as holding that it calls for insanity or imbecility. The language of the court in that case is, "insanity or mental infirmity that is equivalent in destroying mental competency." By that it is seen that the court viewed mental incompetency from any cause rendering a person as incapable of managing his property as if he were insane, covered by the statute. In short, that mental incapability of one to manage his property, as distinguished from insanity in the ordinary <sup>571</sup> sense, gives the court jurisdiction to appoint a guardian, as held in the later case: In *re Leonard's Estate*, 95 Mich. 295, 54 N. W. 1082.

In the earlier decisions of courts, particularly the English decisions, the mooted question was whether a court of chancery possessed jurisdiction to appoint a guardian of a person in the absence of a finding that such person was insane or an idiot. A good review of such cases is contained in the opinion in *Re Barker*, 2 Johns. Ch. 232. The position finally taken by the English courts and the one which the New York court adopted is indicated in the following, quoted from the chancellor's opinion: "Lord Eldon, in *Ridgeway v. Darwin*, 8 Ves. Jr. 65, observed that in Lord Hardwicke's time commissions of lunacy were not granted to the extent in which they have been since granted. That when he came into the court, he found a course of cases establishing its authority where the party was not absolutely insane, but was unable to act with any proper and provident management, and was liable to be robbed

by anyone, under that imbecility of mind, calling for as much protection as absolute insanity. When the mind was worn out by years, or epilepsy, or habitual intoxication, etc., the party required that care should be thrown around him."

That view is embodied in many, we may say most, of the modern statutes. The words "lunacy" and "unsound mind" have been bent out of their technical sense in some instances, a legislative construction being given thereto in harmony with the broad views of courts to which we have alluded, that they include every phase of unsound mind rendering one incapable of caring for himself or his property (1 Birdseye's New York Rev. Stats. 1899, p. 512); that it includes mental unsoundness rendering the sufferer incapable of managing his property: Missouri Rev. Stats. 1899, sec. 3702. In many statutes, of which that of Michigan and our own are instances, the term "insanity," considered in its technical sense, is separated from its equivalent as regards the ability of the sufferer to care for himself or his property, leaving no ground <sup>572</sup> to claim that mental unsoundness, meaning insanity strictly so called, is essential to the appointment of a guardian. The statute provides for the guardianship of insane persons and any others who, "by reason of extreme old age or other cause, are mentally incompetent [that is, incapable] to have the charge and management of their property."

True, the evidence in this case does not show that Martha Streiff was insane or an imbecile in the technical sense of those terms; but it pretty clearly shows that she might as well be either the one or the other as regards capability to have the charge and management of her property. That satisfies, clearly, the very letter of the statute. The evidentiary facts found, which are well supported by the proof, show, as before indicated, that appellant was so weak of mind as to submit to the will of others to the extent of parting with all she possessed without making any provision whatever for her future support, notwithstanding her utterly helpless condition. It shows that she had neither will power to assert her rights in her own home, nor to disassociate herself from her surroundings and obtain the assistance and care of others. It shows that she was in her second childhood, and in nearly the last and most helpless stage thereof. It shows that she was as much in need of care and protection as an infant, and that those under whose control she was living neither extended that care to her nor permitted others to do so or to comfort her in any way, but took



advantage of her weakness and their relations to her to practically rob her. That is what the evidence strongly tends to prove. It is what the court found in effect. If the court has not power under our statute to rescue an old person from such a situation, it is a severe criticism upon the wisdom of the law-making power; but there has been no legislative neglect in that regard, as we have seen, in that the statute expressly provides for just such cases as this—for persons who, from extreme old age or other cause, are mentally incompetent to manage their property. Thus <sup>573</sup> has become written law the reasoning of courts of which that found in *Ridgeway v. Darwin*, 8 Ves. Jr. 65, is a fair type, where the chancellor said, in effect: The question is not necessarily whether the person is absolutely insane; it is sufficient if he is unable to act with any proper and provident management, and is liable to be robbed by anyone, calling for as much protection as absolute insanity. And that in *Ex parte Cranmer*, 12 Ves. Jr. 445, where Lord Erskine said that it is unseemly that a person whose faculties have become so decayed by old age that he is unfit to govern himself or his affairs, cannot have the protection of a guardian except that he be put upon the footing of a lunatic. Why should not a man be entitled to protection in his second state of infancy as well as the first?

By the Court. The judgment is affirmed.

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*As to the Degree of Mental Incompetency* which will justify the appointment of a guardian for an adult, see *McCamman v. Cunningham*, 108 Ind. 545, 9 N. E. 455; *Emerick v. Emerick*, 83 Iowa, 411, 49 N. W. 1017, 13 L. R. A. 757; *Partello v. Holton*, 79 Mich. 572, 44 N. W. 619; *In re Wetmore's Guardianship*, 6 Wash. 271, 33 Pac. 615. Unless an alleged lunatic is shown to be unfit for the government of himself by the return to the writ de lunatico inquirendo, the court will not place him and his estate under guardianship: *In re Lindsley*, 44 N. J. Eq. 564, 6 Am. St. Rep. 913, 15 Atl. 1. And a person in his dotage is not within the purview of a statute providing for the appointment of a guardian over insane persons: *Overseers of the Poor v. Gullifer*, 49 Me. 360, 77 Am. Dec. 265.

## COBB v. SIMON.

[119 Wis. 597, 97 N. W. 276.]

**MASTER AND SERVANT—Liability of the Former for the Acts of the Latter.**—A master is liable for the negligent or wrongful acts of his servant committed in endeavoring to perform a duty delegated to him by the master, and this is so notwithstanding that the method adopted by the servant may not have been authorized, or may even have been prohibited, by the master. (p. 911.)

**MASTER AND SERVANT—Nonliability of the Former for the Acts of the Latter.**—A master is not liable if his servant steps aside from the master's business and maliciously and wantonly commits a tort for the accomplishment of his own purposes. The test is not whether the act was done during the existence of the employment, but whether it was done in the transaction of the master's business. (pp. 911, 912.)

**MASTER AND SERVANT—Arrest and Search by the Servant—Liability of Master for.**—A Floor-walker Employed in a Department Store whose duty it is to watch customers and prevent them from doing wrongful acts and to take stolen merchandise away from them if he finds them in the act of stealing, represents his employer in temporarily imprisoning and searching a person whom he believes to be guilty of theft, and his act renders his employer liable to an action for false imprisonment. If, on the other hand, the floor-walker knew nothing had been stolen, and the imprisonment and search were for the purpose of extorting money, his employer is not answerable, because the act of the floor-walker would be a tort committed for his own purpose. (p. 912.)

**MASTER AND SERVANT—Merchant and Employé.**—An instruction that a master is liable for a wrong done by his servant, whether through the negligence or malice of the latter and in the course of the employment in which the servant is engaged to perform a duty which the master owes to the person injured, is inapplicable and prejudicially erroneous in an action by a customer against a merchant for false imprisonment due to an employé of the latter. (p. 914.)

**JURY—Instructions to the Jury, When Inadequate and Misleading.**—In an action to recover of a merchant for an arrest and false imprisonment due to his employé, an instruction to a jury that ratification may be signified by acts of omission as well as of commission, though correct as a proposition of law, may be prejudicial where the jury are not informed what acts of omission are meant, but left to select any act of omission or commission which they chose and predicate ratification on it. (p. 914.)

**MASTER AND SERVANT—Ratification of Tort of Servant. — Retention of a Servant** in his employment after notice to the master of a tort committed by the servant is evidence of ratification by the former, but the information to him must be full and complete to justify the conclusion of ratification on this ground. (p. 915.)

**MASTER AND SERVANT—Ratification of a Servant's Tort is not Assumed Against the Master Unless Such Information comes** to the master not as a mere idle rumor, but in a manner so persuasive as to convince the mind of an ordinarily prudent employer that facts exist which call for the servant's discharge. (p. 915.)

**EVIDENCE—Communications Made to a Prosecuting Attorney.**—Where a servant is prosecuted for a tort committed by him, and his employer calls on the prosecuting attorney and is by the latter informed of the prosecuting witness' version of the transaction, the conversation with the prosecuting attorney cannot be excluded as a privileged communication in an action subsequently commenced against the employer for the same tort. (p. 916.)

Action for assault and false imprisonment. The defendant was the proprietor of a large department store, where the plaintiff and her daughter went to make some purchases in June, 1900. After buying some lace, they were approached by Saxe, a floor-walker in the employ of the defendant, and accused of stealing the lace. The daughter testified: "We were three feet away from the outer door of the vestibule on the sidewalk, when Saxe stopped us—tapped me on the shoulder. I looked around to see what he wanted and who he was. He asked me for the lace. I handed him the package of lace I had purchased. He said: 'This is not the lace I want. It is the lace you stole.' I said I did not steal any lace. Then he stepped around sort of back of me and my mother, who stood at my left, almost directly in front of me, and then he apparently took a bolt of lace of about twelve yards from under her arm, made such a movement, and said, 'Here it is.' That is the first I had noticed or seen anything of it. After he spoke about this, he asked us to come back into the store with him. I turned around and faced him—he was standing almost next to the door, just outside, so people could go in and out—and he said, 'Come back into the store,' and we went."

The plaintiff and her daughter went with Saxe into a small room, where he shut and locked the door, tore open plaintiff's dress, and threatened to send both women to the police station unless they paid him fifty dollars. They denied stealing any lace, but were kept half an hour, and were released only after giving him fifteen dollars, all the money they had. Saxe died before his testimony was taken. The jury returned a special verdict in response to a question as follows:

"1. Did the plaintiff sustain an injury on the eighteenth day of June, 1900, at the defendant's store, known as the 'Boston Store,' in the city and county of Milwaukee, at the hands of one J. H. Saxe? A. (By consent of all parties.) Yes. 2. Was the said J. H. Saxe on the eighteenth day of June, 1900, in the employ of the defendant, Julius Simon, as floor-walker? A. (By consent of parties.) Yes. 3. Were the

acts causing the plaintiff's injury done by said J. H. Saxe when acting within the scope of his employment by the defendant? A. Yes. 4. Did the defendant ratify the acts of said J. H. Saxe toward the plaintiff after having learned the fact? A. Yes. 5. If the court should be of the opinion that the plaintiff is entitled to recover compensatory damages, at what sum do you assess the plaintiff's compensatory damages herein? A. Two thousand five hundred dollars. 6. If the court should be of the opinion that the plaintiff is entitled to recover, in addition to compensatory damages, punitive or exemplary damages, at what sum do you assess the plaintiff's exemplary or punitive damages? A. None."

Verdict for the plaintiff, which the defendant moved to set aside. The motion was denied, and judgment entered on the verdict. The defendant appealed.

Fiebing & Killilea, Theodore Kronshage, Jr., and Oscar M. Fritz, for the appellant.

D. T. Phalen, Simon Gillen and Ernest A. Kehr, for the respondent.

**601** WINSLOW, J. The undisputed evidence showed that Saxe was guilty of assault and false imprisonment, and the serious questions in the case were whether the defendant was shown to be liable for the acts of Saxe, either because they were within the scope of his employment or because the defendant ratified such acts after knowledge.

The principle is well understood that the master is liable for the negligent or wrongful acts of his servant committed in endeavoring to perform a duty delegated to him by the master, and this is so notwithstanding the method adopted by the servant may not have been authorized, and may even have been prohibited, by the master. On the other hand, it is equally well understood that if the servant steps aside from his master's business, and maliciously or wantonly commits a tort for the accomplishment of his own purposes, the master **602** is not liable for such acts. The test is not whether the act was done during the existence of the employment, but whether it was done in the prosecution of the master's business: *Bergman v. Hendrickson*, 106 Wis. 434, 80 Am. St. Rep. 47, 82 N. W. 304,

The scope of Saxe's duties was thus stated on the trial by the defendant: "It was a part of Mr. Saxe's business to watch



customers and prevent them from doing any wrongful acts in the store. It was not a part of his employment or business to settle with them or take from them in case he found anything. If he discovered anyone in the act of stealing, he was either to take the merchandise away from them, or call the police patrol, or have them arrested, as we have done in very many cases."

And again he says: "Mr. Saxe's duties in reference to persons suspected of stealing were either to prohibit them from taking the goods when they did not pay for them, or else call for the police and arrest them if they insisted upon it."

Thus it appears that it was Saxe's duty to watch customers and prevent them from doing wrongful acts; also to take stolen merchandise away from customers whom he discovered in the act of stealing. Now if, as matter of fact, Saxe honestly believed that plaintiff had stolen a bolt of lace or other property in the store, and, acting on that belief, imprisoned the plaintiff and searched her, it seems clear that as to these acts, at least, the defendant would be liable, within the rule of the Bergman case, because the servant was attempting to carry out his duty in taking merchandise away from a customer whom he supposed was in the act of stealing it, though using means not authorized by the master. On the other hand, if the servant knew no merchandise had been stolen, but falsely or by a trick made it appear that the plaintiff had the lace under her arm, and imprisoned and assaulted <sup>603</sup> her in order to extort money from her, the defendant would not be liable for any of his acts, because Saxe had stepped aside from his employment to commit a tort for his own purposes and ends. The defendant strongly claims that the evidence shows the latter state of facts, without dispute, and hence that the third question of the verdict should not have been submitted to the jury. This claim is not without considerable weight. Saxe's version of the transaction was never given, and we have really only the version given by the plaintiff's daughter. She testifies that Saxe stepped back of the plaintiff and apparently took a bolt of lace from under her mother's arm, and said, "Here it is," and that she had not seen anything of it before. A legitimate inference from this evidence, doubtless, is that Saxe produced the lace by some trick or sleight of hand, but is this inference conclusive? The daughter does not say that the lace was not in fact under her mother's arm, nor does she testify that Saxe produced it by a trick; and the plaintiff herself does not testify at all as to the matter, though she must have known what

the fact was, and was on the stand as a witness twice. In this situation of the evidence, we think it would be going too far to hold that the inference of a trick by Saxe is conclusive. Upon another trial such fact may perhaps appear, but, as the evidence stands upon this trial, we think it was a question for the jury under proper instructions.

This brings us to a consideration of the instructions given by the court upon the third question. The instructions were in part as follows: "A man acts within the scope of his employment when the motive which impels him is the performance of a duty with which he is charged by his employer. His method of performing that duty may not have been expressly authorized or have been contemplated, and may have been expressly prohibited; but his acts would be within the scope of his employment, provided he was intrusted with the duty he was <sup>604</sup> attempting to perform. The test of the scope of employment is the purpose of the act and not its method. Was the object of the act the performance of a duty resting upon the servant? If it was, then the act was within the scope of his employment; otherwise not. A master is liable for a wrong done by his servant, whether through negligence or malice of the latter, in the course of an employment in which the servant is engaged to perform a duty which the master owes to the person injured."

As to all of these instructions, except the last sentence, there is no serious difficulty. They are quite general in their nature, and not as helpful to the jury as more specific statements, such as are contained in the preceding portions of this opinion, would be, but we are unable to say that they are erroneous. We cannot regard the last sentence quoted, however, as in any way applicable to the present case. It would be applicable in the case of an assault upon a passenger by one of the servants of a common carrier, because in such case the common carrier owes the duty to the passenger of transporting him safely and protecting him against injury, including injury from the hands of the carrier's own servants. This principle and its reasons are well understood: *Craker v. Chicago etc. Ry. Co.*, 36 Wis. 657, 17 Am. Rep. 504; *Wood on Master and Servant*, 2d ed., sec. 321. It has not, however, been applied to a merchant in his relations to customers. It is true that customers in such case are upon the premises by invitation, and the merchant owes the positive duty to the customer of using ordinary care to keep the premises in a reasonably safe condition for

use by the customer in the usual way; and this doubtless includes the duty of using ordinary care to employ competent and law-abiding servants, but we do not understand that he insures the customer's personal safety. We have been referred to no cases so holding. The general principle as frequently stated is that persons who come upon premises to do business with the occupant at his express or implied request are there by invitation, and that they are entitled to <sup>605</sup> the same treatment due to all invited persons, namely, the exercise of ordinary care by the occupant: *Hupfer v. National D. Co.*, 114 Wis. 279, 90 N. W. 191. We therefore conclude that it was error to give the sentence in question to the jury in this case, because the case was not one where it could rightly be applied.

Upon the fourth question the court charged the jury as follows: "To ratify" means to confirm or approve of, and such ratification may be signified by acts of omission as well as of commission—negatively as well as affirmatively. So, in deciding this question, you may consider what the defendant did not do that he should have done if he desired to disaffirm, as well as what he did do indicative of affirmance or disaffirmance; and you will notice the last part of the question. This ratification or affirmance, if it took place, must have taken place, in order that you may answer this question in the affirmative, after having learned of the facts. You will answer that question 'Yes' or 'No,' as you determine the fact to be from all the credible evidence in the case."

Here, too, it will be noticed that the language is very general. There is no positively erroneous statement in it, but in what respect does it enlighten the jury? They were informed that ratification might be signified by acts of omission as well as by acts of commission, but they were no wiser than before with regard to what acts of omission or commission would constitute ratification. The helpfulness of a charge lies in the application of the law to the facts of the instant case. It does little good to tell a jury that ratification may be signified by acts of omission, and to scrupulously refrain from telling them what acts of omission are meant. Not only does such a charge do little good, but it may become absolutely misleading. For instance, in the present case the only fact in evidence from which ratification could have been rightfully found was the fact (testified to by the defendant, but afterward partially contradicted by him) <sup>606</sup> that he retained Saxe in his employ after he had been informed of the plaintiff's

story. This being the only testimony on which ratification could be predicated, the jury should have been told under what circumstances retention of the employé constitutes ratification. On the contrary, they seem to have been set adrift without compass or sextant upon an uncharted sea, and allowed to select any act of omission or commission which they chose, and predicate ratification upon it. The vice in this very clearly appears from a moment's consideration of one piece of testimony. Upon cross-examination, the defendant testified that he never went to see the plaintiff after being informed of her story. This was certainly an act of omission. The jury would not have been justified in finding ratification from this fact alone, yet, under the charge, they may well have done this very thing. We cannot but think that, while the language of the charge is not erroneous in law, still, when taken in connection with the facts of the case, it is positively misleading and prejudicial, because it allows the jury to find ratification from acts or omissions which are entirely inadequate for that purpose. Retention of a servant in his employment after notice to the principal of a tort committed by the servant is evidence of ratification of the act by the principal: *Bass v. Chicago etc. Ry. Co.*, 42 Wis. 654, 24 Am. Rep. 437; *Robinson v. Superior Rapids etc. Ry. Co.*, 94 Wis. 345, 59 Am. St. Rep. 897, 68 N. W. 961, 34 L. R. A. 205. The information to the principal should be full and complete, in order to justify the conclusion of ratification on this ground: *Patry v. Chicago etc. Ry. Co.*, 77 Wis. 218, 46 N. W. 56. It is not essential that the information should come from the plaintiff, but however it comes it should be more than mere idle rumor and should be so convincing and persuasive as to convince the mind of an ordinarily prudent employer that the facts exist which call for the servant's discharge. Any other rule would necessitate the discharge of faithful employés whenever their conduct is assailed by irresponsible, unfounded gossip, <sup>607</sup> and such a rule would be plainly unjust both to employer and employé. The question is generally one for the jury, in view of all the information which came to the employer, and was such in the present case, under proper instructions.

A number of rulings upon evidence are assigned as error, but none of them are deemed well taken, and but one of them is regarded of sufficient importance to require special treatment. On the day after the assault upon the plaintiff, Saxe was arrested and prosecuted criminally for the offense; and



the defendant, Simon, called on the assistant district attorney of Milwaukee county with reference to the matter. The assistant district attorney was placed on the stand by the plaintiff, and testified, against objection, that in that conversation he stated to the defendant Mrs. Cobb's version of the transaction at length. This ruling is now assigned as error, and the ground taken seems to be that the communications were privileged, because they were communications between attorney and client. This objection is plainly not well taken. There was no relation of attorney and client between the parties, and the defendant was not even a prosecuting witness. It was rather an attempt on the part of the defendant to explain matters to the prosecuting officer from the defendant's standpoint. We are aware of no rule which excludes such testimony.

We regard the damages awarded as clearly excessive. While the act, as shown by the evidence, was entirely unjustifiable, there were no circumstances of public disgrace or insult; nor was there physical violence. The testimony tended to show that heart difficulty, weakness, and headaches have resulted from the occurrence; but the plaintiff testifies that she does her own housework, except the washing, and that she is not nearly so bad as she was at first. Under the evidence, we should regard any verdict exceeding one thousand dollars as excessive.

By the Court. Judgment reversed, and action remanded for a new trial.

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*The Principal Case* is cited with other decisions involving similar questions in the monographic note to *Crane v. Bennett*, 177 N. Y. 106, 101 Am. St. Rep.

## LE FEBER v. VILLAGE OF WEST ALLIS.

[119 Wis. 608, 97 N. W. 203.]

**MUNICIPAL CORPORATIONS—Judicial Control of Legislative Discretion of.**—The honest judgment of the municipal authorities as to what is promotive of the public welfare must ordinarily control, although not in accord with the views of the court. Nevertheless, the delegation of legislative power to subordinate political divisions of the state is solely for public purposes and must be exercised with reference to them. If an act is so remote from every such purpose that no relation thereto can, within human reason, be discovered, such act must be deemed excluded from the delegation. To that extent courts will inquire into the purposes and policy of municipal conduct, and will hold unauthorized and invalid acts which are wholly unreasonable. (p. 918.)

**MUNICIPAL CORPORATIONS—Ordinances for Supplying Light, When Unreasonable.**—An ordinance whereby a village contracts for thirty years certainly, and fifty years contingently, to take all its lights from a company and pay for them at a rate fixed by such ordinance is unreasonable, and hence void, especially when the village has already reached a population entitling it to become a city and it is practically a part of a great city, though not yet within its corporate limits, and the prices to be paid are in excess of those elsewhere paid under similar circumstances. (pp. 922, 923.)

**MUNICIPAL CORPORATIONS—An Ordinance Submitted to the Popular Vote may, Nevertheless, be Declared Void and Unreasonable.**—An ordinance, if unreasonable, is as much void when approved by a vote of the electors as if the municipality had acted through any other of its authorized agencies, though doubtless the assent of the large part of the community may be recognized by the courts as a cogent circumstance in support of the reasonableness of the ordinance. (p. 923.)

**MUNICIPAL CORPORATIONS—Ordinances of, When Must be Declared Wholly Void.**—If an ordinance contracting for the supply of light to a village is unreasonable and void, because of the great length of the term and the excessive prices by which it seeks to bind the municipality, the courts cannot single out parts of the ordinance which it deems reasonable and declare it valid as to them. (p. 923.)

Suit by residents and taxpayers of the village of West Allis brought February 24, 1903, to have an ordinance declared void and to enjoin officers of the village from creating liability or making any payments under such ordinance. By it the Northwestern Heat, Light and Power Company, a corporation, was granted a franchise to construct and maintain a system and the necessary appliances for the manufacture of gas and electricity and selling and distributing to the village and its inhabitants heat, light, and power by means of electricity, gas, oil, naphtha, gasoline, and acetylene. The rights given were exclusive. The ordinance specified the prices which

were to be paid, and the village bound itself for the period of thirty years. Within four months prior to the expiration of that time the village reserved the privilege of purchasing the plant of the corporation at a price to be agreed upon, and in the event of failure to agree, then to be fixed by arbitration, the company to choose one arbitrator and the village another, and in the event of the failure of these two to agree, they were to select a third. If the municipality did not exercise this power to purchase, the rights of the corporation were to continue for twenty years longer. The trial court dismissed the plaintiffs' complaint, and they appealed.

Edgar L. Wood and Quarles, Spence & Quarles, for the appellants.

Winkler, Flanders, Smith, Bottum & Vilas and F. H. Remington, for the respondents.

**613** DODGE, J. It is perfectly well settled in this state, as in most others, that municipal corporations are not completely beyond judicial review and control, even in the exercise of the jurisdiction and discretion delegated to them by the legislature. True, that discretion must and will be accorded broad scope and great deference. The honest judgment of the municipal authorities as to what is promotive of the public welfare must ordinarily control, although not in accord with the views of courts. Nevertheless the delegation of legislative power to subordinate political divisions of the state is solely for public purposes, and must be exercised with reference to them. If an act be so remote from every such purpose that no relation thereto can, within human reason, be discovered, such act must be deemed excluded from the delegation. To that extent, then, courts will inquire into the purpose and policy of municipal conduct, and will hold unauthorized, and invalid, acts which are wholly unreasonable: *Hayes v. Appleton*, 24 Wis. 512; *Barling v. West*, 29 Wis. 307, 315, 9 Am. Rep. 576; *Clason v. Milwaukee*, 30 Wis. 316; *Cook v. Racine*, 49 Wis. 243, 5 N. W. 352; *Atkinson v. Goodrich T. Co.*, 60 Wis. 141, 160, 50 Am. Rep. 352, 18 N. W. 764; *Stafford v. Chippewa Valley etc. Ry. Co.*, 110 Wis. 331, 351, 85 N. W. 1036; *State v. Sheboygan*, 111 Wis. 23, 37, 86 N. W. 657; *Hurley W. Co. v. Vaughn*, 115 Wis. 470, 476, 91 N. W. 971; *State Center v. Barenstein*, 66 Iowa, 249, 23 N. W. 652; *Hall v. Cedar Rapids*, 115 Iowa, 199, 88 N. W. 448; *Flynn v. Little Falls*

etc. Co., 74 Minn. 180, 77 N. W. 38, 78 N. W. 106; State v. Cincinnati etc. Co., 18 Ohio St. 262, 301; Chicago v. Rumpff, 45 Ill. 90, 96, 92 Am. Dec. 196; Davenport v. Kleinschmidt, 6 Mont. 502, 533, 13 Pac. 249; Lamar v. Weidman, 57 Mo. App. 507, 510; Dillon on Municipal Corporations, secs. 97, 311, 443.

The ordinance before us is assailed as thus unreasonable. Most prominent among the elements claimed to render it so is the extraordinary term, of thirty years certainly and fifty years contingently, through which the village and its municipal successors are bound under its terms to take all its lights from this company and pay for them at rates now definitely fixed. That a term of thirty years in a contract for water supply is not under all circumstances sufficient alone to invalidate the contract as unreasonable is a proposition now settled: Oconto W. S. Co. v. Oconto, 105 Wis. 76, 80 N. H. 1113; Hurley W. Co. v. Vaughn, 115 Wis. 470, 91 N. W. 971. This is the extent, however, to which this court has gone, and thirty-one years seems to be the longest period sustained in any cited case: Reed v. Anoka, 85 Minn. 294, 88 N. W. 981. On the other hand, much shorter terms of contract, either for other service than water supply or complicated by other elements, have been held unreasonable. The considerations which in the Oconto case were deemed sufficient to warrant a thirty-year contract for water, namely, magnitude of investment and time required to develop private consumption to the profit producing point, apply, though in less degree, to a gas-lighting contract, in greatly diminished degree to the supply of electric lights, but hardly at all to supply of naphtha or oil street lights,<sup>615</sup> where no outlay for plant is required. Hence a term of contract for any of these forms of lighting might well be unreasonable, though sustainable in a water supply contract. Further, we cannot deem the contract period in the present ordinance other than fifty years. The contingency upon which the village may limit it to thirty years is so restricted as to be hardly worthy of mention. The practical possibility of securing municipal action or effecting fiscal arrangements during a four months period, not to occur till thirty years hence, is slight. The opportunity for the company to refuse to agree on price, and to render practically ineffectual the provisions for arbitration by selecting as its member of the board one who may refuse assent to any impartial third member, is obvious.



A further very obvious and cogent consideration consists in the difference between the situation of West Allis and that of either Oconto or Hurley. Both the latter were, and were likely to remain, individual and independent communities, with no opportunity to obtain water or light from plants established elsewhere, and with prospects of but normal municipal growth and development. West Allis was in practical effect a part of the urban development of Milwaukee, though outside its limits. Its existence was due to the already accomplished fact of the location of vast factories as part of the business and manufacturing aggregation pertaining to the metropolis. Its streets were laid out in continuation and extension of the system already existing in Milwaukee. The electric street-car lines of that city already traversed the new village. Its proximity was such that speedy extension to it of the gas and electrical facilities existing in the city was beyond reasonable doubt.

Yet further, the legislature has established, as to cities, ten years as the limit permissible for lighting contracts: Stats. 1898, secs. 925-952, subd. 34. The evidence made apparent that West Allis, at the time of this contract, had <sup>616</sup> already attained population more than sufficient to make it a city ipso facto, though that fact could not be effectively established until a state census should be taken: Stats. 1898, sec. 925g. While legally a village, so that the absolute legislative limitation on cities did not apply, yet obviously all the reasons which induced such legislative limit are cogent as reasons why it ought not to be exceeded by this village. All these distinctions render it obvious that the two Wisconsin cases above cited can have no controlling effect as to the reasonableness of the time limit in this contract, even if that were the only extraordinary element therein.

That a fifty year term even for gas lighting is extraordinary and far in excess of any sustained by authority, we have already said; also that the situation was such as to make specially unnecessary any extraordinary and special provision for lighting plant; but whether any mere length of time alone must force conclusion of unreason we need not decide; that element is certainly one which, with others, must have effect, though insufficient alone. One such additional element was the price agreed to be paid throughout the term. Without going into detail of the evidence, it is apparent that such prices considerably exceeded those elsewhere paid under sub-

stantially similar circumstances; electric arc lights by thirty per cent to fifty per cent, gas lights by twenty-five per cent, and gasoline lights by seventy-five per cent. These excessive prices for so long a term were rendered the more unreasonable by the probability, already mentioned, that the gas and electric lighting facilities of Milwaukee would speedily be extended to this village, with prices lower than those with which the above comparisons are made. Also, it is striking that the greatest excess in price was upon the gasoline lights, with which the village might in the main be forced to content itself at the will of the company, as we shall presently demonstrate. These, of course, might be supplied by anyone without large preliminary investment, and <sup>617</sup> present none of the reasons for long term contract or large price which might be urged in favor of gas or electric lighting, for which expensive plant must be provided.

Not the least striking characteristic of this ordinance is its omission of all the ordinary reservations to the village of power to control the manner of its performance in those respects in which time and circumstances must make wise provision in advance impossible; also the absence of any binding contract on the part of the company to furnish lights of the kinds and at places which public welfare may demand. The only reservation of any power of control in the village is of "such rights as it cannot waive" to make ordinances and regulations. This is, of course, a most extraordinary provision, utterly needless and meaningless in a contract, and no adequate substitute for those reservations usually so industriously made in franchises and contracts of this sort. Further, the company is given power to make all regulations in its discretion, some of which may be very burdensome alike to the village and to the private consumers, with only the limitation that they shall be reasonable and not contrary to law and not beyond the power of said village to permit. A more complete surrender by a village of its power to protect the public welfare in the important matter of street lighting can hardly be imagined.

As to the agreement of the company to supply lights, it is substantially without force except as to gasoline or oil lamps. The agreement is in terms to keep the village and its citizens supplied with light by the six mentioned means and any or all of them. This, perhaps, would give option to the city, and might enable it, to compel the supply of gas and electric light at places where necessary; but it is at once qualified by the

limitation that such supply shall be with gas and electric light only upon and along those parts of the highways where gas mains are laid at the time, or poles erected and wires strung. We search the contract in vain for any power in the <sup>618</sup> city to compel the company to lay its pipe or stretch its wires at any specific place or to any specified extent. The only burden in the latter respect assumed by the company is that it shall commence the construction of its plant and active work in furnishing light within five months from the day of acceptance of the ordinance. As to when such construction shall be completed, the ordinance is silent, as also as to what shall constitute such completion. Even if this may require that either an electric or a gas plant be established, there is nothing here to require the laying of even a single block of gas-pipe or the stretching of a single block of wire. Certainly, when the company shall have gone to even that extent, it will have satisfied every term of the contract. The rest of the village, if lighted at all, must be lighted with oil or gasoline, at prices, as we have said, seventy-five per cent above those charged elsewhere, and with an absolute restriction upon the village against purchasing from anyone else even this temporary form of light. The result is that this village has bound itself for fifty years to buy oil or naphtha lights from this company at a grossly excessive price, presumably so profitable as to remove the motive of self-interest which perhaps might otherwise be relied on to induce extension of gas mains and electric wires sufficiently to meet the most pressing public needs. Thus the village may never within that term be able to obtain, except to the most trifling extent, any of the modern forms of street lights, for it can buy them of no one else.

We have perhaps carried the detailed analysis of this ordinance further than was necessary, and may end it here, although there are various other phrases, clauses, and provisions of the contract most significant of a result or purpose to merely benefit the company, without thought or consideration for the public welfare. We cannot avoid the conviction that the terms of this ordinance and contract bring it within <sup>619</sup> that degree of unreasonableness which, after yielding all due deference to the discretion vested in the municipality, compels us to say that that body has transcended the powers delegated to it by the legislature, and that its act in passing this ordinance and entering into this alleged contract is void for that reason.

Some contention is made that because the legislature requires the village board to grant a franchise when, upon submission to popular vote, the majority of the votes have been in the affirmative (secs. 959-952), the doing of such act is no longer discretionary with the village board, but is in effect the act of the legislature, and therefore cannot be reviewed by the courts as to its reasonableness. This argument confuses the municipal corporation with the village board. It is not alone the acts of one or another of the several village officers which are subject to review for unreason by the judiciary, but the act of the corporation itself, which is also a mere delegate of certain powers, which it must exercise within such delegation. Now, the electorate of this village, in special election assembled, is none the less an agency of the municipality than is the village board or any of the village officers, within their respective jurisdictions. True, the electorate comes nearer to the whole people of the village, who are the corporation, but it does not constitute the whole. It may speak for and bind the whole only within the limits of the authority conferred upon it, just as can the village board or any other officer. No authority is cited for the proposition that, because the village acts in some other way than through its village board, its acts, however unreasonable, are beyond revision and correction by the judiciary, and no reason presents itself to our minds in favor of such view. This ordinance, if unreasonable, is as much void when approved by a certain number of the electors as if the village had acted through any other of its authorized agencies, though doubtless <sup>620</sup> the assent of so large a part of the community would be recognized by the courts as a cogent circumstance in support of the reasonableness of an ordinance.

It is further urged that although we might find this ordinance unreasonable and therefore illegal in certain respects—as, for example, in its length of time—we should restrict the invalidity to those elements, leaving valid the other portions. It is hardly necessary, after the discussion of the grounds of the invalidity of this ordinance, to say that they so permeate the whole and are so obviously interdependent, and the consideration, either to the village or to the company, for all the provisions thereof, that no such severance is possible. We cannot, for example, eliminate one-half of the price for gasoline lamps and say that the ordinance and contract shall stand valid as against the company at such diminished price; nor can we supply in the contract an agreement by the company to sup-



ply lights of different kinds, as the village government may deem public welfare to demand in the future. Hence we can find no escape in this contention from the conclusion of complete invalidity.

Many other grounds for invalidating the ordinance in question are asserted and have been vigorously argued, but, as complete invalidity results from the considerations already stated, discussion and decision of the others would be needless expenditure of labor. We therefore do not pass upon them.

By the Court. Judgment reversed, and cause remanded with directions to render judgment in favor of the plaintiffs according to the prayer of the complaint.

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*Courts* will not ordinarily inquire into the motives that actuate legislative action on the part of municipalities, and they are reluctant to inquire into the reasonableness, expediency, or justice of municipal ordinances. However, courts have power to inquire into alleged abuses of powers by cities and towns in the enactment of ordinances, and to declare them void when the limits of authority have been transcended: *State v. Davidson*, 50 La. Ann. 1297, 69 Am. St. Rep. 478, 24 South. 324; *Frost v. Chicago*, 178 Ill. 250, 69 Am. St. Rep. 301, 52 N. E. 869, 49 L. R. A. 657; *Grand Rapids v. Brandy*, 105 Mich. 670, 55 Am. St. Rep. 472, 64 N. W. 29, 32 L. R. A. 116; *State v. Taft*, 118 N. C. 1190, 54 Am. St. Rep. 768, 23 S. E. 970.

*A Contract Between a Municipal Corporation and a water company* whereby the municipality agrees to limit the amount of license tax to be imposed on the water company during the term of the contract, is held ultra vires in *Mayor etc. of Birmingham v. Birmingham Water Works Co.*, 139 Ala. 531, 101 Am. St. Rep. —, 36 South. 614.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**WYOMING.**

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**FIRST NATIONAL BANK v. CITIZENS' STATE BANK.**

[11 Wyo. 32, 70 Pac. 726.]

**APPEAL AND ERROR—Restriction to the Record.**—If a request is made for a separate statement of the conclusions of fact and of law, the record should show such request and that it was made in due season. (p. 928.)

**APPEAL AND ERROR—Facts Relied upon Must Appear by the Record.**—It is not sufficient, to entitle a party on appeal to rely upon his request that the law and the facts be separately found, that he append an affidavit to the motion for a new trial deposing to such request. (p. 929.)

**APPEAL AND ERROR.—A Request for a Separate Statement of Conclusions of Fact and of Law Comes too Late** if first made after the judge has announced his decision and directed the preparation of a decree in accordance therewith. Such request should be made at the time of the trial, or not later than the final submission of the case for decision, or some later time fixed by the court. (p. 929.)

**HOMESTEAD—Mortgages upon.—An Acknowledgment Taken as Required by the Statute is Essential** to the validity of a mortgage of a homestead or of any release or waiver of the homestead right. (p. 930.)

**HOMESTEAD.—A Mortgage of a Homestead the Acknowledgment to Which was Taken and Certified by an Officer Disqualified to Act is void.** (p. 930.)

**CONVEYANCE, Acknowledgment of, Who Disqualified to Take.** A notary public who is an owner of, and stockholder in, a corporation is disqualified from taking the acknowledgment of a mortgage executed for its benefit, though it is not named as a party therein, as where a note and mortgage are on their face in favor of a natural person, but the debt secured in fact belongs to the corporation. (p. 933.)

**LIMITATION OF ACTIONS—Statute, When not Sufficiently Pleaded.**—If, in an action to foreclose a mortgage, a junior mortgagee made a party defendant, answers, alleging that his lien is prior and superior to that of the plaintiff, this is not a pleading of the statute of limitations against the plaintiff's claim, nor can it

entitle such defendant to resist plaintiff's suit on the ground that his cause of action is a note in renewal of a debt which is barred by the statute. (p. 934.)

**LIMITATION OF ACTIONS—Leave to Plead the Statute of Limitations, What does not Amount to.**—Where the defendant does not plead the statute of limitations, an order made after the trial granting the parties the privilege of amending their pleadings to conform to the facts proved does not entitle the defendant to file an answer pleading such statute, and if filed, the court may strike such answer out. (p. 934.)

**MORTGAGE, Renewal of, Effect upon a Second.**—If the note to secure which a mortgage is given is renewed after the execution of a second mortgage to another party, such second mortgage does not thereby become entitled to priority on the ground that the renewal increases the burden on the encumbered premises, where there is nothing to show that the rate of interest on the renewal note is greater than on the original. (p. 935.)

**MORTGAGE—Effect of Renewal as Against a Second Mortgage.**—The taking of a new note in place of one to secure which the mortgage was given does not operate to extinguish the lien of the mortgage, in the absence of an agreement between the parties to that effect, and the first mortgage may therefore be foreclosed against a junior mortgagee whose rights accrued before such renewal. (p. 936.)

**MORTGAGE—Foreclosing for Interest.**—If a note given in renewal of a pre-existing note which was secured by a mortgage is by its terms due two years after date, but provides for annual payment of interest, and that the failure to pay any interest within thirty days after due shall cause the whole note to become due at once at the option of the holder, he is entitled, as against a junior mortgagee, to foreclose before the expiration of the two years if the interest becomes due within that time and remains more than thirty days unpaid. (p. 936.)

**COLLATERAL SECURITY.**—If a note has been transferred as collateral security, the original payee cannot, by agreement with the maker, extend the time for payment. (p. 937.)

E. E. Enterline and N. K. Griggs, for the plaintiff in error.

E. E. Lonabaugh, for the defendant in error.

**51** POTTER, C. J. This suit was instituted in the district court April 22, 1899, by the Citizens' State Bank of Dubuque, Iowa, for the purpose of foreclosing three certain real estate mortgages executed by George Tschirgi and his wife, Marie T. Tschirgi, to secure the payment of certain promissory notes given by said George Tschirgi, or by him and his wife. Matthew Tschirgi, the father of George, the First National Bank of Sheridan and E. A. Whitney were made **52** parties defendants as having or claiming to have some interest in or liens upon the lands covered by the mortgages. Pending the settlement of the issues in the case, Catherine Tschirgi, the wife of Matthew, was made a party defendant, and her interest was

disclosed by appropriate pleadings, as was also the interest of Matthew Tschirgi. Simeon E. Baldwin does not seem to have appeared in the cause until the rendition of the final decree, whereby, by consent of all the parties, the title to a certain tract of the lands involved was quieted in him. The First National Bank of Sheridan being interested in the lands, or a part thereof, as the owner of a mortgage executed to E. A. Whitney by said George and Marie T. Tschirgi, appeared and answered, and by cross-petition set forth its mortgage and prayed for its foreclosure, alleging the same to constitute a lien superior and prior to the mortgages held by the plaintiff, notwithstanding that it was subsequent as to time of execution.

Five separate tracts of land were originally involved in the controversy, but in this court the contest is narrowed to two of the tracts. The title to one of the tracts originally involved was, as above stated, quieted in Simeon E. Baldwin, by consent of all the parties; and by like consent the title to another tract was quieted in Matthew Tschirgi. A third tract, upon which the plaintiff was decreed a first and prior lien under one of its mortgages, is out of the case, the defendant bank, plaintiff in error here, not complaining of the decree in that respect.

By the final decree of the district court, the mortgages upon the other two tracts held by the plaintiff, the Citizens' State Bank of Dubuque, were found and adjudged to be prior and superior to the mortgage of the defendant bank—the First National Bank of Sheridan; and the mortgage of the last-named bank was adjudged void so far as it affected the homestead of the mortgagors; and in the decree providing for the sale of the homestead, the homestead exemption of fifteen hundred dollars was ordered paid to said George and <sup>53</sup> Marie T. Tschirgi, after satisfaction of the amount due upon the mortgage of the Citizens' State Bank covering that tract, and before the application of any of the proceeds of the sale thereof, toward the mortgage thereon of the First National Bank.

The First National Bank of Sheridan brings the cause here on error, and complains of the decree in so far as it relates to the homestead and the validity of its mortgage covering the same, and adjudges the mortgages of the plaintiff bank to constitute superior liens upon the two tracts now in controversy. Before proceeding to a discussion of these matters, we will dispose of a preliminary question raised by plaintiff in error.

The cause was tried and submitted to the court, and thereupon taken under advisement on the fourth day of January,



1900. Final decree and judgment was rendered August 30, 1900. The findings of the court to some extent at least are contained in the decree, but it is contended that there is not a separate statement of the conclusions of fact and law; and it is urged that error was committed by the court in failing to state its conclusions of law and fact separately, as requested by the plaintiff in error. It may be, and doubtless should be, conceded that the decree does not in form and substance amount to a separate statement of the conclusions of law and fact as contemplated by the statute providing therefor when requested; indeed, the decree states that the issues are found generally for the plaintiff. The statute on the subject is as follows: "Upon the trial of questions of fact by the court, it shall not be necessary for the court to state its findings, except, generally, for the plaintiff or defendant, unless one of the parties request it, with the view of excepting to the decision of the court upon the questions of law involved in the trial, in which case the court shall state in writing the conclusions of fact found separately from the conclusions of law": Rev. Stats., sec. 3660.

<sup>54</sup> One of the grounds for new trial set forth in the motion therefor was that the court erred in failing and refusing to state and find its conclusions of fact and law separately, as requested by defendant bank; and attached to the motion appears to have been an affidavit of the attorney for the bank setting forth that, "after the said cause had been submitted to the aforesaid court for its decision and judgment, and after the presiding judge had indicated what his decision or the decision of the court would be, and had requested the attorney for the plaintiff to draw up the decree in accordance therewith, but before entering of the decision and judgment in the said action, to wit, on or about the 20th of June, 1900, atlant, in behalf of the defendant bank, made request in writing of the said presiding judge that the said court and judge should state and find its conclusions of fact and of law separately." The record is elsewhere silent respecting the request for separate findings, and for this reason we think that the question is not presented.

The record should disclose that a request for separate statement of conclusions of fact and law was in fact made, and that it was made in due season. And a recital in the motion for new trial, or a statement in the affidavit attached to the motion, that a request was made, is insufficient: *Smith v.*

Uhler, 99 Ind. 140; Nickless *v.* Pearson, 126 Ind. 477, 26 N. E. 478; Van Horn *v.* State, 5 Wyo. 501, 40 Pac. 964; Elliott's Appellate Procedure and Trial Practice, sec. 732. But not having been made until after the judge had announced his decision, and directed the preparation of decree, more than five months after the cause had been submitted, the request came too late. The court was not then required to comply with it; Elliott's Appellate Procedure and Trial Practice, sec. 732; Toledo *v.* Barnes, 1 Ohio N. P. 188; Wilcox *v.* Byington, 36 Kan. 212, 12 Pac. 826; Ross *v.* Baker, 58 Neb. 402, 78 N. W. 730. In the case last above cited, under a statute precisely like our own, the Nebraska court say that "it is proper, in order that the trial judge may examine and consider the questions of fact and law, and formulate and prepare <sup>55</sup> the requisite statements, that the request should be made at the time of the trial, and not later than at the final submission of the cause for decision, or at a later time, to be fixed by the court. The judge should not be called upon at the same time of the rendition of the decree to then particularize in regard to every conclusion of fact and also of law. He undoubtedly might and may do so. We think it discretionary with him, if the request is made later than at the time we have indicated, whether he will comply with it or not."

The mortgage held by the plaintiff in error, and under its cross-petition sought to be foreclosed, covered, in addition to other lands, a tract of one hundred and sixty acres found to be the homestead of the mortgagors, George and Marie T. Tschirgi. The mortgage was given by them to E. A. Whitney to secure the payment of a note made payable to him. He testified that, at the time of the execution of the mortgage, he had no interest in it nor in the debt, but that the debt secured belonged to the bank, and the note and mortgage were made to him for the benefit of the bank. It was, as he testified, the result of an indebtedness previously due to him that he had turned over to the bank. Subsequently he indorsed the note to the bank. He testified that when the note and mortgage were made he was merely acting for the bank. The court found that the mortgage was given to Whitney, as trustee for the bank. The acknowledgment of the mortgage was taken before and certified by a notary public, who was at the time the cashier of the bank and one of its stockholders. Upon the ground that the mortgage was acknowledged before a party interested therein, and in the debt secured thereby, it was held

void as to the homestead, to the extent of fifteen hundred dollars, the homestead interest.

Our statute provides that every sale, mortgage, disposal or encumbrance of a homestead shall be "absolutely void" unless the wife of the owner or occupant, if he have any, shall, separate and apart from her husband, freely <sup>56</sup> and voluntarily sign and acknowledge the instrument of writing, conveying, mortgaging, disposing of, or encumbering such homestead, and the officer taking her acknowledgment shall fully apprise her of her right and the effect of signing and acknowledging such instrument. It is provided further that no deed or other instrument shall be construed as releasing the right of homestead, unless the same shall contain a clause expressly releasing or waiving such right. And in such case the certificate of acknowledgment shall contain a clause substantially as follows: "Including the release and waiver of the right of homestead," or other words which will expressly show that the parties executing the deed or other instrument intended to release such right; and that no release or waiver of the right of homestead by the husband shall bind the wife unless she join in such release or waiver: Rev. Stats., sec. 2770; see, also, sec. 2776.

The provisions of the statute make the proposition too clear to require discussion that an acknowledgment taken as required by the statute was an essential element to render the mortgage in question effectual and valid as a release or waiver of the homestead right: *Ogden Bldg. Assn. v. Mensch*, 196 Ill. 554, 89 Am. St. Rep. 330, 63 N. E. 1049; *Gage v. Wheeler*, 129 Ill. 197, 21 N. E. 1075. And it follows that, should it be held that the acknowledgment was taken and certified to by an officer at the time and in that instance disqualified and incompetent to act, then the district court correctly adjudged the mortgage void as affecting the homestead interest.

The authority of a party interested in a conveyance to act officially in taking the acknowledgment of the execution thereof has been the subject of frequent judicial determination; and the general rule, sustained by the great weight of authority, is that an acknowledgment taken before one who is a party to the conveyance or is interested therein is void: *Ogden Bldg. Assn. v. Mensch*, 196 Ill. 554, 89 Am. St. Rep. 330, 63 N. E. 1049; *Kothe v. Krag-Reynolds Co.*, 20 Ind. App. 293, 50 N. E. 594; *Horbach v. Tyrrell*, 48 Neb. 514, 67 N. W. 485, 489, 37 L. R. A. 434; *Withers* <sup>57</sup> *v. Baird*, 7 Watts, 227, 32 Am. Dec. 754; *Brown v. Moore*, 38 Tex. 648; *Davis v. Beasley*, 75

Va. 491; *Groesbeck v. Seeley*, 13 Mich. 329; *Miles v. Kelley*, 16 Tex. Civ. App. 147, 40 S. W. 599; 1 Devlin on Deeds, 2d ed., sec. 467; 1 Cyc. 553, and cases cited; 1 Ency. of Law, 2d ed., 493, and cases cited. In *Cyclopedia of Law and Procedure* it is said: "Because of the probative force accorded to the certificate, as well as the usually important consequences of the instrument itself, public policy forbids that the act of taking and certifying the acknowledgment should be exercised by a person financially or beneficially interested in the transaction."

Our attention has been directed to the fact that in one case at least where the rule above stated is laid down, there was a statute expressly declaring interest of the officer a disqualification; but it is to be observed that, in that case, the general question was elaborately discussed, and the conclusion reached that, independent of the statute, the disqualification on account of interest existed on grounds of public policy: *Kothe v. Krag-Reynolds Co.*, 20 Ind. App. 293, 50 N. E. 594. It is true that the same reasons have not always been assigned as the ground or foundation for the principle that interest in the conveyance constitutes a disqualification. Some of the decisions have held the act of taking the acknowledgment, especially of a married woman when the law requires it to be taken separate and apart from her husband, to be judicial, and the disqualification is declared upon that theory. As to whether the act is a judicial one or ministerial only, there appears to be some conflict in the authorities. Other decisions have found the reason for the rule in the conclusiveness of the officer's certificate, while still others, and among them several of the more recent decisions, and which seem to us to have entered into a deeper consideration of the question, maintain the rule upon the broad ground of public policy, in the absence of any statutory declaration on the subject; and whether the act be ministerial or judicial is regarded as immaterial, or at least as unnecessary to a decision of the question.

58 Our statutes do not expressly disqualify an officer from taking an acknowledgment in case he should be interested in the transaction or the instrument, nor is the certificate of a notary made conclusive of the facts therein contained. The certificate is, however, constituted presumptive evidence: Rev. Stats., sec. 2602. And all deeds and other conveyances of any interest in lands, executed, attested and acknowledged in accordance with the statutory requirements, may be read in evi-



dence without, in the first instance, furnishing other or additional proof of the execution thereof: Rev. Stats., sec. 2739. And in case of the loss of the instrument, the record thereof may likewise be read in evidence: Rev. Stats., sec. 2739. These provisions, together with those declaring a conveyance properly executed, and acknowledged, when recorded, to operate as constructive notice thereof, serve to attach to an acknowledgment very important and far-reaching consequences. We perceive no sufficient reason, therefore, for going counter to the overwhelming weight of authority, and discarding the general rule prohibiting an officer financially or beneficially interested in a conveyance from taking the required acknowledgment of its execution. Not only do we think the rule a sound one, but the reasons therefor are peculiarly persuasive when applied to the case of an acknowledgment such as that required on the part of a wife in order to release the homestead right under the provisions of our statutes.

Thus far we have referred to the general rule. We come now to the degree or character of interest that will operate to render the officer incompetent to act, as applicable to the facts in the case at bar. There seems to be a direct and somewhat formidable conflict in the authorities as to whether one who is an officer of a corporation, but not a stockholder, is thereby disqualified to take the acknowledgment of an instrument to which the corporation is a party, or in which it is interested. We need not consider that question, since in the case before us the notary was <sup>59</sup> not only an officer, and one of the principal officers of the bank, but he was also a stockholder. In such a case the authorities present a much greater unanimity; and with remarkably few exceptions, one who is a stockholder, as well as an officer of the interested corporation, is held to be disqualified: *Ogden Bldg. Assn. v. Mensch*, 99 Ill. App. 67, 196 Ill. 554, 89 Am. St. Rep. 330, 63 N. E. 1049; *Kothe v. Krag-Reynolds Co.*, 20 Ind. App. 293, 50 N. E. 594; *Horbach v. Tyrrell*, 48 Neb. 514, 67 N. W. 485, 489, 37 L. R. A. 434; *Wilson v. Griess*, 64 Neb. 792, 90 N. W. 866; *Smith v. Clark*, 100 Iowa, 605, 69 N. W. 1011; *Hays v. Home etc. Loan Assn.*, 124 Ala. 663, 82 Am. St. Rep. 216, 26 South. 527; 1 Cyc. 555; *Iron Belt etc. Loan Assn. v. Groves*, 96 Va. 138, 31 S. E. 23; *Merced Bank v. Rosenthal*, 99 Cal. 39, 31 Pac. 849, 33 Pac. 732; *Florida Savings Bank v. Rivers*, 36 Fla. 575, 18 South. 850; *Miles v. Kelley*, 16 Tex. Civ. App. 147, 40 S. W. 599.

An excellent and thorough discussion of this question is to be found in the opinion of the court in *Ogden Bldg. Assn. v. Mensch*, 99 Ill. App. 67, 196 Ill. 554, 89 Am. St. Rep. 330, 63 N. E. 1049. The bank had the sole beneficial interest in the mortgage in question. Although the bank was not named therein as grantee, the individual to whom it was given acted simply for the bank, and he had no interest in it except as trustee for the bank. The paper evidence of the indebtedness was held by the bank, and it had the right to demand the indorsement of the payee therein named at any time. More than that, the mortgagors understood that the debt was due the bank, and that the mortgage was given to secure the bank on account of the debt due to it from them or from the husband, George Tschirgi.

We are unable to escape the conclusion that the notary taking the acknowledgment was incompetent to do so, and for that reason that the mortgage is void as to the homestead. The court committed no error in so holding.

In the second cause of action set out in the petition of the plaintiff, the Citizens' State Bank, it is alleged in substance that on November 22, 1887, George Tschirgi made and delivered to one D. H. Moon his promissory note for seven thousand three hundred and sixteen dollars, payable on or before — years after date, and that the said note is lost; that to secure its payment George <sup>60</sup> Tschirgi and wife made, executed and delivered their mortgage deed covering certain lands, which are described in the petition. The recording of the mortgage is alleged and also assignments thereof from said Moon to one Kiene, and from the latter to Matthew Tschirgi. Thereafter, it is averred, the original note being lost, and there being then due thereon the sum of twelve hundred and ninety-one dollars, and eighty-four cents, said George Tschirgi, on February 8, 1898, made and delivered to said Matthew Tschirgi his certain promissory note in renewal of said indebtedness for the said unpaid balance. The renewal note is set out in full in the petition, whereby it appears that it was made payable in two years after date, with interest, payable annually, at the rate of eight per cent per annum; and that it provided on its face that a failure to pay any of the interest within thirty days after it should become due should cause the whole note to become due and collectible at once, at the option of the holder. It is recited in the note

that it is given as a renewal of part of the debt secured by mortgage to D. H. Moon, and assigned to M. Tschirgi. It is then alleged that the note had been indorsed and delivered to the plaintiff as collateral security for a certain described indebtedness due from said Matthew Tschirgi, and that the maker had failed to pay the interest that fell due in February, 1899, in consequence whereof the plaintiff elected to declare the whole principal sum to be due, together with the unpaid interest.

It is now contended on behalf of the defendant bank, plaintiff in error here, that as to it, a second mortgagee, action on the debt was barred by the statute of limitations, for the reason that as it is argued that the first mortgagee could not by consenting to an extension of the time of payment of his debt prevent the statute of limitations from running so far as the rights of the second mortgagee are concerned.

As to this, it is sufficient to say that the statute of limitations was not pleaded by the defendant bank. We do not understand that the well-settled rule that the statute is not available under a denial is attempted to be controverted by <sup>61</sup> counsel; but it seems to be urged that an allegation in the answer that the lien of the defendant is prior and superior to that of plaintiff was sufficient to raise the question of the statute of limitations, or, at any rate, that in the absence of a motion to compel it to reform its pleading, the defendant, having made the said averment, should have been permitted to so amend its answer as to clearly plead the bar of the statute.

After the cause had been submitted indeed, the court having granted the parties the privilege of amending their pleadings to conform them to the facts proven, defendant filed an amended answer, wherein the statute of limitations was specially pleaded; but, on motion, that part of the answer was stricken out by the court.

It is clear that the allegation of the original answer relied on did not amount in any sense to a pleading of the statute of limitations, nor was it sufficient to furnish the basis for the amendment subsequently attempted to be made. The attempted amendment set up an altogether new defense; and even had there been a right upon proper showing under the statute to have interposed the defense by amendment before or even during trial, no such showing was made or offered as would have authorized the amendment at the time it was made; and it is plain that there exists no reasonable ground for the

interference of this court with the order striking the allegations constituting the new defense from the amended answer.

It is, however, seriously argued that, in case the defendant bank should be held to have waived the statute of limitations by its failure to plead it, its mortgage ought to have preference over the first mortgage on the ground that the taking of the renewal note increased the burdens on the encumbered premises. Unless the extension of the time of payment thereby preventing the running of the statute of limitations caused the burdens to be increased upon the mortgaged premises under the first mortgage, we are unable to see how such burdens were increased, except possibly that the rate <sup>62</sup> of interest was increased by the renewal note. The rate provided by the original note was not disclosed, and counsel for defendant bank complains of that; but this court cannot assume that the rate was increased in order to disturb the judgment, should there be anything in the proposition that the circumstance would have operated to reverse the order of the mortgage liens. As already stated, the defendant bank is not in a position to take advantage of the statute of limitations. In this connection it is but proper to mention that, in support of the motion to strike the new defense from the amended answer, an affidavit of counsel for plaintiff below was presented to the effect that, had the statute been set out by way of defense before the trial, it could have been shown by proof of partial payments from time to time that the claim had at no time been barred; and an offer to make such proof without serious delay was made, should the defense be allowed to stand.

We have not considered the proposition contended for, that as against the second mortgagee the holder of the prior encumbrance could not by agreement with the mortgagor prevent the running of the statute, since we do not regard that question as within the issues. The rule is laid down that the mere extension of the time of payment in no way impairs the security even as against subsequent encumbrances, although the extension may be effected by a renewal of the mortgage note: 1 Jones on Mortgages, sec. 355; 2 Jones on Mortgages, secs. 924, 925, 942; 21 Ency. of Law, 2d ed., 664, and cases cited; *Kearby v. Hopkins*, 14 Tex. Civ. App. 166, 36 S. W. 506. And that the taking of a new note in place of the one originally given does not operate as an extinguishment of the mortgage lien, unless that is shown to have been the actual and express intention of the parties: 20 Ency. of Law, 2d



ed., 1063. The thing secured is the debt, rather than the note or other evidence thereof, and so long as the debt can be traced, whatever form it may assume, the security remains good as security for the debt: 20 Ency. of Law, 2d ed., 959; 2 Jones on Mortgages, 924; Simmons Hdw. Co. v. <sup>63</sup> Thomas, 147 Ind. 313, 46 N. E. 645; Bray v. First Ave. Coal Min. Co., 148 Ind. 599, 47 N. E. 1073; McCoughrin v. Williams, 15 S. C. 505.

Not only was there a failure to show that the taking of the renewal note was intended to operate as an extinguishment of the debt, but it definitely appears by recital in the body of the new note that it was given as a renewal of part of the debt secured by mortgage to Moon, which had been assigned to M. Tschirgi, the payee named in such renewal note.

The further objection is urged that the suit was prematurely brought. The ground of this objection is that the suit was commenced before the expiration of two years after the date of the renewal note. But the note itself provided for annual payments of interest, and that a failure to pay any interest within thirty days after date should cause the whole note to become due at once, at the option of the holder. That provision was as much a part of the agreement as the promise to pay within two years after date; and we are unaware of any rule of law that prevented the parties upon extending the time of payment of the debt, doubtless then past due, to make the extension for the full term of two years conditional upon the prompt payment of the annual interest, and if not paid that the holder should be authorized to declare the whole amount due.

The third cause of action is based upon a note for five thousand dollars, given April 6, 1893, by George Tschirgi to Matthew Tschirgi, and a mortgage securing the same executed by said George Tschirgi and wife. The note was afterward indorsed and the mortgage assigned to the plaintiff, the same being held by the latter as collateral security for the debt already mentioned due to the plaintiff from Matthew Tschirgi. The maturity of the note was not stated therein otherwise than as follows: "——— after date, without grace." The rate of interest was not stated, the space therefor being left blank; but as to interest, it is alleged in the petition that interest had been paid up to October 6, 1894, in the sum of four hundred and fifty dollars, the same being at the rate of six per cent

<sup>64</sup> per annum. On the seventeenth day of February, 1898, George Tschirgi signed a paper reading as follows: "For value received, the matter of payment is hereby extended for two years from April 6, 1898, on a certain promissory note dated April 6, 1893, for five thousand dollars, executed by me to Matthew Tschirgi, which note is hereby renewed for two years from April 6, 1898."

The note provides that interest shall be payable annually, and both note and mortgage contain a provision to the effect that a failure to pay interest within thirty days after due shall cause the whole note to become due and collectible at once, at the option of the holder.

There is no allegation in the petition of the exercise of the option, but the default in the mortgage is alleged to have occurred by reason of the failure to pay the note when demand was made for payment, and failure to pay the annual interest due for the years 1895, 1896, 1897, 1898 and 1899, as well as failure to pay the taxes on the property for the year 1898, the intention being evident to treat the note as one payable on demand, and the attempted renewal for the period of two years from April, 1898, as not consummated, in the absence of consent thereto on the part of the holder. And it seems to be manifest that George Tschirgi could not of his own volition, without the consent of the holder, arbitrarily extend the time for the payment of the note. That there was any such consent or agreement between the parties is not shown, nor was any consideration therefor shown. At the date of the writing the note and mortgage had passed into the hands of the plaintiff, and the only allegation as to the writing is that it was made and delivered to Matthew Tschirgi, although the petition refers to it as George Tschirgi's contract of renewal.

The same objections are made in respect to the third cause of action that are made to the second cause of action, which have already been sufficiently discussed. The same situation as to the statute of limitations prevails in respect to this note and mortgage as was found to exist in relation to the <sup>65</sup> Moon note and mortgage; and it is unnecessary to enlarge upon what has been said on that subject. Neither do we regard further discussion required as to the effect of the extension of the time of payment, or the premature institution of the suit; except that it might be said that, even should the writing of February, 1898, be considered as an extension for

two years, it would at least be doubtful whether the conditions of the note as to maturity at the option of the holder upon failure to pay interest did not continue in force.

We do not think the position of counsel for plaintiff in error can be sustained that the plaintiff declared upon an extension. It is not alleged that the time for payment was in fact extended, but what was alleged is explained above. On the contrary, the averments of default in the conditions of the mortgage seem to proceed on the theory that there had been no valid or binding extension. We have considered the objection that the action was brought prematurely on its merits, but it is at least questionable whether the objection was not waived by a failure to plead it in any way. Counsel for defendant in error advances the proposition that the matter not having been pleaded plaintiff in error is not in a position to take advantage of the point, even if it would have been well taken, if presented in time. The objection not being a valid one, in our opinion, we do not decide the question as to whether such an objection must be raised, if at all, by demurrer, or answer, or some other pleading.

Our attention is called to the fact that the judgment of the court allows an attorney fee of one hundred dollars on account of the Moon mortgage, whereas the mortgage itself provides for an attorney fee of only fifty dollars. It was doubtless the result of an inadvertence on the part of the court; and counsel for defendant in error bank concedes in his brief that the judgment should be modified to that extent, and that they will be willing that it shall be done. We will leave that matter to be attended to in the district <sup>66</sup> court. It is apparent that the attention of the court was not called to the mistake. The motion for new trial does not charge error in the amount of the recovery, and it is doubtful, therefore, if it constitutes an error that should be rectified by order of the appellate court: *Syndicate Imp. Co. v. Bradley*, 7 Wyo. 228, 51 Pac. 242, 52 Pac. 532.

We have referred to and discussed all the points urged by counsel that have been deemed material to a determination of the questions involved. We find no prejudicial error in the judgment, and it will therefore be affirmed.

Corn and Knight, JJ., concur.

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*An Acknowledgment of a Mortgage* to a corporation in which the homestead of the mortgagors is waived and relinquished, taken by a notary who is a stockholder in the corporation, is void: *Ogden*

Bldg. etc. Assn. v. Mensch, 196 Ill. 554, 89 Am. St. Rep. 330, 63 N. E. 1049. But see Read v. Toledo Loan Co., 68 Ohio St. 280, 67 N. E. 729, 96 Am. St. Rep. 663, and cases cited in the cross-reference note thereto.

A *Homestead Right* is inalienable otherwise than in the precise manner prescribed in the statute: Minnesota Stoneware Co. v. McCrossen, 110 Wis. 316, 84 Am. St. Rep. 927, 85 N. W. 1019.

A *Mortgagee, in Taking a Renewal Note*, does not lose the benefit of his security: Jarboe v. Shiveley, 109 Ky. 402, 59 S. W. 328, 95 Am. St. Rep. 384, and cases cited in the cross-reference note thereto. See, also, Laconia Sav. Bank v. Vittum, 71 N. H. 465, 93 Am. St. Rep. 561, 52 Atl. 848.

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## WILLEY v. DECKER.

[11 Wyo. 496, 73 Pac. 210.]

**COURTS.**—The Jurisdiction of the Supreme Court upon Reserved and Difficult Questions should be invoked by the trial court by making a statement of the question upon which the opinion of the higher court is desired. (p. 943.)

**SUPREME COURT, Jurisdiction of.**—Under the Statute of Wyoming Authorizing the Reservation of Important and Difficult Questions for the decision of the supreme court, it will not pass upon questions of fact, nor upon the cases themselves. (p. 943.)

**WATERS AND WATERCOURSES.**—The Common-law Doctrine Concerning the Rights of Riparian Owners in the water of a natural stream does not prevail, and has never prevailed, in Wyoming. (p. 948.)

**WATERS AND WATERCOURSES.** The Doctrine of Prior Appropriation is Established in Wyoming as a rule of imperative necessity and is an outgrowth of the custom of the earlier settlers upon the public lands for the purposes of mining or rendering the soil available for cultivation. (p. 951.)

**WATERS AND WATERCOURSES**—Appropriation of Waters for Nonriparian Lands.—Under the doctrine of prior appropriation, it is not now and never has been essential to a water right that the appropriator should apply the water to riparian lands. (p. 959.)

**WATERS AND WATERCOURSES** Appropriation in the Case of Interstate Streams.—The separation of lands capable of irrigation by state lines from the stream whence the water is diverted is of no consequence in the appropriation of water for irrigation. (p. 961.)

**WATERS AND WATERCOURSES**—Appropriation from Interstate Streams.—In the case of interstate streams parties in possession of lands in either state are entitled to appropriate any water of the stream not previously appropriated for the irrigation of their lands by diverting the water in the state where the lands are situated. (p. 962.)

**WATERS AND WATERCOURSES**—Appropriation of Water in One State for Use in Another.—Where a stream flows from one state into another, water may be appropriated and diverted in the former state for use on lands in the latter. (pp. 962, 963.)



**WATERS AND WATERCOURSES.**—Statutory and constitutional declarations of the state of Wyoming that waters of natural streams are the property of the public and subject to appropriation rather declare and affirm a principle already existing than announce a new one. (p. 962.)

**WATERS AND WATERCOURSES—Statutes Respecting, Construction of.**—A statute providing that all persons owning or holding a possessory right or title to any lands in the territory of Wyoming, when their claims are on the bank, margin, or neighborhood of a stream of water, shall be entitled to the use of such stream for the purposes of irrigation and making such claim available for agricultural purposes, will be construed as declaratory of pre-existing law, and not as limiting or qualifying pre-existing rights. (p. 966.)

**WATERS AND WATERCOURSES—Jurisdiction to Enjoin Interference with Waters Appropriated from an Interstate Stream.**—Where waters of a stream running from another state into this have been appropriated in the former state for use in this, its courts have jurisdiction to enjoin a subsequent diversion from such stream in such other state, if its effect is to deprive plaintiff, whose lands are in this state, of waters to which they are found to be entitled by priority of appropriation. (p. 971.)

**COURTS—Jurisdiction to Determine Interstate Water Rights.** The courts of this state have jurisdiction to adjudge the right to water diverted from a natural stream in this state to be conveyed to and used in another state, to the extent, at least, of inquiring into and determining the right of the one party to relief by injunction against the other. (pp. 972, 973.)

**COURTS—Jurisdiction.**—A Former Adjudication is not a Bar to Jurisdiction, though it may constitute a good defense to the action. (p. 975.)

**COURTS—Jurisdiction Over Water Rights, When not Exhausted.**—The decision of the board of control and of the district court on appeal therefrom adverse to a water right does not deprive the courts of the state of jurisdiction to inquire into and determine an alleged water right. (pp. 974, 975.)

Appelget & Mullen, for the plaintiffs.

505 **POTTER, J.** This cause was submitted to the district court sitting within and for the county of Sheridan upon an agreed statement of facts, and thereupon that court ordered certain important and difficult questions arising in the case to be reserved for the decision of this court. With one exception the reserved questions relate to the jurisdiction of the court to award the relief prayed for.

506 The action is brought to restrain certain of the defendants from diverting the waters of Youngs creek to the injury of the plaintiffs, who claim a right to the use of the water by prior appropriation. Youngs creek is a natural stream of water, having its source in the state of Montana and flowing thence in a general southeasterly course into Sheridan county, Wyoming. The right

claimed by the plaintiffs is founded upon an appropriation of water for the irrigation of lands through the construction of a ditch commenced in the year 1884, and completed in 1885, and the application of the water for the purpose aforesaid in 1886 and each year thereafter. The plaintiffs are Dennis H. Willey, Samuel Ellison, John W. Boyle, Edward Foss and Henry Verley. The defendants against whom relief is sought are Oscar Obberreich and Edgar, John, Edwin and Nathan Demmon. One of the original defendants, Etta L. Nearpass, disclaims any interest; and another, Charles L. Decker, as administrator of the estate of John D. Adams, deceased, was made a party defendant for the reason, as alleged, that he is united in interest with the plaintiffs, but refuses to join in the prosecution of the suit. He was not served with process and made no appearance.

The lands of the plaintiffs are owned by them in severalty, but the water claimed to have been appropriated for the irrigation thereof is diverted through the same ditch known as the "Gladewater ditch." That ditch was constructed jointly by John W. Boyle, John D. Adams, William T. Peoples and Lewis Walker. Adams is deceased. Boyle is one of the plaintiffs and Peoples and Walker are the grantors, respectively, of the other plaintiffs. The parties who originally constructed the ditch were the owners of the land lying under and irrigated therefrom.

The headgate of the ditch was and is located in Sheridan county, in this state, and the water of Youngs creek is diverted thereby in said county. The lands of Boyle, Foss and Verley are situated in this state, but the lands of the plaintiffs, Willey and Ellison, are situated in the county <sup>507</sup> of Rosebud, in the state of Montana. The situation of the plaintiffs, then, is as follows: They claim respectively to have a right by prior appropriation to the use of a certain quantity of the water of Youngs creek diverted in this state and conveyed through a ditch located partly in this state for the irrigation of lands owned by them situated in this state and in the state of Montana, respectively. The following admission is contained in the agreed statement of facts: "That the lands owned by the persons named as the original constructors of the Gladewater ditch were irrigated by water from said ditch in the year 1886 and each year thereafter, as follows: John W. Boyle seventy-eight acres; Edward Foss and Henry Verley, ninety-eight acres; John D. Adams one hundred and twenty acres, all in Sheridan county, Wyoming, and William T. Peoples, the lands now owned by Willey and Ellison, situated in Rosebud county, Montana, one hundred and sixty

acres." It should be added that it is admitted that Willey and Ellison reside upon their respective tracts of land in Montana.

In 1897 the defendant, Obberreich, constructed a dam and reservoir in the south fork of Youngs creek, and tributary to the same, in the state of Wyoming, for the purpose of catching the flood waters of said tributary in times of freshets, and conveyed said water upon his lands in said Sheridan county, Wyoming, for the purpose of irrigating the same, and has continued so to do. The said dam and reservoir, it is admitted, are situated above the headgate of the Gladewater ditch, and during the irrigating season said Obberreich diverts all the water flowing in said south fork above his dam and headgate.

In 1898 the defendants, Edgar, John, Edwin and Nathan Demmon, began the construction of a ditch taken out of the main channel of Youngs creek, with dam and headgate situated in Rosebud county, in the state of Montana, and above the mouth of the south fork of said stream and above the headgate of the Gladewater ditch, and diverted a portion of the water flowing in the main channel of said stream, the point of diversion being in Montana, and used <sup>508</sup> the same irrigating lands owned by them in Sheridan county, in this state; and it is admitted that said defendants had continued such diversion and use until the commencement of the suit, claiming a right adverse to the rights of the owners of the Gladewater ditch.

It is agreed that in the spring months in certain seasons there is sufficient water in the stream to supply all the water rights thereon, but that during the months of June, July and August water naturally flowing in said stream at the head of the Gladewater ditch is insufficient to supply all the parties claiming the right to use the waters of said stream through said ditch, after the diversions made by the defendants aforesaid in the states of Wyoming and Montana.

The summons issued in the action was served upon the defendant, Obberreich, and upon the defendants, Edgar, John, Edwin and Nathan Demmon, in Sheridan county, in this state; but whether they are residents of that county or not does not appear. It is agreed, however, that they own lands in the county, and that their diversion of the water is for the purpose of irrigating those lands. They each appeared in the cause and answered.

The reserved questions are as follows: "1. Has the district court of Sheridan county, Wyoming, under the facts stated, jurisdiction to render a decree restraining the defendants, or either of them, from diverting the waters of said Youngs creek

to such an extent as to deprive the plaintiffs, or either of them, of the necessary water for the irrigation of their said lands? 2. Under the facts stated, are the rights of the plaintiffs to the diversion and use of the waters of said Youngs creek for the irrigation of their said lands superior to the rights of the defendants, or either of them? 3. Has the district court of Sheridan county, Wyoming, jurisdiction to adjudicate the right to water diverted from a natural stream in said county, in Wyoming, to be conveyed through the Gladewater ditch and used in the **509** state of Montana, on the lands of plaintiffs, Willey and Ellison? 4. Has the district court of Sheridan county, Wyoming, jurisdiction to adjudicate the water right claimed by Peoples and his grantees, Willey and Ellison, under the facts agreed upon herein, after a decision by the board of control and by the district court of said county adverse to said water right, as hereinbefore stated? 5. Has the district court of Sheridan county, Wyoming, any jurisdiction under the facts stated to prevent the diversion of water from said Youngs creek in Montana, and to prevent its being conveyed by private ditch from said state of Montana into the state of Wyoming, and its use in said last-named state on lands of the defendants Demmons?"

The questions reserved for decision are not happily stated. Some of them seem to comprehend questions of fact, as well as of law. The ultimate question or questions to be determined by the trial court upon a consideration of the facts are set forth rather than the precise legal question or proposition involved in such determination. A more satisfactory method in this class of cases is the statement of the legal question upon which the opinion of this court is desired. In cases coming here under the statute authorizing the reservation of important and difficult questions we have uniformly declined to decide questions of fact, or to pass upon the cases themselves, holding those matters not to be within the contemplation of the statute. In such cases we inspect the record to ascertain whether the questions presented are actually involved in a determination of the matter before the court, but generally for no other purpose. To avoid any possible misunderstanding of the scope and effect of our decision in the case at bar, we propose to consider only the questions of law that appear to be suggested by the reserved questions rather than decide the questions in the precise form in which they have been prepared. As it is not difficult to gather from the reserved **510** questions the legal propositions involved, which must have been in the mind of the court in sending the



matter here, we are not inclined to apply a technical rule for the purpose of avoiding a decision at this time.

Practically, there are but three legal questions involved. The principal or fundamental question is concealed rather than expressed in the reserved question No. 2. That question is whether William T. Peoples, the grantor of the plaintiffs, Willey and Ellison, acquired a legal right by prior appropriation to the use of the waters of the stream in controversy by joining with the owners of Wyoming lands in the construction of the Gladewater ditch and thereby diverting the waters of said stream at a point within this state for the irrigation of his lands situated in Montana.

As there can be no doubt of the right of the owners of said ditch, who were also proprietors of lands in this state, to make a lawful appropriation, and as it is conceded that they are prior in point of time, and have continued the application of the water to the purpose for which it was originally appropriated, it is not conceived that the trial court regarded a determination of their rights to be involved in much difficulty. We believe, therefore, the question above stated to be the important and difficult legal question intended for our decision.

It is greatly to be regretted that in the determination of a question of such manifest gravity the court has not been favored with a brief or argument on behalf of the defendants. It is a question of the greatest importance, affecting not only private interests, but the public interest as well. Although the right to make an appropriation of the waters of a natural stream by diverting the same in one state or territory and conveying it into an adjoining state or territory for the irrigation of lands there situated, has attracted the attention of those interested in the various irrigation problems that confront the people in the arid portion of this country, and the difficulties liable to arise on account <sup>511</sup> of the appropriation of water on interstate streams have been to some extent recognized, there has been no decision of a court of last resort, so far as we are advised, upon the particular questions now before us. The question was presented to the supreme court of Colorado, in the case of Lamson v. Vailes, 27 Colo. 201, 61 Pac. 231, but as the cause could be determined upon another proposition, this question was not decided. It was there stated that the case was one of first impression in that jurisdiction. We are not called upon in the case at bar to decide whether such an appropriation as the plaintiffs, Willey

and Ellison, rely on can be lawfully made in this state under our constitution and present statutes; and we shall express no opinion on that matter. The appropriation under consideration was made prior to the admission of Wyoming as a state, and, indeed, prior to the statute of 1886 covering the subject of irrigation. Neither is it necessary for us to decide whether a right by prior appropriation can or could have been lawfully acquired for the irrigation of lands in another state through the diversion of the water of a stream lying wholly within the boundaries of Wyoming. The stream in controversy is an interstate stream. Its source is in Montana and it flows from that state into Wyoming. While not expressly stated in the facts of this case, we think it proper and reasonable to assume that the tributary from which the diversion of the defendant, Obberreich, is made has its source in Montana, the same as the main channel. The contrary is not shown; and as the dam of said defendant is evidently located close to the Montana line, we shall, for the purposes of this opinion, consider such tributary as flowing in both states.

The nearest approach to a decision touching this question is to be found in the case of *Perkins County v. Graff*, 114 Fed. 441, 52 C. C. A. 243. That was a case in the United States circuit court of appeals for the eighth circuit, on appeal from the United States circuit court for the district of Nebraska. It involved the legality of the issuance of the certain bonds by Perkins <sup>512</sup> county, Nebraska, to aid in the construction of an irrigating canal. The proposition of the irrigation company was to construct a canal which should divert the waters of the Platte river at a point in the state of Colorado about eight miles west of Julesburg, and conduct them thence easterly into and through the county of Perkins, in Nebraska. Suit was brought upon certain coupons cut from the bonds; and it was contended, among other things on behalf of the county in attempting to defeat recovery, that the bonds were void on the ground that they were issued to assist the irrigation company in violating the constitution and laws of Colorado, and the comity between the states. The constitution of Colorado declares the water of every natural stream to be the property of the public, and that the same is dedicated to the use of the people of the state, subject to appropriation "as hereinafter provided." It also declares that "the right to divert unappropriated water of any natural stream for beneficial uses shall

never be denied. Priority of appropriation shall give the better right as between those using water for the same purpose."

In the case cited, one paragraph of the syllabus as prepared by the court reads as follows: "Drawing water through a canal from one state into another for the purpose of irrigating lands in the latter state is not necessarily a violation of the constitution, laws or policy of the former state, although that state reserves all the waters for itself and its citizens, so far as they are necessary for the beneficial uses to which the state and its citizens apply them." And in the opinion delivered by Circuit Judge Sanborn it is said: "But the constitution, the statutes, and the judicial decisions of Colorado limited the power of its citizens to use the waters of the rivers of that state to the amounts which are necessary for the beneficial uses to which they apply or intend to apply them. The constitution and laws of that state have been in force for many years, and yet there is a surplus of the waters of the Platte river, which flows from the state of Colorado into the <sup>513</sup> state of Nebraska. No reason is perceived why the irrigation company might not lawfully withdraw this surplus water from the river at such place in the state of Colorado as it should select, and lead it through a portion of that state into the county which issued these bonds, to irrigate the arid lands in that region. Corporations of other states are not prohibited from transacting business in the state of Colorado. There is no law of that state to which our attention has been called which prohibits such corporations from obtaining by purchase the right of way through private property, and no reason is perceived why the scheme of the irrigation company was not both rational and lawful. The construction and maintenance of canals for the purpose of irrigating arid lands is both permitted and promoted by the legislation and the public policy of the state of Colorado. It was undoubtedly a part of the scheme of this company to irrigate the lands in the state of Colorado which should be adjacent to its canal. When this had been done, no injury could result to the state or to the citizens of the state of Colorado from leading the surplus waters of the Platte river through the canal beyond the limits of that state into the county of Perkins, because these surplus waters would flow beyond the borders of that state, and into the state of Nebraska, along the natural channel of the river, if they were not drawn into it through the canal. When the proposition of the irrigation company is carefully and rationally considered, it is not obnoxious to the con-

stitution, the laws or the public policy of the state of Colorado, and these bonds cannot be defeated because the intention of the company was to draw the waters to irrigate the lands of this county from without the state of Nebraska."

The case did not involve a controversy between different appropriators, and is perhaps not to be regarded as a direct precedent upon the question we are now considering. But it is fairly evident, we think, that the learned court perceived no reason why an appropriation of water might not <sup>514</sup> be made for the irrigation of lands in one state by means of the diversion of water from a stream in another state naturally flowing from the latter state into the former.

In both this state and the state of Montana, through which Youngs creek flows, the doctrine of prior appropriation is recognized and applied. The adoption of the doctrine by the state of Montana, however, as indicated by the decisions of its courts, has not proceeded upon precisely the same theory, nor have the courts of that state gone to the extent that we have in abrogating the common-law rule of riparian rights in respect to the use of flowing water. In that state the doctrine more generally known perhaps as the California doctrine prevails. Stated briefly, that doctrine is that while a stream is situated on the public lands of the United States, a person may, under the customs and laws of a state, and the legislation of Congress, acquire by prior appropriation the right to use the waters thereof for mining, agricultural and other beneficial purposes, and to construct and maintain ditches and reservoirs over and upon the public land, such right being good against all other private persons, and by statute good as against the United States and its subsequent grantees; but that, when a grantee of the United States obtains title to a tract of the public land bordering on a stream, the waters of which have not been hitherto appropriated, his patent is not subject to any possible appropriation subsequently made by another party without his consent. In other words, it is held under that doctrine that the rules of prior appropriation, founded upon local customs and laws, and ratified by congressional legislation, are confined in their operation to the public domain of the United States: Black's *Pomeroy on Water Rights*, 44. In Montana it seems one may make a valid appropriation of water with the same effect on unsold state lands: *Smith v. Denniff*, 24 Mont. 20, 81 Am. St. Rep. 408, 60 Pac. 398. It is held in that state that the absolute title to a water right can only



be acquired by grant, express or implied, of the riparian owner of the land and water, and the common-law <sup>515</sup> rule that assured to a riparian owner the right to the reasonable use without substantial diminution in quantity and quality of the water flowing by or over his land is abrogated to the extent only that under the doctrine of prior appropriation a riparian owner, or one having title to a water right by grant from him, is allowed to use the water in a manner that at common law would be deemed unreasonable: *Smith v. Denniff*, 24 Mont. 20, 81 Am. St. Rep. 408, 60 Pac. 398.

Upon that theory the right acquired by prior appropriation on the public domain is held to be founded in grant from the United States government, as owner of the land and water, under the acts of Congress of 1866 and 1870: U. S. Rev. Stats., secs. 2339, 2340; U. S. Comp. Stats. 1901, p. 1437.

In this state, on the other hand, the common-law doctrine concerning the rights of a riparian owner in the water of a natural stream has been held to be unsuited to our conditions; and this court has declared that the rule never obtained in this jurisdiction: *Moyer v. Preston*, 6 Wyo. 308, 71 Am. St. Rep. 914, 44 Pac. 845. It was said in the opinion in that case that "a different principle better adapted to the material condition of this region has been recognized. That principle, briefly stated, is that the right to the use of water for beneficial purposes depends upon a prior appropriation." And, further, in explanation of the reasons for the existence of the new doctrine, it was said: "It is the natural outgrowth of the conditions existing in this region of country. The climate is dry, the soil is arid and largely unproductive in the absence of irrigation, but when water is applied by that means it becomes capable of successful cultivation. The benefits accruing to land upon the banks of a stream without any physical application of the water are few; and while the land contiguous to water, and so favorably located as to naturally derive any sort of advantage therefrom, is comparatively small in area, the remainder, which comprises by far the greater proportion of our land otherwise susceptible of cultivation, must forever remain in their wild and unproductive condition unless they are reclaimed <sup>516</sup> by irrigation. Irrigation and such reclamation cannot be accomplished with any degree of success or permanency without the right to divert and appropriate water of natural streams for that purpose and a security accorded to that right. Thus, the imperative and growing necessities of our conditions in this respect alone, to say nothing of the other beneficial uses, also

important, has compelled the recognition rather than the adoption of the law of prior appropriation."

In view of the contention in Colorado that until 1876 the common-law principles of riparian proprietorship prevailed in that state, and that the doctrine of priority of right to water by priority of appropriation was first recognized and adopted in the constitution, the supreme court of that state, by Mr. Justice Helm, concluded a discussion of the matter as follows: "We conclude, then, that the common-law doctrine giving the riparian owner a right to the flow of water in its natural channel upon and over his lands, even though he makes no beneficial use thereof, is inapplicable to Colorado. Imperative necessity, unknown to the countries which gave it birth, compels the recognition of another doctrine in conflict therewith. And we hold that, in the absence of express statutes to the contrary, the first appropriator of water from a natural stream for a beneficial purpose has, with the qualifications contained in the constitution, a prior right thereto, to the extent of such appropriation." And it was further said that the latter doctrine has existed from the earliest appropriations of water within the boundaries of the state: *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443.

When the question was first considered in the state of Nevada the court held that the patentee of the government succeeded to all of its rights, and among these was the right to have the water of a stream theretofore diverted returned to its natural channel: *Vansickle v. Haines*, 7 Nev. 249. But that case was overruled in *Jones v. Adams*, 19 Nev. 78, 3 Am. St. Rep. 788, 6 Pac. 442. And in *Reno Smelting etc. Works v. 517 Stephenson*, 20 Nev. 269, 19 Am. St. Rep. 364, 21 Pac. 317, 4 L. R. A. 60, it was unequivocally declared that the common-law doctrine of riparian rights was unsuited to the condition of that state. The court said: "Here the soil is arid and unfit for cultivation unless irrigated by the waters of running streams. The general surface of the state is table-land, traversed by parallel mountain ranges. The great plains of the state afford natural advantages for conducting water, and lands otherwise waste and valueless become productive by artificial irrigation. The condition of the country, and the necessities of the situation, impelled settlers upon the public lands to resort to the diversion and use of waters. This fact of itself is a striking illustration, and conclusive evidence of the inapplicability of the common-law rule."

The leading case in Arizona is *Clough v. Wing*, 2 Ariz. 371, 17 Pac. 453. In that case it is said that the problem to be solved in the arid portions of the earth has not been how best to drain the water off the land and get rid of it, but how to save it to be conducted upon land in aid of the husbandman. The learned judge who wrote the opinion refers to the antiquity of irrigation in that section of country and in other lands, and remarks: "Thus we see that this is the oldest method of skilled husbandry, and probably a large number of the human race have ever depended upon artificial irrigation for their food products. The riparian rights of the common law could not exist under such systems; and a higher antiquity, a better reason, and more beneficent results have flowed from the doctrine that all right in water in non-navigable streams must be subservient to its use in tilling the soil." And, further, it is said that the common law, so far as the same applies to the uses of water, "has never been, and is not now, suited to conditions that exist here."

The supreme court of Utah say: "Riparian rights have never been recognized in this territory, or in any state or territory where irrigation is necessary; for the appropriation of water for the purpose of irrigation is entirely and <sup>518</sup> unavoidably in conflict with the common-law doctrine of riparian proprietorship. If that had been recognized and applied in this territory it would still be a desert; for a man owning ten acres of land on a stream of water capable of irrigating a thousand acres of land or more, near its mouth, could prevent the settlement of all the land above him. For at common law the riparian proprietor is entitled to have the water flow in quantity and quality past his land as it was wont to do when he acquired title thereto, and this right is utterly irreconcilable with the use of water for irrigation. The legislature of this territory has always ignored this claim of riparian proprietors, and the practice and usages of the inhabitants have never considered it applicable, and have never regarded it": *Stowell v. Johnson*, 7 Utah, 215, 26 Pac. 290.

In disposing of what the court calls the "phantom of riparian rights," and declaring that the maxim "first in time, first in right," should be the settled law in that jurisdiction, the supreme court of Idaho forcibly state the reasons for the new doctrine: "Whether or not it is a beneficent rule, it is the lineal descendant of the law of necessity. When, from among the most energetic and enterprising classes of the east, that

enormous tide of immigration poured into the west, this was found an arid land, which could be utilized as an agricultural country, or made valuable for its gold, only by the use of its streams of water. The new inhabitants were without law, but they quickly recognized that each man should not be a law unto himself. Accustomed, as they had been, to obedience to the laws they had helped make, as the settlements increased to such numbers as justified organization, they established their local customs and rules for their government in the use of water and land. They found a new condition of things. The use of water to which they had been accustomed, and the laws concerning it, had no application here. The demand for water they found greater than the supply, as is the unfortunate fact still all over this arid region. Instead of <sup>519</sup> attempting to divide it among all, thus making it unprofitable to any, or instead of applying the common-law riparian doctrine to which they had been accustomed, they disregarded the traditions of the past, and established as the only rule suitable to their situation that of prior appropriation. This did not mean that the first appropriator could take what he pleased, but what he actually needed, and could properly use without waste. Thus was established the local custom, which pervaded the entire west, and became the basis of the laws we have to-day on that subject": *Drake v. Earhart*, 2 Idaho (716), 750, 23 Pac. 541.

We have referred to the case of *Moyer v. Preston*, 6 Wyo. 308, 71 Am. St. Rep. 914, 44 Pac. 845, decided by this court, in which it was held that the common law of riparian proprietorship did not prevail in this state. In the later case of *Farm Investment Co. v. Carpenter*, 9 Wyo. 110, 87 Am. St. Rep. 918, 61 Pac. 258, 50 L. R. A. 747, we said respecting the use of the waters of natural streams, and the right obtained therein by prior appropriation, for the purposes of irrigation: "This use and the doctrine supporting it is founded upon the necessities growing out of natural conditions, and is absolutely essential to the development of the material resources of the country. Any other rule would offer an effectual obstacle to the settlement and growth of this region, and render the lands incapable of successful cultivation."

It will be observed that the doctrine of prior appropriation is established as a rule of imperative necessity, and the outgrowth of the custom of the earlier settlers upon the public lands for the purpose of mining or rendering the soil avail-



able for cultivation. This is further illustrated by the decisions of the supreme court of the United States. The doctrine was first recognized by Congress in 1866 by the act of July 26th of that year; the ninth section of said act declaring that: "Wherever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and the decisions of courts, the possessors <sup>520</sup> and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed": U. S. Rev. Stats., sec. 2339; U. S. Comp. Stats. 1901, p. 1437. And again by the act of July 9, 1870: "All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the preceding section": U. S. Rev. Stats., sec. 2340; U. S. Comp. Stats. 1901, p. 1437.

The acquirement of water rights upon public lands under the custom and rule of prior appropriation was considered by the supreme court in *Atchison v. Peterson*, 20 Wall. 507, 22 L. ed. 44, and *Basey v. Gallagher*, 20 Wall. 670, 22 L. ed. 452. We quote the expression of the court in the opinion delivered by Mr. Justice Field in the case last above cited: "In the late case of *Atchison v. Peterson*, 20 Wall. 507, 22 L. ed. 414, we had occasion to consider the respective rights of miners to running waters on the mineral lands of the public domain; and we there held that by the custom which had obtained among miners in the Pacific states and territories, the party who first subjected the water to use, or took the necessary steps for that purpose, was regarded, except as against the government, as the source of title in all controversies respecting it; that the doctrines of the common-law declaratory of the rights of riparian proprietors were inapplicable, or applicable only to a limited extent, to the necessities of miners, and were inadequate to their protection; that the equality of right recognized by that law among all the proprietors upon the same stream would have been incompatible with any extended diversion of water by one proprietor, and its conveyance for mining purposes to points from which it could not be restored to the stream; that the government, by its silent acquiescence, had assented to and encouraged the occupation of the public lands

for mining; and that he who first connected his labor with property thus situated <sup>521</sup> and open to general exploration, did in natural justice acquire a better right to its use and enjoyment than others who had not given such labor; that the miners on the public lands throughout the Pacific states and territories, by their customs, usages and regulations, had recognized the inherent justice of this principle, and the principle itself was at an early period recognized by legislation and enforced by the courts in those states and territories, and was finally approved by the legislation of Congress in 1866. The views there expressed and the rulings made are equally applicable to the use of water on the public lands for purposes of irrigation. No distinction is made in those states and territories by the custom of miners and settlers, or by the courts, in the rights of the first appropriator from the use made of the water, if the use be a beneficial one." And again advert- ing to the act of 1866: "It is very evident that Congress intended, although the language used is not happy, to recognize as valid the customary law with respect to the use of water which had grown up among the occupants of the public land under the peculiar necessities of their condition; and that law may be shown by evidence of the local customs, or by the legis- lation of the state or territory, or the decisions of the courts. The union of the three conditions in any particular case is not essential to the perfection of the right by priority; and in case of conflict between a local custom and a statutory regulation, the latter, as of superior authority, must necessarily control."

In *Brodie v. Water Co.*, 101 U. S. 274, 25 L. ed. 790, the opinion was expressed that the statute alluded to was rather a voluntary recognition by Congress of pre-existing rights, constituting valid claims to a continued use, than the estab- lishment of new rights; and in *United States v. Rio Grande Irr. Co.*, 174 U. S. 690, 19 Sup. Ct. Rep. 770, 43 L. ed. 1136, Mr. Justice Brewer, delivering the opinion of the court, ob- served that "as to every stream within its dominion a state may change this common-law rule and permit the appropria- tion of the flowing waters for such purposes as it deems wise." "Notwithstanding the unquestioned <sup>522</sup> rule of the common law in reference to the right of a lower riparian proprietor to insist upon the continuous flow of the stream as it was, and, although there has been in all the western states an adoption or recognition of the common law, it was early developed in their history that the mining industry in certain states, the

reclamation of arid lands in others, compelled a departure from the common-law rule, and justified an appropriation of flowing waters both for mining purposes and for the reclamation of arid lands, and there has come to be recognized in those states, by custom and by state legislation, a different rule—a rule which permits, under certain circumstances, the appropriation of the waters of a flowing stream for other than domestic purposes.”

We have alluded to the fact that, contrary to the rule established in this and some other jurisdictions similarly situated and subject to the same natural condition, the rights as at common law of individual riparian owners are recognized and applied where such rights have been acquired anterior to an appropriation in conflict therewith. This is the case in the state of Montana in common with several other states, in most of which states, however, the condition exists that the climate is partly humid, and the arid lands are limited to certain localities. The rule in those states where the doctrine of prior appropriation and the common-law rule as to riparian rights to the use of water are both enforced is set forth in the able opinion of Judge Holcomb in the case of *Crawford County v. Hathaway* (Neb.), 93 N. W. 781, decided by the supreme court of Nebraska. It is there said: “The two doctrines stand side by side. They do not necessarily overthrow each other, but one supplements the other. The riparian owner acquires title to his usufructuary interest in the water when he appropriates the land to which it is an incident, and when the right is once vested it cannot be divested except by some established rule of law. The appropriator acquires title by appropriation and application to some beneficial use and of which he <sup>523</sup> cannot be deprived except in some of the modes prescribed by law. The time when either right accrues must determine the superiority of title as between conflicting claimants.” It seems that the legislature of the state of Nebraska had in 1889 abrogated the common-law rule of riparian ownership in water, and substituted therefor the doctrine of prior appropriation; but it was held in the case cited that the act could not, and did not, have the effect of abolishing riparian rights which had already accrued, but only of preventing the acquisition of such rights in the future.

It is no part of our purpose to enter into a discussion in this opinion of the relative merits of the opposing legal theories under which the doctrine of priority of appropriation is maintained and enforced in the different jurisdictions. The stream

from which the appropriations in controversy in this case were made is an interstate stream. In the state of Montana, where the stream has its source, there is recognition of the common-law rule as to the rights of a riparian owner, modified, however, as already indicated, by existing conditions and statutes. But in the case at bar there is no disclosure in the statement of facts of any conflict with the claims of riparian owners in Montana. The fact is mentioned that the defendants are owners of lands along the banks of Youngs creek; but we understand from the other stipulations that those lands are located in this state; and under the decisions of this court, such fact alone confers upon them no title to or right to the use of the waters of the stream. In the absence of riparian ownership in parties other than the general government or the state, the right of prior appropriation is recognized in the state of Montana.

Our purpose in referring to the various decisions of the courts has been to show the fundamental principle and underlying reasons for the doctrine of prior appropriation. It is to be observed that whether adopted in lieu of or as a substitute for the common law, or merely as a modification <sup>524</sup> thereof, it is the result of the same conditions, and rests upon the same practical basis.

In the Nebraska case above cited the court say: "This right has grown out of the necessities of the case, and has been sanctioned by the acts of Congress, and recognized by the laws of the state. It is a matter of common knowledge, historical in character, that in the development of the state in the higher altitudes in the western portions because of the arid or semi-arid climatic conditions which prevail, it has been found impossible to successfully engage in agricultural pursuits, save by applying to the soil, by the process known as irrigation, waters diverted and drawn from natural streams, thereby rendering highly productive a land otherwise valuable only for grazing. It is a fact so common and notorious that we may properly take judicial notice of it, that since the early settlement of the western portions of the state it has been the custom of the settlers to appropriate the waters of the streams flowing therein by means of irrigating canals, and apply them to the soil in prosecuting the business of agriculture in all its varied branches." And the court proceeds to say that such custom existed before the enactment of any irrigation statute; and that where the custom has been so generally recognized as to have the force of law, "it can only be regarded as a substantial adoption of the doctrine



of prior appropriation of water which obtains in the arid states immediately west of us."

In the early Montana case of *Thorp v. Freed*, 1 Mont. 651, the legal ground for sustaining the right to divert and thereby appropriate waters upon the public lands, seems to have been held by Judge Knowles to be that the unsurveyed lands of the United States and the water of the streams flowing through the same belong to no one: and that the one who first appropriates any portion thereof of such lands, or the water incident thereto, for a beneficial purpose, would become the owner thereof, until the general government, or some one claiming thereunder, should assert title <sup>525</sup> to the same. But the occasion for applying such a rule, and discovering some legal ground for the protection of rights thereunder, is recognized as the outgrowth of the necessities and customs of the country. The learned judge says: "If we were called upon to say what were the necessities of this country, in regard to the use of water for the purposes of irrigation, we should reply that there was a demand that water should be used for that purpose, and that the considerations of the general welfare of the country and the principles of natural equity should guarantee to the prior appropriator of water for such use the first right to the use of the same, to the extent of his necessities for domestic purposes, the quenching of the thirst of himself or animals, and for agricultural purposes. We can see no reason why, if the common law is to be changed by the considerations above named, it should not be changed to suit the wants of the country and in accordance with the principles of equity." And, again: "Ever since the settlement of this territory it has been the custom of those who settled themselves upon any portion of the public domain, and devoted any part thereof to the purposes of agriculture, to dig ditches, and turn out the waters of some stream to be used to irrigate the same. This right has been generally recognized by our people. It has been universally conceded that this was a necessity in agricultural pursuits. So universal has been this usage that I do not suppose there has been a parcel of land to the extent of one acre cultivated within the bounds of this territory that has not been irrigated by water diverted from some running stream." Chief Justice Wade, who delivered a concurring opinion, disagreed with his associate respecting the existence of a custom and insisted upon the applicability of the common law to that territory; and as one of the reasons for maintaining the right of the owner of lands along the margin

of a stream to its use, said: "Water for the purposes of irrigation in this country is equally necessary as water to sustain life. They are terms implying the same thing. The resources <sup>526</sup> of the country cannot be developed, and our valleys cannot be reclaimed and become inhabited, unless the waters of the streams can be used in an equitable manner, to cause the earth to bring forth its fruits." And thereupon he observes "that water for irrigation in this country as naturally belongs to the lands through which the stream passes, in certain proportions, as in other countries it belongs to the land to supply the necessities of life."

With all due respect for the opinion of the learned judge, we feel impelled to say that, in our judgment, his premises do not lead to the conclusion reached. We agree with him as to the natural necessity of water for irrigation; but if that necessity is to be confined to the narrow area of the comparatively few legal subdivisions of land bordering the streams, the valleys will ordinarily not be reclaimed, nor the resources of the country developed; and the application of the common-law rule will not result in an equitable use of the waters of the streams.

In the cases involving the subject of irrigation heretofore decided by this court reference has been made to the act of 1875 as the first expression of the legislative department regarding it. That act constitutes, it is true, the earliest attempt in this jurisdiction to regulate the subject. But there are other declarations and provisions anterior to that act which tend to illustrate the custom as to the use of water, and its necessity, and the public recognition thereof.

The first territorial legislature enacted a law for the development of the mining resources of the territory, and provided in that act for placing and recording notices of claims for ditches and water privileges, and requiring the completion of such ditches within a certain time after filing notice: Laws 1869, c. 22, secs. 15-18. And in the act passed by the same legislature for the creation and regulation of corporations, authority was conferred upon any three or more persons to associate for the formation of a company to construct a ditch for the purpose of conveying water to any mines, mills or lands, to be used for mining, <sup>527</sup> milling or irrigating of lands; and it was provided that any such company should "have the right of way over the line named in the certificate, and shall also have the right to run the water of the stream or streams named in the certificate through their ditch; provided, that the line proposed shall not

interfere with any other ditch whose rights are prior to those acquired under this article, and by virtue of said certificate. Nor shall the water of any stream be directed from its original channel to the detriment of any miners, millmen or others along the line of said stream, who may have a priority of right, and there shall be at all times left sufficient water in said stream for the use of miners and agriculturists who may have a prior right to such water along said stream." It was also provided that such company should furnish water to the class of persons using water in the way named in the certificate, whether miners, millmen or farmers, whenever they should have water in their ditch unsold, at rates to be fixed by the county commissioners: Laws 1869, c. 8, secs. 28-31. That act was carried into the compilation of 1876, chapter 34. In 1884 those sections were amended so as to permit a single company to organize for the purpose of constructing several ditches; but otherwise the law was not changed. As so amended, the provisions became incorporated into the revision of 1887, as sections 532 to 546, inclusive. And without further alteration they continue in force: Rev. Stats. 1899, secs. 3066-3069. Under a provision in the statutes of Colorado similar to that above noticed, to the effect that the water of a stream shall not be diverted from its original channel to the detriment of others along the line of the stream, it was held in a case already cited that it was not intended to prohibit the diversion of water to the "detriment" of parties who might settle upon the stream at some future period, and that detriment at the time of diversion could only exist where the water diverted had been previously appropriated and used; although the qualifying words, "who have a priority of right," was not embodied <sup>528</sup> in the original Colorado statute, but they were inserted by amendment at the succeeding session of the legislature. The court held the amendment to amount to an acknowledgment by the legislature of a doctrine already existing under which rights had accrued that were entitled to protection: *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443.

In 1873 the third legislative assembly of the territory of Wyoming adopted a memorial to Congress urging the grant to the several states and territories situated in the arid region of one-half the arid lands, the same, or the proceeds thereof, to be devoted to the construction of irrigating canals and reservoirs, for the reclamation of the arid and waste lands; and in the preamble it was recited in substance that the portion of the public domain lying between the ninety-ninth meridian of longi-

tude west from Greenwich and the Pacific Ocean is arid and generally incapable of cultivation except by means of irrigation; that such region embraces more than one-third of the geographical area of the United States, and comprises the territories of New Mexico, Arizona, Colorado, Wyoming, Utah, Idaho and Montana, and the state of Nevada, and large portions of the states of Oregon, California, Nebraska, Kansas and Texas, and of the territories of Washington and Dakota; that the water supply of its rivers and smaller streams is abundant to reclaim millions of acres that lie waste and unproductive; and that the soils of the region named are remarkable for their productiveness, when subjected to irrigable agriculture; that the present agriculture of such region is confined to the immediate valleys of the watercourses where irrigating canals are of easy construction, and comparatively inexpensive, and will remain confined to these narrow limits, unless some extensive system of irrigation can be established.

This memorial is not only significant from an historical standpoint, in view of the later acts of Congress, and especially the recent congressional legislation in aid of irrigation enterprises, and the conservation of the waters through <sup>529</sup> the proposed construction of reservoirs, but it demonstrates emphatically the early recognition in this jurisdiction of the necessity of irrigation, and the great benefits to accrue from the reclamation, not only of the lands lying adjacent to the streams, but those removed therefrom as well. It shows, also, the prevalence here of the custom existing elsewhere in the west, and the recognition of a similarity in condition of adjacent states and territories.

From our somewhat extended review of the origin of the doctrine of prior appropriation of the waters of natural streams, it is quite clear that neither the custom or necessity that gave birth to the doctrine was confined to riparian lands. With respect to irrigation, the same necessity existed in the case of all lands, whether bordering on a stream or otherwise. Indeed, if there was any difference, the necessity was greater in the case of nonriparian lands. They constituted, and continue to constitute, the far greater body of lands whose cultivation is desirable, and upon the productiveness of which the welfare of the country in a large measure depends. And it is an undoubted fact that from an early date, if not from the very beginning, the custom of the settlers in the diversion of running water for purposes of irrigation disregarded the location of the lands, except



in so far as irrigation was at first confined to lands upon which water could be the more easily and inexpensively conducted.

It is hardly necessary, therefore, to cite authority upon the proposition that, under the doctrine of prior appropriation, it is not now and never has been essential to a water right, that the appropriator should apply the water upon land commonly or legally known as riparian. Pomeroy, in his work on Water Rights, states that the land which the appropriator possesses and on which the water is used, may be at a distance from the stream, and that the very object of his appropriation may be to conduct the water from the stream, through a ditch or canal across intervening public lands, to the tract which he possesses as a mining claim, a farm or <sup>530</sup> a mill, or even to sell and dispose of the water thus conducted through the canal to other parties, who use it for like purposes on their own "claims" or tracts of land: Black's Pomeroy on Water Rights, 47.

The act of Congress of 1866 granting rights of way for ditches over the public lands recognized a custom to conduct water to lands other than those situated on the margin of streams. Mr. Kinney asserts that a valid appropriation may be made for the irrigation of lands, or for any other beneficial use, not situated upon or near the stream: Kinney on Irrigation, 156. And we think this proposition is conceded in every jurisdiction where the doctrine is to any extent enforced.

In the Colorado case of Coffin v. Left Hand Ditch Co., 6 Colo. 443, the appellee claimed to have appropriated certain water from St. Vrain creek, through its diversion by means of a ditch which conducted the water to the James creek, thence along the bed of the same to Left Hand creek, where it was again diverted by lateral ditches, and used to irrigate lands adjacent to the last-named stream. It was contended that such appropriation was unlawful. But the court upheld it, and said: "In the absence of legislation to the contrary, we think that the right to water acquired by priority of appropriation thereof is not in any way dependent upon the locus of its application to the beneficial use designed. And the disastrous consequences of an adoption of the rule contended for forbid our giving such a construction to the statutes as will concede the same, if they will properly bear a more reasonable and equitable one. The doctrine of priority of right by priority of appropriation for agriculture is evoked, as we have seen, by the imperative necessity for artificial irrigation of the soil. And it would be an ungenerous and inequitable rule that would deprive one of its

benefit simply because he has, by large expenditure of time and money carried the water from one stream over an intervening watershed and cultivated land in the valley of another. <sup>531</sup> It might be utterly impossible owing to the topography of the country, to get water upon his farm from the adjacent stream; or, if possible, it might be impracticable on account of the distance from the point where the diversion must take place and the attendant expense; or the quantity of water in such stream might be entirely insufficient to support his wants."

The supreme court of the state of Washington says that, "The right of appropriation, as defined by the best authorities, is not controlled by the location of the stream with reference to the premises which are irrigated": *Offield v. Ish*, 21 Wash. 277, 57 Pac. 809. See, also, *Long on Irrigation*, 50; *Thomas v. Guirand*, 6 Colo. 530; *Hammond v. Rose*, 11 Colo. 524, 7 Am. St. Rep. 258, 19 Pac. 466; *Oppenlander v. Left Hand Ditch Co.*, 18 Colo. 142, 31 Pac. 854. The court say in the case last cited: "The appropriator, though he may not own the land on either bank of a running stream, may divert the water therefrom, and carry the same withersoever necessity may require for beneficial use, without returning it, or any of it, to the natural stream, in any manner."

This being the law under whatever system the right to appropriate water for irrigation is recognized, the natural and logical result of the doctrine would seem to be at least in the case of interstate streams, and in the absence of contrary constitutional or statutory provisions, that the separation of the lands capable of irrigation from such streams by state lines is of no consequence, if we are to consider merely the general principles of the doctrine and the reasons that called it into existence. The same necessity applies to the lands on either side of the line, and the water naturally flows in the channel of the stream in disregard of such line above as well as below it. We are not aware of any rule which restricts as to location the point of diversion in initiating an appropriation, except the probable requirement that it be so located as to render the proposed diversion feasible in view of the intended use, and possibly <sup>532</sup> that if the proposed point of diversion be situated upon lands of another, the appropriator shall secure a right of way for his ditch or works to be constructed on such lands. So far as the mere right of appropriation is concerned, no obligation is imposed upon a party to divert the water at the

nearest possible point to his land, or within any particular district.

Doubtless it would be conceded that in the case of an interstate stream parties in possession of lands in either state would be entitled to appropriate any water of the stream not previously appropriated for the irrigation of their lands by diverting the water within the state where their lands are situated; and that the grantor of plaintiffs, Willey and Ellison, was entitled to divert from the stream in controversy, at some point in Montana, sufficient unappropriated water for the irrigation of his lands. The federal court, sitting in Montana, recognized a similar right in the case of a Wyoming appropriator from another stream, flowing from Montana into Wyoming, and held that an invasion of his rights by the diversion of the water in Montana might be enjoined: *Howell v. Johnson*, 89 Fed. 556. In that case the learned judge said: "The idea that there can arise any international water right question in the case of the appropriation of the waters of an unnavigable stream cannot be maintained. The right to such waters, after the national government has disposed of them, must always be a question pertaining to private persons."

Some expressions contained in the opinion in that case in respect to state ownership and control of the waters of unnavigable streams have been supposed destructive of an essential principle in the law of irrigation. It is not necessary that we agree with all the reasons given by the court for the conclusion announced, nor that we assent to all the views expressed in the opinion. We think there can be little question, but that it was rightly held that the plaintiff in the case had secured a right by appropriation <sup>533</sup> to the waters of the stream, as against a subsequent appropriator in the other state, which might be protected in the courts of such state against injury by acts occurring therein.

We find nothing, therefore, in the fundamental principle of the doctrine of prior appropriation that he who is first in time is first in right, nor in the reasons that led to the establishment of the doctrine, which is opposed to the acquirement of a water right for the irrigation of lands in one state by the diversion of the water at a point in another state from a stream flowing in both states. But in this and other jurisdictions where the common law, in respect to the use of water and the right thereto, is altogether ignored, there has been established, either by judicial decision or statute, or both, as an essential

principle, that the water of all natural streams is the property of the public or of the state. In this state the earliest declaration to that effect occurred in the statute of 1886. It was there declared that the water of every natural stream is the property of the public, subject to appropriation as therein provided: Rev. Stats. 1887, sec. 1344. The constitutional declaration is that such water, as well as the water of all springs, lakes or other collections of still waters within the boundaries of the state is the property of the state; that priority of appropriation for beneficial uses shall give the better right; and that no appropriation shall be denied except the same be demanded by the public interests: Const., art. 8, secs. 1, 3.

This court has stated that the statutory and constitutional declarations seem rather to declare and confirm a principle already existing than to announce a new one, for the reason that under the rule permitting the acquisition of rights by appropriation the waters become perforce publici juris: *Farmers' Inv. Co. v. Carpenter*, 9 Wyo. 110, 87 Am. St. Rep. 918, 61 Pac. 258, 50 L. R. A. 747. The appropriation in question antedates the act of 1886. But we think the waters of natural streams, even at the time of such appropriation, are to be regarded as <sup>534</sup> belonging to the public, subject to the right of appropriation.

That principle is not maintained to the same extent in Montana. It is there held that the right to the use of running water follows the ownership of riparian soil; and that a water right can be acquired only by the grant, express or implied, of the owner of such soil. But it is also said that the state has, by necessary implication, assumed to itself the ownership, sub modo, of the rivers and streams of the state and "expressly granted the right to appropriate the waters of such streams, which right, if properly exercised in compliance with the requirements of the statutes, vests in the appropriator full legal title to the use of such waters by virtue of the grant made by this state as owner of the water": *Smith v. Denniff*, 24 Mont. 20, 81 Am. St. Rep. 408, 60 Pac. 398.

The obvious meaning and effect of the expression that the water is the property of the public is that it is the property of the people as a whole. Whatever title, therefore, is held in and to such water resides in the sovereign as representative of the people. The public ownership, if any distinction is material, is rather that of sovereign than proprietor: *Farm Inv. Co. v. Carpenter*, 9 Wyo. 110, 87 Am. St. Rep. 918, 61 Pac.



258, 50 L. R. A. 747. That ownership, however, is subject to a particular trust or use, specially defined in the statutes and in the constitution. And that trust or use, in the absence of statute, is just as prominently and intrinsically attached to such public ownership. The waters are held subject to appropriation for beneficial uses. And we have endeavored to show that the right of appropriation is not, in the absence of statute at least, restricted locally nor by state lines. The trust is to be considered as coextensive with the right on which it rests. Upon the general principles governing such appropriation, we perceive no reason, if the same be not prohibited by statute, why the owner of lands in another state may not at a point in this state lawfully divert the water of a stream flowing in both states and conduct such water upon his lands for their irrigation, and thereby secure <sup>535</sup> a valid water right. There is nothing in the essential character of the trust or use for which the waters are held by the public that, in our judgment, prevents the acquirement of a water right on such a stream in that manner, provided the appropriator is able to comply with the statutory provisions regulating and controlling the appropriation and diversion of the public waters.

Moreover, a desirable comity between the states within whose respective dominions the same stream may flow, and a due regard by each for the rights of the residents and land owners in the adjoining state, would seem to require a liberal view of this matter. In an interesting case in Wisconsin, where the question arose whether the state could constitutionally sell the ice formed upon public waters, it was held that where the term "people of the state" is used to designate the beneficiaries of the trust in navigable waters, all the people who may choose to enjoy the same within the state are referred to, whether citizens of the state or persons who came within its territory, for the purpose of enjoying such public rights: *Rossmiller v. State*, 114 Wis. 169, 91 Am. St. Rep. 910, 89 N. W. 839, 58 L. R. A. 93.

Whether, upon the grounds stated, the views we have expressed are correct or not, there is another consideration which forces us to the same conclusion. When the appropriation was made Montana and Wyoming were each under a territorial form of government. The sovereign authority resided in the United States: *Cooley's Constitutional Limitations*, 526. It is true that as territories they were invested with certain rights of legislation, and subject to the provisions of their organic

acts and other laws of Congress exercised a limited sovereignty over the territory within their respective boundaries. But the primary sovereign authority was the general government. There was then fundamentally no divided sovereignty over these waters.

It must be understood that we express no opinion upon the question as affected by the later legislation of this state <sup>536</sup> on the subject of the appropriation of water. That legislation did not and could not have destroyed rights already accrued; although, as we have previously held, such accrued rights may be regulated by subsequent legislation, and a compliance with such regulations, if not unreasonable, may be required: *Farm Inv. Co. v. Carpenter*, 9 Wyo. 110, 87 Am. St. Rep. 918, 61 Pac. 258, 50 L. R. A. 747. It is evident, however, that one irrigating lands in another state must suffer some disadvantages. The state laws regulating the distribution of the waters cannot operate beyond its boundaries; and it is doubtful whether any remedy in case of injury to his rights is open to such an appropriator other than those obtainable through the medium of the courts.

The only statute in force at the time the appropriation was made under which plaintiffs claim having possible effect upon the question under consideration is section 1, of chapter 65 of the Compiled Laws of 1876. It provided as follows: "All persons who claim, own or hold a possessory right, or title, to any land or parcel of land, within the boundary of Wyoming Territory, when those claims are on the bank, margin or neighborhood of any stream of water, creek, or river, shall be entitled to the use of the water of said stream, creek or river for the purposes of irrigation, and making said claim available, to the full extent of the soil, for agricultural purposes."

Were this statute to be regarded as the source and the exclusive authority for right of appropriation, the reference alone to lands within the boundaries of Wyoming Territory might be construed as an exclusion of all lands otherwise situated from the benefits of the act. That might possibly also require a construction excluding lands held by fee simple title. The use of the word "claim" or "claims" in various places in the act would seem to indicate that the purpose of the statute was to authorize an appropriation for the irrigation of land held under possessory title. It may have been deemed desirable to dispel any doubts respecting the right to make an appropriation for land so held.

**537** But the right existed before the passage of the act. The latter is to be considered as declaratory only, and not as the creator of a new right or privilege. It contains no negative words showing an intention to limit or qualify the right. Other territories adopted statutes practically in the same language—notably, Colorado and Montana; the one situated south and the other north of us. Doubtless the one first passed furnished an example for the others. We think the intention of the legislature in mentioning alone lands situated within this territory was not to exclude other lands, any more than the mention of irrigation was intended as an exclusion of other beneficial uses. It was quite natural without any positive purpose of exclusion to mention Wyoming Territory, since the legislature was enacting laws for that territory. It was no doubt understood that a statute would have no extraterritorial effect. It is, of course, true that the plaintiffs who own lands in another state cannot claim by virtue of the statute referred to; but their right depends upon the law that existed independent of the statute.

We have already extended the discussion of this question beyond our original purpose. But we cannot forbear a brief reference to two public reports of administrative officers as illustrating the practical necessity of the rule laid down. In the very able report of Mr. Fred Bond, the state engineer of Wyoming, for the years 1901 and 1902, appropriations of water from interstate streams is considered at some length, and some practical suggestions are made to the end that through uniformity of laws such appropriations may be equitably regulated. The significant feature of his discussion, in this particular connection, is the necessity of recognition of all appropriations from such streams, whether the diversion occurs in the one state or the other, based upon the only principle that he deems entitled to consideration, viz., the principle that priority of appropriation gives the better right, and that an appropriation consists of two things—a diversion by some adequate means and an application to some beneficial use.

**538** He says: "Upon the doctrine that priority of appropriation gives the better right is based the adjudications of water in all the arid states, yet, not one of them has undertaken to carry this doctrine to its logical conclusion. There is no reason why an appropriator from a stream lying wholly within a state should receive protection, either better or different in kind, from that accorded to a user from a stream passing from one

state into another, and if much costly litigation in the United States courts is to be avoided, if, in a word, all appropriations are to receive the same protection and in all the same degree under state laws as a part of them now enjoy, means for securing that protection must be early devised."

In a report to the Department of Agriculture of the United States, from the office of the station for irrigation investigations, dated June 15, 1899, is contained a very interesting, as well as instructive, discussion of the water right problems of Bear river, a stream flowing through three arid states, Wyoming, Idaho, and Utah. It appears therefrom that there exist several cases upon that one stream where a diversion is made in one state for the irrigation of lands in another. In the case before us two instances of the kind appear. Hence, it would seem that irrigators have not deemed it obligatory upon them under the law to confine their diversion and application to the same state in the case of an interstate stream.

The question next demanding our attention is whether the district court of Sheridan county, in this state, has jurisdiction, in case the facts warrant it to decree the relief prayed for. That relief, so far as concerns the inquiry before us, is twofold: First, an adjudication of the priorities or rights to the use of the waters of Youngs creek; and second, the granting of an injunction to restrain the defendants from diverting any of said waters to the injury of the rights of plaintiffs.

The defendants against whom the relief is demanded were served with process, and have appeared and answered. 539 It does not appear whether they are residents of this state or not. Possibly it might be proper to assume the fact of such residence; but we are inclined to consider the matter immaterial. The court has obtained jurisdiction over their persons, and they have submitted themselves to that jurisdiction by filing an answer to the merits.

It is contended that jurisdiction to prevent the continuance of the alleged injuries exists on the ground that the writ of injunction operates in personam. And Mr. High states that the remedy by injunction being primarily in personam, a nuisance consisting of an injury to water rights may be enjoined in the state which has jurisdiction of the person committing the injury, regardless of the locus of the nuisance itself: 1 High on Injunctions, 803. But he cites an early case to the contrary, where it is held that the jurisdiction is in rem, and that a nuisance consisting of a diversion of water from a river which



is the boundary line between two states must be enjoined in the state where the nuisance is located: *Stillman v. White Rock Mfg. Co.*, 3 Wood. & M. 538, Fed. Cas. No. 13,446. It is to be observed, however, that the only material question in that case was whether the federal court in Rhode Island possessed jurisdiction to restrain a defendant, over whose person the court had jurisdiction, from diverting the water of a stream dividing Connecticut and Rhode Island in the latter state to the injury of plaintiff's mill in the former; and Judge Woodbury stated that if the view he took of the matter was not sound, it might be reasonable to hold a wrongdoer liable, either where the direct act is done or where the consequential injury is felt.

We conceive it unnecessary to place the jurisdiction of the district court on the sole ground that the writ of injunction operates in personam. Indeed, as this case does not involve any contract rights, nor any question of fraud, we think there might exist some doubt of the jurisdiction of the court, based upon that ground alone, where the wrong act and the consequential injury both occurred in <sup>540</sup> another state or jurisdiction: See *Northern Ind. R. Co. v. M. C. R. Co.*, 15 How. (U. S.) 233, 14 L. ed. 674; *Livingston v. Jefferson*, 1 Brock. 203, Fed. Cas. No. 8411; *Alexander v. Tolleston Club*, 110 Ill. 65.

The diversion by the defendant, Obberreich, occurred and is being continued within the state and in the county of Sheridan; and the lands, as well as ditch of the plaintiffs, Boyle, Foss and Verley, injured by such diversion, are situated in the same county and state. It is clear, therefore, that, whatever the form of action, the district court of Sheridan county, as between those parties, has ample jurisdiction. It has jurisdiction as between them not only to restrain Obberreich from unlawfully diverting the waters to the injury of the rights of Boyle, Foss and Verley, but to determine their relative rights to the use of the water; the water diverted by Obberreich being used on Wyoming soil.

The diversion made by the other defendants occurs in Montana, and, although they conduct the water so diverted to and upon lands within this state, the act of diversion occasions the injury complained of, and the wrongful act, therefore, if any, occurs in Montana; while it is equally obvious that the locus of the injury to plaintiffs, Boyle, Foss and Verley, is in this state, where their ditch and lands are situated.

Under our code provisions, actions for the recovery or partition of real property must be brought in the county where

the subject of the action is situate: Rev. Stats. 3496. Generally, for the recovery of a fine, forfeiture or penalty imposed by statute, the action must be brought in the county where the cause, or some part thereof, arose: Rev. Stats. 3499. No special provision is made respecting actions growing out of nuisance, trespass and the like; and such actions are probably governed, so far as the code is concerned, by section 3505, which requires every action not otherwise mentioned to be brought in the county where a defendant resides or may be summoned. We are not inclined, <sup>541</sup> nor do we believe it necessary, in this case to consider the effect of the code provisions upon this kind of action irrespective of the location of the wrong and injury. It may be conceded, for the purposes of this decision, that the court, would not assume jurisdiction unless it were found, in the class of cases referred to, that either the wrongful act or the injury occurred in this state.

At common law, "where the action is founded on two things done in several counties, and both are material and traversable, and the one without the other doth not maintain the action, then the plaintiff may bring his action in which of the counties he will." In *Bulwer's Case*, 7 Coke, 1, it is laid down: "When matter in one county is depending upon a matter in the other county, there the plaintiff may choose in which county he will bring his action"; and: "If a doth not repair a wall in Essex which he ought to repair, whereby my land in Middlesex is drowned, I may bring my action in Essex, for there is the default; or I may bring it in Middlesex, for there I have the damage": *Rundle v. Delaware etc. Canal*, 1 Wall. Jr. 275, Fed. Cas. No. 12,139; *Foot v. Edwards*, 3 Blatchf. 310, Fed. Cas. No. 4908; *Thayer v. Brooks*, 17 Ohio, 489, 49 Am. Dec. 474; *Barden v. Crocker*, 10 Pick. 383; *Lower Kings etc. Ditch Co. v. Kings River etc. Canal Co.*, 60 Cal. 408; *Deseret Irr. Co. v. McIntyre*, 16 Utah, 398, 52 Pac. 628.

Applying this principle, it was held in *Foot v. Edwards*, 3 Blatchf. 310, Fed. Cas. No. 4908, that the circuit court of the United States for Connecticut had jurisdiction of an action by the owner of a mill in Massachusetts on a stream flowing into that state from Connecticut against one who diverted in the latter state the water of the stream, so that it ceased to flow to plaintiff's mill. And a similar decision was made in *Rundle v. Delaware etc. Canal*, 1 Wall. Jr. 275, Fed. Cas. No. 12,139, where the canal causing the injury was situated in New Jersey, and the lands injured were in Pennsylvania.

In the California case above cited plaintiff and defendant diverted the water of Kings river, in Fresno county. Plaintiff's ditch was about twenty miles in length, of <sup>542</sup> which about eighteen miles was in Tulare county, and the damage was sustained by plaintiff in the last-named county, in which county the action was brought. The acts complained of being the prevention of water from flowing in plaintiff's ditch, which was located in both counties, while the specific act of diversion complained of occurred in Fresno county, it was held that the subject of the action was in both counties, and the action might have been brought in either.

In the case of *Deseret Irr. Co. v. McIntyre*, 16 Utah, 398, 52 Pac. 628, the plaintiff's dams and ditches, as well as its lands to be irrigated therefrom, were situated in Millard county, where the action, similar to the one at bar, was brought. The dams and ditches of the defendants were located in Sanpete county. The court observes that neither the facts relating to the diversion alone, nor those relating to the injury alone, are sufficient to constitute a cause of action; that some of the material facts arose in Sanpete county and some in Millard county, and the cause of action may be said to have arisen in each county. And the court say: "Therefore, the plaintiffs had the right to elect in which they would bring their action."

From the authorities referred to, it is evident that the rule is the same where the act complained of occurs in one state to the injury of property in another. And upon principle, there is no reason why it should not be so. In a Massachusetts case the action was brought by the owner of a mill in Rhode Island. In discussing the matter, and referring to the common-law rule where the locus of the wrongful act and injury occur in different counties, Mr. Justice Holmes remarks: "As between two states, both of which recognize the right, if the rule is to vary at all, it should be on the side of greater liberality, to prevent a failure of justice such as would be likely to happen in the present case if this action were not maintained": *Mannville Co. v. Worcester*, 138 Mass. 89, 52 Am. Rep. 261.

It was held in New Hampshire that, where the person of <sup>543</sup> a defendant is within the jurisdiction of the court, he may be enjoined against destroying a dam of the complainants situated out of the state which would result in injury to property in the state: *Great Falls Mfg. Co. v. Worcester*, 23 N. H. 462. This was a case where the owners of certain cotton-mills requir-

ing the water of Salmon river to enable them to use the mills had maintained a dam across the river partly in New Hampshire and partly in Maine. The defendant, a citizen of New Hampshire, had destroyed part of the dam and threatened to remove the whole of it. The question was whether the court had jurisdiction to restrain the defendant from going into the state of Maine and there committing acts injurious to the property of complainants in New Hampshire; and it was held that the court had jurisdiction.

On principle and authority, therefore, we think there can be no doubt of the jurisdiction of the district court to render a decree restraining the defendants Demmons from diverting the waters of the stream in Montana to such an extent as to deprive those plaintiffs whose lands are situated in this state of the water to which they are found to be entitled by priority of appropriation. As to them, the whole of the injury occurs in this state.

We are of the opinion, also, that jurisdiction resides in the court to restrain said defendants, as well as the defendant Obberreich, from diverting the waters of the stream, as alleged, to such an extent as to deprive the plaintiffs, Willey and Ellison, of the water appropriated by their grantor by means of the ditch in question to which they may be found entitled.

It is true their lands that are irrigated by means of the water appropriated, as claimed, are within the state of Montana; and that the injury to their rights consists partly in the deprivation of said lands of water for their irrigation; and hence that the injury in that respect, as well as the acts of some of the defendants, occurs without this state. But whatever rights by appropriation they have is in consequence <sup>544</sup> of their succeeding to the right of their grantor, Peoples, who was a joint owner of the ditch used to convey the water to such lands. Part of that ditch, how much does not appear, and the head-gate thereof, are situated in this state. The waters for the irrigation of the lands aforesaid are diverted in this state. The right of the prior appropriator to have the water flow in the stream to the head of his ditch is an incorporeal hereditament appurtenant to his ditch and coextensive with his right to the ditch itself: *Kinney on Irrigation*, 247; *Lower Kings etc. Co. v. Kings River etc. Canal Co.*, 60 Cal. 408; *Deseret Irr. Co. v. McIntyre*, 16 Utah, 398, 52 Pac. 628; *Conant v. Deep Creek etc. Co.*, 23 Utah, 627, 90 Am. St. Rep. 121, 66 Pac. 188; *Smith v. Denniff*, 24 Mont. 20, 81 Am. St. Rep. 408, 60 Pac.



398: *Wyatt v. Larimer & Weld Irr. Co.* 18 Colo. 298, 36 Am. St. Rep. 280, 33 Pac. 144.

In the case last cited, Mr. Justice Goddard says: "That a valid appropriation of water from a natural stream constitutes an easement in the stream, and that such easement is an incorporeal hereditament, the appropriation being in perpetuity, cannot well be disputed." He refers to the discussion of property in water by Washburn in his work on Easements and Servitudes (page 276), and Angell on Watercourses (section 141), and adds: "The right acquired to water by an appropriator under our system is of the same character as that defined by the foregoing authorities as an incorporeal hereditament and easement. The consumer under a ditch possesses a like property. He is an appropriator from the natural stream, through the intermediate agency of the ditch, and has the right to have the quantity of water so appropriated flow in the natural stream, and through the ditch for his use."

In the California case cited, it was said that the consequences of the act of diversion "operated upon the whole of plaintiff's ditch, and was injurious as well to that part of it in Tulare county as to that in Fresno county. In no sense can the injury be said to be confined to that part of the ditch in Fresno county. The ditch is an entirety, and the right to have water flow in it is coextensive with plaintiff's right to the ditch itself": *Lower Kings etc. Co. v. Kings River etc. Land Co.*, 60 Cal. 408.

545 The rights of plaintiffs, Willey and Ellison, therefore, if they be found entitled by priority of appropriation, upon the facts, to the use of the water as against any appropriation of defendants, includes the right to have the water of the stream flow down to the headgate of the ditch. And an injury occurs to their rights if that flow be prevented. It follows that they suffer an injury within this state through the diversion of defendants at points above the headgate of the Gladewater ditch.

The inquiry presented by the third reserved question is whether the district court has jurisdiction to adjudicate the right to water diverted from a natural stream in this state to be conveyed and used in the state of Montana on the lands of plaintiffs, Willey and Ellison. It is obvious that in order to protect their rights in and to said water it will be necessary for the court to consider and determine what their rights are as against the defendants; whether or not they have an appropriation superior to the appropriation of the defendants. To that extent, no doubt, the court has jurisdiction. Having jurisdic-

tion to protect their rights in the stream, the court is clearly authorized to inquire into and determine them. But there is some uncertainty in the question and it may be intended to reach beyond that. It is possible that the question may have been intended to embrace an inquiry into the court's jurisdiction to enter a decree forever quieting the title of the plaintiffs to the water claimed to have been appropriated by them. There might be no reasonable objection to that jurisdiction as between all the parties other than Willey and Ellison, the owners of Montana lands. The lands irrigated by all the other parties are situated in this state, and within the county wherein the court is held. In the possible view stated of the question, it is a perplexing one in respect to Willey and Ellison; and as for all practical purposes their rights can be fully protected by the writ of injunction, we are not inclined to decide it upon this hearing, it not being entirely clear that it presents the inquiry suggested.

546 An action was commenced in one of the district courts of Idaho to quiet the title of the plaintiffs to the waters of a certain stream which arises in Idaho and flows into Utah. In that action various parties appeared, some of whom had made appropriations by diverting the water in Utah and irrigating lands in that state. The court entered a decree awarding to each of the parties, the Utah as well as the Idaho appropriators, specific quantities of the waters of the flow of said stream, and quieting their respective titles thereto. Subsequently, some of the Utah parties brought suit in that state asking a decree in accordance with and based upon the Idaho decree. The supreme court of Utah held that the proceeding in the Idaho court was without jurisdiction as to the appropriations made as aforesaid in Utah. The decision was based upon the ground that a water right for irrigation is appurtenant to the land irrigated, and that an action to quiet title and establish the right to divert and use water for such purpose is in the nature of an action to quiet title to real estate, which must be prosecuted in the courts of the state in which the same is situated. It is to be observed that not only the lands irrigated, but the points of diversion and ditches of the Utah parties were located in that state. The substantial effect of the decision was that the Idaho court was not vested with jurisdiction to determine as between themselves the rights of the several appropriators who diverted water from the stream in Utah, and used the same for irrigating lands in that state, and to quiet their titles

thereto: *Conant v. Deep Creek etc. Co.*, 23 Utah, 627, 90 Am. St. Rep. 721, 66 Pac. 188.

It was, however, conceded upon the principle that a person who had appropriated water is entitled to have so much of the waters as he has appropriated flow down to the point of his diversion, that if the settlers higher up on the stream, in another state, whose appropriations are subsequent, divert any of the waters of the stream which have been so first appropriated, then the courts of the latter state will protect the first settler in his rights, citing *Howell v. Johnson*, 89 <sup>547</sup> Fed. 556. And the court said: "The Idaho courts, therefore, have ample and complete jurisdiction to protect the rights of respondents to have the water which they have appropriated, and which they divert in Utah, flow through the channel of the stream, and to limit and determine the rights of the Idaho proprietors with reference thereto."

The distinction between the facts in that case and the one here is that there the parties over whose titles the jurisdiction was denied for the purpose mentioned both diverted and used the water without the territorial jurisdiction of the court which had entered the decree, while here the diversion is in this state and the use occurs in another. Yet to some extent the same reasoning applies. It would not be insisted that the courts of this state could entertain jurisdiction to quiet the title to lands situated in Montana. They might protect certain rights connected with that title. It is held that courts of equity may decree specific performance of contracts respecting land situated beyond the jurisdiction of the state where the suit is brought, the ground thereof being that courts of equity have authority to act upon the person; and, although they cannot bind the land itself by their decree, yet they can bind the conscience of the party in regard to the land, and compel him to perform his agreement: 2 Story's Equity Jurisprudence, sec. 743.

If, therefore, a decree adjudicating the various priorities of the parties would operate as a decree quieting the title to the lands of plaintiffs, Willey and Ellison, in another state, it is quite obvious that it would be beyond the jurisdiction of the court. But for the reasons stated, we shall decline at this time to go into the matter further.

The fourth reserved question is as follows: "Has the district court of Sheridan county, Wyoming, jurisdiction to adjudicate the water right claimed by Peoples and his grantees, Willey and Ellison, under the facts agreed upon herein, after a decision

by the board of control and by the district court of said county adverse to said water right, as hereinbefore stated?"

<sup>548</sup> The reference in the question to the agreed facts is not strictly accurate. The decision of the board and the court was not adverse to the right on its merits; but in each forum an adjudication was denied on the ground of want of jurisdiction. It is disclosed by the statement that Peoples submitted to the board of control in 1892 his proof for the adjudication of his water right, and that said claim was rejected by the board, they holding that they had no jurisdiction to adjudicate water for use in the state of Montana; that on an appeal by other parties to the district court, Peoples attempted to intervene, and his petition therefor was denied by the court for want of jurisdiction. The fact, however, that there has been a former adjudication of any matter does not determine the jurisdiction of the court. Former adjudication may be pleaded and shown in defense. We said in *State v. Ausherman*, 11 Wyo. 410, 72 Pac. 200: "It is not understood that former adjudication is a bar to jurisdiction. It may constitute a good defense to the proceeding upon some issue involved, and control the decision of some question necessary to be determined." This consideration alone requires us to say that an adverse decision by the board of control and the district court on appeal would not defeat the jurisdiction of the court any more than such a decision would defeat jurisdiction in any other case.

Proceedings before the board of control are purely statutory. And an appeal to the district court from a decision of the board of is merely a continuation of those proceedings in an appellate tribunal. Such an appeal is based upon the statute, and does not invite the general law and equity jurisdiction of the court to afford affirmative relief. The character of those proceedings was quite fully considered in the case of *Farm Inv. Co. v. Carpenter*, 9 Wyo. 110, 87 Am. St. Rep. 918, 61 Pac. 258.

Similar statutory proceedings are provided for in Colorado, except that they are prosecuted in the courts in the first instance. It is held in that state that under the statutes <sup>549</sup> governing such special proceeding the court had no jurisdiction therein to award a priority to a ditch for the irrigation of lands in New Mexico: *Lamson v. Vailes*, 27 Colo. 201, 61 Pac. 231.

But this is not an appeal from the decision rendered in the statutory proceeding, and such decision is not before this court for consideration. Neither is the question before the court



whether that decision is *res judicata* of the matter now pending between the plaintiffs, Willey and Ellison, and the defendants.

We have thus considered all the questions which we understand to be presented by the record.

A recapitulation of our views with special reference to the several reserved questions we believe to be unnecessary.

Corn, C. J., and Knight, J., concur.

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*A Right to the Use of Water* may be acquired in the western states by priority of appropriation for beneficial purposes: *Farm Investment Co. v. Carpenter*, 9 Wyo. 110, 87 Am. St. Rep. 918, 61 Pac. 250, 50 L. R. A. 747; *Strickler v. Colorado Springs*, 16 Colo. 61, 25 Am. St. Rep. 245, 26 Pac. 313. As to the right to divert water for the irrigation of land not located on the banks of the stream, see *Hammond v. Rose*, 11 Colo. 524, 7 Am. St. Rep. 258, 19 Pac. 466; and as to the right to divert water to be used on land beyond the watershed, see *Bathgate v. Irvine*, 126 Cal. 135, 79 Am. St. Rep. 158, 58 Pac. 442; *Jones v. Conn*, 39 Or. 30, 87 Am. St. Rep. 634, 64 Pac. 855, 65 Pac. 1068, 54 L. R. A. 630.

*Where a Stream Rises in Idaho* and flows into Utah, an Idaho court has no jurisdiction to determine the title and right to the water flowing in Utah and there diverted and used for irrigation: *Conant v. Deep Creek etc. Irr. Co.*, 23 Utah, 627, 90 Am. St. Rep. 721, 66 Pac. 188.

CASES  
IN THE  
SUPREME COURT OF ERRORS  
OF  
CONNECTICUT.

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MERSICK v. HARTFORD AND WEST HARTFORD  
HORSE RAILROAD COMPANY.

[76 Conn. 11, 55 Atl. 664.]

**RAILWAY MORTGAGES—Awarding Preferences Over, Principles Controlling.**—The principle by which certain preferences are given to a particular class of unsecured creditors over the mortgagees of a railroad is an implied agreement on their part in accepting security for the payment of bonds that current debts contracted in the ordinary course of business of the railroad shall be paid from its current earnings before such mortgagees shall have a claim to the income. (p. 985.)

**RAILWAY MORTGAGES—Limitation upon Right to Give Preference to Other Claims.**—There is no agreement implied on the part of railway mortgagees that the body of the mortgaged property may be used to pay current expenses in operating the road. Such a preference can only be awarded out of the earnings. (p. 985.)

**RAILWAY MORTGAGES—Preference in Favor of Operating and Like Expenses.**—Where no Part of the Income of a railway has been paid into court or remains in possession of the receiver, the court cannot, in a suit to foreclose a mortgage of the railroad, order that the proceeds of its sale or any part thereof be awarded to persons furnishing supplies for operating the road prior to the appointment of the receiver, there having been no diversion of the current income for the benefit of the mortgagees. (p. 986.)

**RAILWAY MORTGAGES—Preference in Favor of Operating Expenses While Trustee is in Possession.**—The expenses of a trustee in a railway mortgage for wages of employes or other expenses incurred in operating the road while he is in possession of the property for the benefit of bondholders must be awarded preference over the mortgages in distributing the proceeds of a sale of the mortgaged property under foreclosure. (p. 987.)

**RAILWAY MORTGAGES—Preference in Favor of Expenses Paid by a Trustee to Employés for Work Done Before He Took Possession.**—Where a railway mortgage provided that the trustees should be entitled to be reimbursed for all outlays of whatever sort incurred in the trust and that his compensation and disbursements constitute a first lien on the property, preferences out of the proceeds of a sale under foreclosure are proper in his favor for moneys paid to employés for work done before he took possession, if the court finds that without such payment it was practically impossible to resume the operation of the railway. (p. 987.)

**RAILWAY MORTGAGES.—Preference in the Distribution of the Proceeds of a Sale of Mortgaged Property** may be awarded in favor of a person placed in possession of the road by the trustee under the mortgage for money paid by him for rent of a part of a line of railway operated by him in connection with, and for the benefit of, the mortgaged property. (p. 988.)

**RAILWAY MORTGAGES.—Preferences for Money Advanced to Pay Taxes** will not be awarded out of the proceeds of a sale of railway property under foreclosure, where such advance was in the nature of a loan, and was made by a person under no obligation to pay the taxes and without any request from the mortgagees or bondholders. (p. 988.)

**TAXATION—Subrogation to the Lien of the State.**—One who advances money with which to pay taxes on railroad property which is subject to a mortgage does not thereby acquire the lien which the state might have had on the property. (p. 988.)

Suit to foreclose a mortgage on the property of the defendant railway company which had constructed and operated a street railroad in Hartford and West Hartford. The mortgage was given to the state treasurer as trustee August 1, 1894, to secure indebtedness aggregating \$315,000. On August 1, 1897, default was made in the payment of interest. On January 4, 1899, the trustee, as authorized by the mortgage, and at the request of certain bondholders, placed James Patterson, one of their number, in control of the road as agent of the trustee, and on March 4, 1899, the trustee commenced this suit and procured the appointment of Patterson as temporary receiver. The receivership was made permanent on the 9th of June of the same year. On June 16, 1899, a decree was entered directing the sale of the property at public auction, and such sale was made for \$20,000 on August 1, 1899. The purchasers subsequently organized another corporation styled "The Farmington Street Railway Company," to which the property was conveyed. Afterward this corporation, on showing that it had become the owner of all the bonds sued on, was permitted to join the plaintiff in the suit. Patterson and other claimants were permitted to intervene for the purpose of claiming the proceeds of the sale, and such proceeds were subsequently by the court ordered to be distributed and paid as follows:

1. Of the state treasurer for taxes for the year 1898.	\$1,038.87
2. Of railroad commissioners for salaries.....	11.46
3. Claims for expenses of receivership, and of state treasurer while in possession of property.....	980.00
4. Of W. J. Carroll, assignee, for labor performed within three months from appointment of receiver.....	56.64
	<hr/>
	\$2,086.97
Amount brought forward.....	\$2,086.97

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|---|-----------|
| 5. Of certain named intervening supply creditors, as a class, for supplies essential to the operation of the road, furnished by them to the defendant company after January 1, 1898, and prior to February 4, 1899, amounting to..... | 4,196.47  |
| 6. Of the plaintiff Mersick, trustee, consisting of these items:  | 4,304.04  |
| (a) \$2,855.96 paid for wages of employés from November 12, 1898, to February 4, 1899.  |           |
| (b) \$1,448.08 paid for wages of employés and running expenses while trustee was in possession.   |           |
| 7. Of James T. Patterson.....   | 16,303.55 |
| consisting of these items:  |           |
| (a) \$3,956.52 advanced to pay taxes, April 12, 1898.   |           |
| (b) \$11,031.65 advanced in April, 1898, to pay employés and other pressing claims against the company.   |           |
| (c) \$138.46 rent of Plainville line from February 4 to March 4, 1899.  |           |
| (d) \$1,176.92, rent of Plainville line from June 18, 1898, to February 4, 1899.  |           |

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Total of claims ordered paid.....\$26,891.03

It was found by the court that before the plaintiff Mersick took possession of the road the employés had inaugurated a strike because their wages had not been paid, and that it was practically impossible for him to resume the operation without first paying their wages; that at his request Patterson advanced the sum of \$2,855.96, with which such payment was made. The remainder of the Mersick claim, to wit, the item of \$1,448.08 was also for moneys advanced by Patterson. Of the items of the Patterson claim, that for taxes represented the



sum paid by him April 15, 1898, to the state treasurer upon an understanding with the corporation that he might hold the same as a preferred claim to the same extent as such officer might have held it had payment not been made; that for advances to pay employes and other pressing claims was made under an agreement with the corporation that he should receive assignments of such wages, and such assignments were in fact made to the extent of \$6,666.41. The balance of his claim was rent for a line of street railway owned by him and for the use of which the corporation agreed to pay him rent. In the judgment file the property sold by order of the court was stated to have a value in excess of \$150,000, but there was no evidence of this fact except a statement in the petition of one of the interveners, a demurrer to which had been sustained. Mersick, Patterson, and the Farmington Street Railway Company appealed.

Edward D. Robbins, for the Farmington Street Railway Company.

Howard H. Knapp, for Charles S. Mersick, trustee, and James T. Patterson.

Henry G. Newton and Harrison Hewitt, for the American Refining Company et al.

Joseph P. Tuttle, for John S. Parsons & Co. et al.

**17** HALL, J. The mortgage to the plaintiff trustee was executed and recorded in accordance with the laws of this state permitting a street railway company to so mortgage all its property, including its franchise, to secure the payment of its bonds, and providing for the foreclosure of such mortgage in the same manner as ordinary mortgages of real estate: Gen. Stats., sec. 3848; *Whittlesey v. Hartford etc. Ry. Co.*, 23 Conn. 421, 435.

The funds in the hands of the receiver represent the corpus of the property thus mortgaged. They are the proceeds of a sale of the mortgaged property, under a judgment in an action instituted by the trustee of the bondholders, as their authorized representative, after he had taken possession of the railroad in accordance with the provisions of the mortgage. In this action he asked for the appointment of a receiver and for a foreclosure by sale.

By the judgment of the superior court distributing these funds, the mortgagees of the railroad company receive no part of the proceeds of such foreclosure sale, made by the receiver by order of court and approved and confirmed by the court; but

the entire avails of the sale, after the payment of the expenses of the receiver and trustee, and certain unquestioned claims, are applied to the payment of the unsecured claims of the intervening supply creditors, and of Mersick and Patterson, before described, all of which were contracted since the execution of the mortgage and before possession was taken for the bondholders.

It is the claim of the Farmington Street Railway Company, one of the appellants—which was made a coplaintiff in the foreclosure suit since the commencement of that action, and is now the owner of all the bonds secured by the mortgage—that neither the said supply creditors, nor Mersick or Patterson, are entitled to payment of their claims from <sup>18</sup> the proceeds of the sale of the mortgaged property, until after payment of the mortgage debt; while said intervening supply creditors, and Mersick and Patterson, insist that their claims should take precedence, in order of payment, over the claims of the bondholders.

As supporting this claim of the supply creditors, and of Mersick and Patterson, and as sustaining the judgment of distribution in so far as it gives priority to the supply claims, and to certain items of the claims of Mersick and of Patterson, the leading case of Fosdick v. Schall, 99 U. S. 235, 25 L. ed. 339, and numerous other cases which are said to follow the rule laid down in that case, are cited.

Assuming that the doctrine of Fosdick v. Schall, 99 U. S. 235, 25 L. ed. 339, regarding the respective rights of the mortgagees and of the unsecured creditors of a railroad company as to priority of payment from the mortgaged property, or from the proceeds of its sale, at the time the trustee for the bondholders, or a receiver, takes possession of the railroad, is the law of this state, it becomes important to ascertain, first, just what was decided in that case; and second, whether the rule as there laid down is applicable to the facts of the present case.

Fosdick v. Schall, 99 U. S. 235, 25 L. ed. 339, was decided in 1878. In the opinion by Chief Justice Waite (99 U. S. 252) it is said: "The income out of which the mortgagee is to be paid is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment, and useful improvements. Every railroad mortgagee in accepting his security impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income. If, for the convenience of the moment, something is taken from what may not improperly be called the cur-

rent debt fund, and put into that which belongs to the mortgage creditors, it certainly is not inequitable for the court, when asked by mortgagees to take possession of the future income and hold it for their benefit, to require as a condition of such an order that what is due from the earnings to the current debt shall be paid by the court from the <sup>19</sup> future current receipts before anything derived from that source goes to the mortgagees. . . . This, not because the creditors to whom such debts are due have in law a lien upon the mortgaged property or the income, but because, in a sense the officers of the company are trustees of the earnings for the benefit of the different classes of creditors and the stockholders; and if they give to one class of creditors that which properly belongs to another, the court may, upon an adjustment of the accounts, so use the income which comes into its own hands as, if practicable, to restore the parties to their original equitable rights. While, ordinarily, this power is confined to the appropriation of the income of the receivership and the proceeds of moneyed assets that have been taken from the company, cases may arise where equity will require the use of the proceeds of the sale of the mortgaged property in the same way. Thus it often happens that, in the course of the administration of the cause, the court is called upon to take income which would otherwise be applied to the payment of old debts for current expenses, and use it to make permanent improvements on the fixed property, or to buy additional equipment. In this way the value of the mortgaged property is not unfrequently materially increased. . . . Under such circumstances, it is easy to see that there may sometimes be a propriety in paying back to the income from the proceeds of the sale what is thus again diverted from the current debt fund in order to increase the value of the property sold. The same may sometimes be true in respect to expenditures before the receivership. . . . Whatever is done, therefore, must be with a view to a restoration by the mortgage creditors of that which they have thus inequitably obtained. It follows that if there has been in reality no diversion, there can be no restoration; and that the amount of restoration should be made to depend upon the amount of the diversion."

In *Burnham v. Bowen*, 111 U. S. 776, 4 Sup. Ct. Rep. 675, 28 L. ed. 596, decided in 1884, it was held that a debt for current expenses and payable from current earnings the mortgage interest being then in arrear, <sup>20</sup> was a charge in equity on the continuing income "as well that which

came into the hands of the court after the receiver was appointed as that before," and that a diversion of the current income for the improvement of the mortgaged property, by the trustee in possession or by the receiver, created in equity a charge on the property for its restoration in favor of the current debt creditor. The opinion concludes with the statement that it was only intended to decide what was decided in *Fosdick v. Schall*, 99 U. S. 235, 25 L. ed. 339, "that if current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of the fund which has been thus improperly applied to their use."

In *St. Louis etc. R. R. Co. v. Cleveland etc. Ry. Co.*, 125 U. S. 658, 673, 8 Sup. Ct. Rep. 1011, 31 L. ed. 832, decided in 1888, the court, speaking by Justice Matthews, said: "But here there is no question in respect to current income. The fund in court is the proceeds of the sale of the property, and represents its corpus; and it cannot be claimed that ordinarily the unsecured debts of an insolvent railroad company can take precedence in the distribution of the proceeds of a sale of the property itself over those creditors who are secured by prior and express liens." After stating that there are cases where, owing to special circumstances, unsecured creditors may be entitled to priority of payment, even from the proceeds of a sale of the corpus of the property, citing *Fosdick v. Schall*, 99 U. S. 235, 25 L. ed. 339, *Burnham v. Bowen*, 111 U. S. 776, 4 Sup. Ct. Rep. 675, 28 L. ed. 596, and other decisions of the supreme court, the court says: "The rule governing in all these cases was stated by Chief Justice Waite in *Burnham v. Bowen*, 111 U. S. 776, 4 Sup. Ct. Rep. 675, 28 L. ed. 596, as follows" (quoting the concluding words of the opinion in that case, as above stated), and adding: "There has been no departure from this rule in any of the cases cited; it has been adhered to and reaffirmed in them all."

In *Kneeland v. American Loan etc. Co.*, 136 U. S. 89, 97, 10 Sup. Ct. Rep. 950, 34 L. ed. 379, decided in 1890, it is said: "The appointment of a receiver vests in the court no absolute control over the property, and no general authority to displace vested contract liens. . . . One holding a mortgage debt upon a railroad has the same <sup>21</sup> right to demand and expect of the court respect for his vested and contracted priority as the holder of a mortgage on a farm or lot. . . . No one is bound to sell to a railroad company or to work for it, and whoever has dealings with a company whose property is mortgaged must be



assumed to have dealt with it on the faith of its personal responsibility, and not in expectation of subsequently displacing the priority of the mortgage liens. It is the exception and not the rule that such priority of liens can be displaced."

In *Virginia etc. Coal Co. v. Central R. R. etc. Co.*, 170 U. S. 355, 365, 368, 18 Sup. Ct. Rep. 657, 661, 662, 42 L. ed. 1068, decided in 1898, it was said that where the claim for supplies furnished to continue a railroad as a going concern was, as between the party furnishing them and the holders of bonds secured by a mortgage, a charge in equity on the continuing income, it was immaterial, "in determining the right to be compensated out of the surplus earnings of the receivership, whether or not during the operation of the railroad by the company there had been a diversion of income for the benefit of the mortgage bondholders"; and further, that "the dominant feature of the doctrine as applied in *Burnham v. Bowen*, 111 U. S. 776, 4 Sup. Ct. Rep. 675, 28 L. ed. 596, is that where expenditures have been made which were essentially necessary to enable the road to be operated as a continuing business, and it was the expectation of the creditors that the indebtedness created would be paid out of the current earnings of the company, a superior equity arises in favor of the materialman as against the mortgage bonds in the income arising both before and after the appointment of a receiver from the operation of the property."

The cases above cited, and others upon the same subject, are reviewed in the recent cases of *Lackawanna Iron etc. Co. v. Farmers' Loan etc. Co.*, 176 U. S. 298, 313, 20 Sup. Ct. Rep. 363, 44 L. ed. 475, and *Southern Ry. Co. v. Carnegie Steel Co.*, 176 U. S. 257, 285, 20 Sup. Ct. Rep. 347, 358, 44 L. ed. 458, decided in 1900, in the latter of which the court, in the opinion by Justice Harlan, says: "It may be safely affirmed, upon the authority of former decisions, that a railroad mortgagee when accepting his security impliedly agrees that the current debts of a railroad company contracted in the ordinary course <sup>22</sup> of its business shall be paid out of current receipts before he has any claim upon such income; . . . and that when current earnings are used for the benefit of the mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of any funds thus improperly diverted from their primary use."

Debts contracted not in the ordinary course of the operation of a railroad, but for the purposes of construction, are not en-

titled to priority of payment over the mortgage debt, under the rule in *Fosdick v. Schall*, 99 U. S. 235, L. ed. 339; *Wood v. Guarantee etc. Deposit Co.*, 128 U. S. 416, 9 Sup. Ct. Rep. 131, 32 L. ed. 472; *Lackawanna Iron etc. Co. v. Farmers' Loan etc. Co.*, 176 U. S. 298, 20 Sup. Ct. Rep. 363, 44 L. ed. 475.

From the language quoted from the cases above cited, it would appear that the foundation principle of the rule of *Fosdick v. Schall*, 99 U. S. 235, 25 L. ed. 339, and the other cases referred to, by which a certain preference is given a particular class of unsecured creditors over the mortgagees of a railroad, is an agreement upon the part of such mortgagees, in accepting such security for the payment of bonds, that current debts contracted in the ordinary course of the business of the railroad company shall be paid from the current earnings of the railroad before such mortgages shall have any claim upon such income. It is by virtue of this implied agreement that the current debts, as between the supply creditors and the mortgagees, become a charge in equity upon the continuing income, both before and after the appointment of a receiver, and whether or not there has been a previous diversion of the income for the benefit of the mortgagee.

But the superior equity springing from such implied agreement, in favor of the current debt creditors, is in the current income derived from the mortgaged property, and not in the body of the mortgaged property itself. None of the cases above referred to go so far as to imply an agreement upon the part of the mortgagees, in accepting their security, that the body of the mortgaged property may be used to pay the current expenses of operating the railroad. The power of a court of equity to apply the corpus of mortgaged property to the payment of such unsecured claims <sup>23</sup> against the railroad company, is always made to rest upon the fact that in some manner the mortgagees have received the benefit of those earnings, which, by their implied agreement, should have been applied to the payment of current expenses.

We are not prepared to accept as law the rule which seems to have been adopted in some of the cases cited by counsel, that those who have rendered services or furnished supplies to keep a railroad in operation, even after the mortgage interest is in arrear and the bondholders have the right to take possession under their mortgage, are entitled to priority of payment over the mortgagees, from the corpus of the mortgaged property, or the proceeds of the sale thereof, when there has been no diver-

sion of the earnings of the railroad to the benefit of the bondholders.

Assuming, without deciding, that the doctrine of *Fosdick v. Schall*, 99 U. S. 235, 25 L. ed. 339, is applicable to a street railroad like that of the defendants, how does it affect the rights of these intervening creditors? They are not asking that income in the hands of the receiver be used to pay their claims. There are no earnings of the railroad in his hands. The expense of operating the road during the receivership has exceeded the receipts. To entitle the interveners to payment from the proceeds of the sale of the mortgaged property, it must therefore be shown that there has in some manner been a diversion of the current income for the benefit of the mortgagees.

But it does not appear that the mortgagees have received any part of the income of the road which should have been devoted to the payment of these claims, or that the action of the bondholders in taking possession of the road has prevented the payment of these claims from the earnings of the railroad. On the contrary, it appears that no interest has been paid on the bonds from the earnings of the railroad since August 1, 1896, and that since that time the receipts from the road have been inadequate for the payment of the ordinary operating expenses, and that large sums have been borrowed by the company to enable it to meet its current <sup>24</sup> obligations. There has been no diversion and there can be no restoration. The claims of the supply creditors, and the principal part of the Patterson claim, are not debts of the bondholders, but of the railroad company, contracted either upon the credit of the company itself or upon the credit of its earnings. As there has been no diversion of such earnings for the benefit of the bondholders, there can be no payment of such claims, under the doctrine of *Fosdick v. Schall*, 99 U. S. 235, 25 L. ed. 339, from the mortgaged property or the money derived from its sale, until the mortgage debt is satisfied.

The claims described in the above statement of facts are entitled to priority of payment from the proceeds of the sale, over the bonds, only as below stated.

The first four claims named, amounting to \$2,086.97, are, as we understand, conceded to be privileged. As the last of these four unquestioned claims is the only one allowed by the trial court as a preferred labor claim, under General Statutes, section 1051, it is unnecessary to decide whether, under that

statute, such a labor claim would be entitled to priority of payment from the proceeds of the sale of the mortgaged property, over the mortgage debt.

For the reason already stated—that there has been no diversion of income—none of the claims of said class of supply creditors, amounting to \$4,196.47, are entitled to preference over the mortgage bonds.

The entire claim of Mersick, trustee, amounting to \$4,304.04, is entitled to priority over the bonds, and should be paid as expenses properly incurred by the trustee while in possession of the mortgaged property for the benefit of the bondholders, and stand in the same rank as to preference as the item of \$980, expenses of receiver and trustee.

It appears from the record that the second item of said claim of Mersick (\$1,448.08) was money paid by the trustee for wages of employes while the trustee was in possession, at the request of the bondholders, and under the mortgage which expressly empowered him to “operate and conduct the business of said railroad company.” No question is made as to the reasonableness of the amount so paid.

<sup>25</sup> The first item of Mersick’s claim (\$2,855.96) was money paid employes for wages covering a period of about three months before the trustee took possession.

It is said that these claims of Mersick are made for the benefit of Patterson. The finding is that both these sums were advanced by Patterson at the request of Mersick. We must therefore treat them as money paid out by Mersick.

The mortgage deed under which Mersick as trustee took possession expressly provides that “the trustee shall be entitled to be reimbursed for all outlays of whatever sort or nature to be incurred in this trust,” and that his compensation and disbursements shall constitute a first lien upon the mortgaged property.” That this outlay for wages due employes before the trustee took possession was a reasonable outlay and incurred in the trust, we must regard as determined by the finding that “it was practically impossible to resume the operation of said railroad” without first paying said “striking employes the wages then due them.”

Of the claim of James T. Patterson, only the third item (\$138.46) for rent of the Plainville line during the period the trustee was in possession, is entitled to priority of payment over the mortgage debt. That was a debt properly incurred by the trustee. As we read the finding, the trustee, while in



possession through his agent Patterson, operated the Plainville line in connection with and for the benefit of the mortgaged property, and under a contract to pay the above sum as rent. Upon the facts this item of \$138.46 must be regarded as an expense properly incurred by the trustee while in possession for the bondholders and should rank in order of payment with the other expenses of the trustee and receiver.

The first item of the Patterson claim, \$3,956.52, money advanced April 14, 1898, to the railroad company to pay taxes, is not a preferred claim over the mortgage bonds. Patterson was under no obligation to pay these taxes, and it does not appear that he was either requested or authorized to do so by the bondholders. It was the duty of the railroad company to pay the taxes, and Patterson, at the request of <sup>26</sup> the company, paid its debt. The railroad company could not, by their agreement with Patterson, give him a lien or claim upon the body of the mortgaged property which would take precedence over that of the bondholders. The transaction was a loan by Patterson to the company, and he did not thereby acquire such lien upon the mortgaged property as the state may have had: *Sperry v. Butler*, 75 Conn. 369, 372, 53 Atl. 899.

For the reasons already given, neither the second item of the Patterson claim (\$11,031.65), money advanced by him to the company in April, 1898, to pay wages of employes and other pressing claims against the company, nor the fourth item of said claim (\$1,176.92), for rent of Plainville line prior to the time the trustee took possession, are privileged claims over those of the bondholders.

After payment to the receiver of the sums which may be allowed for his services and expenses, and to the plaintiff trustee of the costs and proper expenses of this appeal, and of the claims as above directed, the remainder of the fund should be paid to said Farmington Street Railway Company.

Apparently the finding in the judgment file, that the value of the mortgaged property at the time of the sale exceeded \$150,000, is not sustained by the record, from which it appears that no evidence was offered upon that subject, and that the demurrer to the pleading containing such an allegation was sustained.

There is error in the judgment distributing the proceeds of the sale of the mortgaged property, and said judgment is set

aside, and the case remanded for the entry of a judgment distributing said funds in accordance with the law as above stated.

In this opinion the other judges concurred.

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*Claims Which Take Precedence Over Mortgages* of railway and like property are discussed in the monographic note to *Green v. Coast Line etc. R. R. Co.*, 54 Am. St. Rep. 400-433.

*The Right to Subrogation* is the subject of a recent monographic note to *American Bonding Co. v. National etc. Bank*, 99 Am. St. Rep. 474-533.

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## HART v. KNAPP.

[76 Conn. 135, 55 Atl. 1021.]

**TRIAL.**—**Instructions Relating to Specific Portions of the Evidence** need not be given where the jury is instructed to take into account all proper evidence bearing upon the disputed points in the case. (p. 990.)

**ACTION for Alienating Affections.**—**A Wife may Maintain an Action Against Another Woman** for seducing the husband of the former and alienating his affections. (p. 991.)

**ACTION of Criminal Conversation—Defense that the Defendant was Seduced.**—In an action by a wife against another woman for alienating the affections of the former's husband by living in adultery with him and causing him to abandon the plaintiff, it is no defense that he was the active and aggressive party and that the defendant yielded to his persuasions and afterward lived in adulterous intercourse with him. (p. 993.)

Action to recover damages for alienating the affections of the plaintiff's husband. Verdict and judgment for the plaintiff; the defendant appealed.

Henry A. Purdy, for the appellee.

Howard W. Taylor, for the appellant.

136 **TORRANCE, C. J.** The complaint, among other things, alleges, in substance, that prior to its date the defendant had alienated the affections of Hart, the plaintiff's husband, had committed adultery with him, had caused him to abandon the plaintiff, and had ever since lived in adultery with him. All this the defendant denied.

The evidence for the plaintiff tended to prove all the allegations of her complaint, and especially that the defendant had done all the things charged against her, "by her acts, blandishments and seductions." The defendant herself did not testify

in the case, but the evidence offered in her behalf tended to prove that shortly after the marriage of the plaintiff to Hart, he remained away from the plaintiff for some time by reason of some disagreement; that prior to his acquaintance with the defendant he was of intemperate habits, and had taken the Keeley cure in 1896; that he had on occasions remained away from home till late in the night, and had become neglectful of his wife and failed to provide adequate support for her; that any affection that might exist on the part of the defendant for Hart was begun and prolonged by his advances and addresses; that there had been no criminal <sup>137</sup> intercourse between the defendant and him; and that after the plaintiff had separated from her husband, "she had met him and made some proposition looking toward his helping her to get some money from the defendant."

No exceptions to the evidence on either side appear to have been taken.

The only errors assigned relate to the action of the court in refusing to charge four certain requests made by the defendant. One of these relates to the claim that the plaintiff consented to and connived at the conduct of her husband with the defendant for the purpose of bringing an action against the defendant for damages; and the defendant says the court did not charge that this, if true, barred a recovery.

This contention is not borne out by the record. The jury are distinctly and emphatically told, substantially in the language of the request, that if the plaintiff "acquiesced and approved of her husband visiting the defendant with the intended purpose" imputed in the request, she could not recover; and that if she consented to the adulterous intercourse between the defendant and Hart, she could not recover. There is nothing in the charge upon the point of connivance of which the defendant can justly complain.

Another of the requests asked the court to tell the jury that "in considering whether the plaintiff connived at the alleged misconduct of her husband," they might take into account certain specific portions of the evidence upon that point. The court did not in terms so charge; but the jury were properly instructed to take into account all the proper evidence bearing upon disputed points in the case; and this, under the circumstances, was enough. It was their duty to do so without being told, and they undoubtedly did so. There is nothing to show that the defendant was harmed by the failure of the court to

call the attention of the jury to that portion of the evidence stated in the request.

The other two requests were in substance as follows: If the jury find "that the defendant did not seduce the plaintiff's husband, but, upon the contrary, that the plaintiff's husband seduced the defendant, then the plaintiff cannot recover." <sup>138</sup> If the jury find that the defendant was not the "active or aggressive party who brought about the 'adulterous intercourse' between herself and the plaintiff's husband," but that "the defendant was the victim of the wiles, blandishments and intrigues of plaintiff's husband," the plaintiff cannot recover.

These two requests cover substantially the same grounds and may be considered together. The court did not charge these requests, but upon this point charged as follows: "The defendant, if she committed adultery with the husband of the plaintiff, is liable for damages in the action, whether the husband sought and solicited the defendant, or the defendant the husband of the plaintiff." The court further added, that "if the defendant was an active, persuading party in the alienation of affection," that fact might be considered on the question of punitive damages.

This part of the charge, although the defendant complains of it in the brief, is not assigned for error; indeed, no part of the charge as actually given is assigned for error. The only error assigned on this part of the case relates to the action of the court in refusing to charge the two requests last above mentioned.

It may, perhaps, be doubted whether there was sufficient evidence in the case to justify the defendant in making these requests. Certainly the record discloses very little evidence of that kind.

The evidence for the plaintiff tended strongly to show that the defendant "was an active or aggressive party" in bringing about the state of things complained of by the plaintiff; while, apparently, the only evidence to the contrary was that of the husband, to the effect "that any affection that might exist on the part of the defendant" for him, "was begun and prolonged" by him. For the purposes of discussion, however, we will assume that there was evidence of the kind in question before the jury.

The plaintiff claimed to have proved her case, and if that claim was sustained by the jury, she was entitled to recover in this action: *Foot v. Card*, 58 Conn. 1, 18 Am. St. Rep. 258,



18 Atl. 1027, 6 L. R. A. 829. Her case was <sup>139</sup> based upon these facts, that the defendant had committed adultery with Hart, had thereafter continuously lived in adultery with him at her home, and had thereby won his affections from the plaintiff and caused him to abandon her. To meet this case the defendant, in these requests, asked the court to say to the jury that if the husband seduced her, and she was the victim of his wiles, that would be a complete bar to this action; and the question is whether this is so.

The question is one of first impression in this state, and, so far as we are aware, it has not been passed upon elsewhere in a case just like the present, and must therefore be determined upon principle rather than precedent. The lack of precedent is not surprising. The right of the injured wife to bring an action of this kind was not recognized in any of the states until recently, and is still denied in many of them. Our own case of *Foot v. Card*, 58 Conn. 1, 18 Am. St. Rep. 258, 18 Atl. 1027, 6 L. R. A. 829, one of the pioneer cases of this kind, was decided in 1889. We are of opinion that the facts assumed in the requests, even if true, constitute no bar to the plaintiff's action. The defense embodied in the requests is based upon the hypothesis that the defendant is guilty of the things charged against her. She thus, hypothetically, admits that she committed adultery with Hart, has long lived in adultery with him at her home, and that as a result of this Hart has abandoned his wife for her. She was a widow, of full age, with full knowledge that Hart was the husband of the plaintiff. She admits, hypothetically, that she engaged with him in a great wrong to the plaintiff. She knew that her course of conduct with him would probably lead him to abandon his wife. "There can be no surer means adopted to estrange husband and wife and stifle all affections that ever existed between them, than the existence of improper relations, especially of a criminal nature, between one of them and another party": *Shufeldt v. Shufeldt*, 86 Md. 519, 525, 39 Atl. 416. She now claims, in effect, that because the husband seduced her she is absolved from liability for her own wrongs against the wife. The word "seduce," when used with reference to the conduct of a man toward a woman, is "universally understood to mean an enticement <sup>140</sup> of her on his part to the surrender of her chastity, by means of some art, influence, promise or deception calculated to accomplish that object, and to include the yielding of her person to him": *State v. Bierce*, 27 Conn. 319, 321. When, therefore, the de-

fendant says that the husband seduced her, that is merely saying that he first solicited, enticed and persuaded her to adulterous intercourse with him, and that she yielded to his persuasion. She yielded to him first, and then continued to live in adultery with him at her home, although for aught that appears she might easily have gotten rid of him had she chosen to do so. In what she did with the husband she did with full knowledge that it was wrongful, and that it would, as the plaintiff claims it did, result in harm to the plaintiff. The gist of the defense set up in the requests is that the defendant did a great wrong by the persuasion of the husband. We know of no rule of law, civil or criminal, that absolves her from liability for such wrong because of such persuasion. Solicitation, persuasion, enticement, temptation, however urgent, powerful or alluring, do not constitute duress. In law, so far as regards the plaintiff, what the defendant did with Hart, she did of her own free will; and she is responsible to the wife for the results of her conduct with the husband, even if it be true that he persuaded her to do what she did, and "was the active or aggressive party" in procuring her to do so.

In actions for criminal conversation at common law, the fact that the wife was, so to speak, the seductress was of no avail as a defense: *Egbert v. Greenwalt*, 44 Mich. 245, 38 Am. Rep. 260, 6 N. W. 654; *Bigaouette v. Paulet*, 134 Mass. 123, 45 Am. Rep. 307; *Bedan v. Turney*, 99 Cal. 649, 34 Pac. 442; *Moore v. Hammons*, 119 Ind. 510, 21 N. E. 1111; *Kroessin v. Keller*, 60 Minn. 372, 51 Am. St. Rep. 533, 62 N. W. 438, 27 L. R. A. 685; although in some cases it has been admitted as bearing upon the quantum of damages: *Sieber v. Pettit*, 200 Pa. St. 58, 49 Atl. 763.

Some of the reasons given for applying such a rule in such actions may not exist in actions brought by the wife to vindicate her rights to the society and affections of her husband; but it is difficult to see why an analogous rule should not be applied in a case like the present to the <sup>141</sup> defense that the husband was the seducer. It may be that in cases like that of *Kroessin v. Keller*, 60 Minn. 372, 51 Am. St. Rep. 533, 62 N. W. 438, 27 L. R. A. 685, an action by a married woman against one of her own sex simply for an act of adultery with the husband, and alleging neither alienation of his affections, nor neglect or abandonment of the plaintiff, the fact that the husband was the seducer should be held to be a defense, as is suggested in that case; but we have no occasion here and now

to decide such a question, for the case at bar is not at all like the Minnesota case. Upon principle we think the facts set up in the requests do not constitute a defense in the present case, and we know of no decision of any court of last resort to the contrary.

There is no error.

In this opinion the other judges concurred.

*Actions by a Wife for the alienation of her husband's affections* are discussed in the monographic note to *Clow v. Chapman*, 46 Am. St. Rep. 472-478. There are many authorities recognizing the right of a married woman to sue a third person for alienating her husband's affections: See *Betser v. Betser*, 186 Ill. 537, 78 Am. St. Rep. 303, 58 N. E. 249, 52 L. R. A. 630; *Reed v. Reed*, 6 Ind. App. 317, 51 Am. St. Rep. 310, 38 N. E. 638; *Price v. Price*, 91 Iowa, 693, 51 Am. St. Rep. 360, 60 N. W. 202, 29 L. R. A. 150; *Deitzman v. Mullin*, 108 Ky. 610, 94 Am. St. Rep. 390, 57 S. W. 247, 50 L. R. A. 808. But it has been held that she cannot maintain an action in the nature of criminal conversation against another woman: *Kroessin v. Keller*, 60 Minn. 372, 51 Am. St. Rep. 533, 62 N. W. 438, 27 L. R. A. 685. Compare *Seaver v. Adams*, 66 N. H. 142, 49 Am. St. Rep. 597, 19 Atl. 776; *Houghton v. Rice*, 174 Mass. 366, 75 Am. St. Rep. 351, 54 N. E. 843, 47 L. R. A. 310.

## KNAPP & COWLES MANUFACTURING COMPANY v. NEW YORK, NEW HAVEN AND HARTFORD RAIL- ROAD COMPANY.

[76 Conn. 311, 56 Atl. 512.]

**HIGHWAYS.**—An Abutting Property Owner has no Absolute Right at the Common Law to Occupy the Whole of the Adjoining Highway with apparatus or materials to facilitate the construction of improvements on his lands. He may thus occupy part or the whole of it only when reasonably necessary to facilitate such work and compatible with the right of the public and the neighboring proprietors to the use of the highway. (p. 997.)

**HIGHWAYS, Right of Land Owner to Fill with Apparatus and Materials.**—A street railway corporation owning a tract of land on which its road is constructed and abutting on a public street has no right, while reconstructing its road, to fill the entire street with apparatus and materials to the injury of others whose lands abut on such street. (p. 997.)

**TORT**—Justification by Showing Right to do a More Injurious Act.—One cannot justify injuring another by an unlawful act by showing that he could do a lawful act which would have injured him more. (p. 997.)

**CONSTITUTIONAL LAW**—Property Right, What is not a Deprivation of.—A judgment against an elevated railway company for damages caused to a land owner whose property abuts on a public street by its occupation of such street with its apparatus and ma-

terials during the time it was reconstructing its road does not take from it any property right, nor deprive it of the protection of the laws. (p. 997.)

**PLEADING—Averment of Facts, What is not.**—A statement in an answer by a defendant corporation that it "proceeded in no respect under or by virtue of its charter" is a mere matter of argument and not a statement of fact. (pp. 997, 998.)

**RAILWAY, When not Relieved from Liability for Injuring the Property of Others.**—The fact that a railway corporation is authorized by statute to construct a railway over and along certain property does not imply that it shall be exempt from the duty imposed by the provision of its charter that it shall pay for the use of any real estate required for the construction of its road. (p. 998.)

**TORTS, Want of Benefit to the Defendant.**—In an action to recover for a wrongful act, the question is not whether it was to the gain of the defendant, but whether it was to the loss of the plaintiff. (p. 998.)

**HIGHWAYS, Taking of Land Abutting on, What is.**—The use of a public street by putting up a fence which shuts off all access to abutting property and occupying the street with building apparatus and materials and a double track railway two feet above the sidewalk is not a mere source of consequential damages, but a direct taking of the land of an abutting owner for a purpose to which it had never been dedicated or appropriated. (p. 998.)

**HIGHWAYS, Notice of Defects in, When not Required.**—A statute giving a right of action to anyone injured in person or property by a defective road against the party bound to keep it in repair, but denying such right unless written notice of the injury is given, is merely designed to give an action to one injured while using the highway in consequence of a defect therein, and does not apply to an action brought by an abutting property owner to recover damages from one occupying the street in front of his property with apparatus and building materials. (p. 999.)

**TRESPASS in Constructing a Railway, Cause of Action, When Arises.**—The constructing of a railway on the plaintiff's land was an act of trespass for which an action could be immediately brought, and every day's use of it for railway purposes was a new trespass founding a new claim for damages. (p. 999.)

**LIMITATION OF ACTIONS—Trespass.**—Where an action is brought for constructing and maintaining a railway on plaintiff's land, the statute of limitation applicable to trespass bars so much of the cause of action as rests on acts done more than three years before the suit was brought, but does not preclude a recovery for acts done or damages suffered within the three years. (p. 999.)

**APPEAL AND ERROR—Presumption in Favor of the Action of the Trial Court.**—Where an action is brought for a continuing act of trespass, recovery for part of which is barred by the statute of limitations, it will be presumed that the trial court, in assessing damages, considered such only as followed from the continuation of the trespass within three years prior to the commencement of the suit. (p. 1000.)

Action to recover damages for acts done in the construction of improvements upon the defendant's road to the injury of the plaintiff, who is an abutter on the street adjoining such road. The suit was brought in March, 1903. A demurrer to the an-



swer was sustained, and judgment rendered for the plaintiff for five hundred dollars.

Goodwin Stoffard and Arthur M. Marsh, for the appellant.

Stiles Judson, Jr., and Samuel F. Beardsley, for the appellee.

**312** BALDWIN, J. The plaintiff owns a factory in Bridgeport fronting on a highway known as Railroad avenue, and also the fee of that street for its entire width. The defendant owns and operates a railroad adjoining that street on the opposite side. While reconstructing this road on an elevated grade, it put a fence on Railroad avenue which shut off all access from the sidewalk in front of the plaintiff's factory to the worked portion of the street, and occupied the whole of that portion of it with building apparatus and materials, and by a double track, laid two feet above the grade of the sidewalk, on which it moved all the trains on its main line for more than a year. The defendant pleaded in justification substantially the same matters which it relied on in the **313** case of *McKeon v. New York etc. R. R. Co.*, 75 Conn. 343, 53 Atl. 656, and also: 1. That no written notice of this claim had been given by the plaintiff, as required by the General Statutes of 1888, section 2673 (Rev. 1902, sec. 2020); 2. That while running its trains on Railroad avenue, its whole location was occupied by building apparatus and materials, which otherwise it would have been necessary for it to place on the avenue, and which, if so placed, would have occasioned the plaintiff greater damage and inconvenience than did the use made of the street as a site for a temporary railway; and 3. That the right of action did not accrue within three years before the commencement of the suit. The answer also averred that to sustain the action, under the circumstances disclosed, would be to take the defendant's property without due process of law, and deprive it of the equal protection of the laws, and thus violate its rights under both the state and national constitutions.

The acts of which the plaintiff complains are substantially similar to those which were the subject of the *McKeon* case. The defendant's answer was therefore properly held insufficient, unless there is merit in some of the new defenses which it sets up. That the plaintiff would have been damaged more, had the defendant filled up Railroad avenue with building ap-

paratus and materials, instead of turning it into a railroad, is immaterial.

In the first place, an abutting proprietor has at common law no absolute right, in order to facilitate the construction of improvements upon his land, to occupy the whole of the adjoining highway with apparatus or materials. He may thus occupy part or the whole of it, if it be reasonably necessary to facilitate such a work, and if it be compatible with the right of the public and of neighboring proprietors to the reasonable use of the highway. But their rights are as perfect as his. When several parties enjoy common or concurrent rights to the use of the same thing, each must use his with due regard to those of the others. No facts are set up in the answer showing that the defendant, merely <sup>314</sup> by virtue of its ownership of adjoining land, could promote its own interests, at the expense of its neighbors and of the community, by filling up the entire street for a year or more with its apparatus and materials.

But if it had that right, it did not exercise it. The answer avers that "certain necessary building materials and apparatus were placed and used by the defendant in said highway, but said temporary tracks occupied substantially the whole of the main roadway thereof."

Nor, under any circumstances, can one justify injuring another by an unlawful act, by showing that he could have done a lawful act which would have injured him more.

The judgment rendered against the defendant therefore took from it no property right. Its action was taken not as a land owner, in the exercise of a privilege appurtenant to premises which it owned and desired to improve, but as an agent of the state to promote public ends in the attainment of which it also had, by reason of its franchises, a private interest. That its authority from the state gave it no right to lay its tracks on the plaintiff's land without making just compensation, was determined in the McKeon case.

Nor does the judgment appealed from deprive it of the equal protection of the laws. The plaintiff's recovery is for a direct invasion of its rights of property. There was no discrimination against the defendant. Anyone guilty of a similar wrong would be liable in the same way and to the same extent.

It is alleged in the answer that all the acts complained of were done under authority and direction of the state, and with an exemption from any liability for damages so occasioned, and that the defendant "proceeded in no respect under or by

virtue of its charter.” This last statement is in its nature mere matter of argument, and not an averment of fact. When the state clothed the defendant with the great powers on which it relies, the state knew what was the legal character and what were the legal responsibilities of the agent thus selected to do its will. It could only accept <sup>315</sup> and only exercise the agency in its character as a railroad company, for as such only did it exist. It must be presumed that the general assembly intended the charter from which it derived its being to govern its proceedings, except so far as the new grant of new powers might enlarge or restrict its effect. That there was in the legislation on which the defendant relies no implied restriction of the provision in the charter respecting its duty to pay for the use of any real estate required for constructing its road, with all necessary turnouts, was determined in the McKeon case.

It is further alleged that the defendant received no benefit from its use of Railroad avenue except such as might be necessarily incidental to carrying out the orders of the state for the elimination of grade crossings. Had it been incumbent on the plaintiff to show a benefit to the defendant, it would be necessarily implied from its use of the street, elsewhere admitted in the answer, to run its trains on. But the question was as to the plaintiff's loss, not the defendant's gain.

The use which the defendant made of the street was not a mere source of consequential damage, such as might happen from closing part of a highway to public travel, or diverting its course, as in *Newton v. New York etc. R. R. Co.*, 72 Conn. 420, 429, 44 Atl. 813. It was a direct taking of the plaintiff's land during a certain time, for a purpose to which it had never been dedicated or appropriated.

General Statutes, section 2020 (re-enacting Gen. Stats., Rev. 1888, sec. 2673), gives an action to “any person injured in person or property by means of a defective road,” against “the party bound to keep it in repair,” except that “when the injury is caused by a structure legally placed on such road by a railroad company” the action lies only against such company; but no action can be maintained “unless written notice of such injury and a general description of the same, and of the cause thereof, and of the time and place of its occurrence shall, within sixty days thereafter, or, if such defect consist of snow or ice, or both, within fifteen days thereafter, be given” to the party sued.

<sup>316</sup> No such notice as is thus provided for was required from the plaintiff to the defendant. The statute is designed merely to give an action to one injured while using a highway, in consequence of a defect due to a want of repair: *Bartram v. Sharon*, 71 Conn. 686, 694, 71 Am. St. Rep. 225, 43 Atl. 143, 46 L. R. A. 144; *Upton v. Windham*, 75 Conn. 288, 292, 96 Am. St. Rep. 197, 53 Atl. 660. It was enacted to protect those rightfully upon the highway, not those wrongfully excluded from it. Still less can it be claimed to refer to the injury done to the owner of land within the limits of a highway, by the temporary taking of it, without making compensation, as a site for a steam railroad.

The fifth defense—that of the statute of limitations—having been pleaded as a full defense, was properly held insufficient.

For the defendant to construct a railway upon the plaintiff's land was an act of trespass, for which an action could have been immediately brought. Every day's use of it for railway purposes was a new trespass, founding a new claim for damages: *New Milford Water Co. v. Watson*, 75 Conn. 237, 249, 52 Atl. 947, 53 Atl. 57; *Uline v. New York Cent. etc. R. R. Co.*, 101 N. Y. 98, 54 Am. Rep. 661, 4 N. E. 536. More than three years had elapsed from the date of the original entry before the action was brought. The statute of limitations applicable to actions of trespass (Gen. Stats., sec. 1115) was a bar to so much of the plaintiff's cause of action as rested upon acts done more than three years before suit brought, but not a bar to a recovery for acts done or damages suffered within three years: *Bull v. Pratt*, 2 Root, 440. The taking of the plaintiff's land for the defendant's purpose was not a permanent appropriation of it. It constituted a temporary invasion of his rights, commencing, as averred in the answer, on or about December 15, 1899, and continuing until on or about March 15, 1901, when it ceased altogether.

The cause of demurrer pleaded to the fifth defense was that "the acts of the defendant alleged in the complaint gave rise to one continuous and entire right of action, and it appears from the allegations of the answer that said acts <sup>317</sup> continued until on or about the fifteenth day of March, 1901, which is within three years before the commencement of this action." This statement of the nature of the wrong was not technically accurate, but it gave the defendant substantial notice that the plaintiff considered its complaint as adapted to a recovery for a continuing series of acts, the latest of which occurred on or



about March 15, 1901. It must be presumed, in the absence of any finding to the contrary, that the trial court, in assessing damages, considered such only as followed from the continuance of the trespasses within three years from the commencement of the suit.

There is no error.

In this opinion the other judges concurred.

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*The Principal Case* is cited in the monographic note to *Wright v. Austin*, 143 Cal. 236, 101 Am. St. Rep. 000, on the rights, obligations, and remedies of persons over whose land a public highway runs.

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## COBURN v. RAYMOND.

[76 Conn. 484, 57 Atl. 116.]

**APPEAL AND ERROR—Conflict Between Finding and Judgment.**—Where a cause is assigned to a committee to find and report the facts, and its report is received and no other evidence heard by the court, the judgment must be set aside if contrary to the finding of facts so reported. (p. 1002.)

**INSANE PERSONS.**—The Contracts and Conveyances of Persons Non Compos Mentis when not under guardianship, are voidable, but not void. (p. 1002.)

**INSANE PERSONS—Suits to Set Aside Contracts or Deeds** of insane persons who are not under guardianship furnish no exception to the maxim that he who seeks equity must do equity; so that if, on the whole case, it would be inequitable to set aside the conveyance, there is no inexorable rule that it must be done because, perchance, the grantor was deficient in mental capacity. (p. 1004.)

**INSANE PERSONS—Restoration Necessary to Disaffirmance of Deeds of.**—Before an incompetent person can disaffirm his deed made when he was not under guardianship, he must make restitution of the consideration so far as it remains in his hands in favor of one who has dealt with him in ignorance and in good faith. (p. 1005.)

**INSANE PERSONS, Rights of Subsequent Grantees Under Deeds Made by.**—Subsequent grantees who acquired title in good faith and in ignorance of the incompetency of a remote grantor when he executed his conveyance are entitled to be restored to their original position before they can be deprived of their property by the intervention of a court of equity. (pp. 1005, 1006.)

**DEEDS, Capacity Required for Execution of.**—Average mental capacity on the part of the grantor is not required for the execution of a valid deed. (p. 1006.)

**INSANE PERSON'S Incompetency to Execute a Deed, Notice of.**—One who has met a grantor of a deed and knows she is not of average mental capacity is not chargeable with notice that she has not capacity to execute a deed, where it appears that her near relatives had all dealt with her as a person having such capacity. (p. 1006.)

**INSANE PERSONS—Estoppel to Urge Insanity.**—One of several grantors who was present at the execution of a deed and knew its purposes and actively participated in the transaction is, on the death of another of such grantors, estopped as her heir or a successor in interest from urging that such deed is as to such other grantor void, on the ground that she was incompetent to execute it by reason of mental incapacity. (pp. 1006, 1007.)

Suit to set aside certain conveyances and to foreclose a mortgage, and for other relief brought by the conservator of Jane E. and Helmina J. Jennings against Francis M. Jennings and William T. and Thomas I. Raymond. The cause was referred to a committee which made a report and finding of facts. After this report was filed, both plaintiffs died and an administrator of Helmina's estate was appointed. By the report of the committee it appeared that the real property affected by the suit belonged to Joshua Jennings in 1880, at which time he died intestate, leaving a widow and four children, one of whom was the plaintiff Helmina and another the defendant Francis M. Jennings; that such property consisted of the homestead of seven acres and of another tract of fifteen acres; that by conveyances from his brothers and sisters Francis had, in 1899, acquired the title to both parcels, subject to the interest of his mother; that the homestead was subject to a mortgage executed by both Francis and his mother to the South Norwalk Savings Bank for three thousand dollars, and the other tract to a mortgage to Helmina for two thousand dollars, and both tracts were also subject to a second mortgage made in 1896 to the defendants Raymond; that the savings bank commenced a suit to foreclose its mortgage, and the defendant Francis, being unable to discharge the mortgage indebtedness, entered into an agreement with the defendants Raymond whereby they agreed to assume the mortgage of the savings bank and cancel the indebtedness due to themselves on receiving a conveyance of both tracts clear of the interest of the mother and sister, and to permit Francis to occupy the premises for ten years at a stipulated rental, and to repurchase the property at any time before the expiration of the lease on the payment to them of the original costs; that a quitclaim deed was thereupon obtained by Francis from Helmina and also a release of her mortgage, and he and his mother executed a conveyance to the Raymonds, who, in turn, gave him a lease of the property with an option to purchase; that these conveyances and the lease were procured from the mother and sister by a statement made by Francis to them of the trouble he was in, of his inability to raise the money, and

that the property would be lost to him unless he could make arrangements with the Raymonds; that the Raymonds never had any personal communications with the ladies, but directed their attorney to prepare the necessary papers, and he and their bookkeeper were present when the deeds were executed, and neither observed that either lady was not competent to understand them; that Thomas I. Raymond had met Helmina some years before and knew that she was not a person of average mental capacity, but did not know whether she had capacity to understand or execute a deed; that she was of inferior intelligence and incapable of transacting business, and did not have mental capacity to understand the deed, and this Francis knew when he procured her signature, and that she received no consideration. The report further found that all the charges of fraud and conspiracy on the part of the Raymonds were untrue. On this report the court entered a decree setting aside the conveyance from Helmina to her brother and from him to the Raymonds, and foreclosing the two thousand dollar mortgage given to her. The defendants Raymond appealed.

John H. Light and William F. Tammany, for the appellants.

Joseph A. Gray and John J. Walsh, for the appellees.

**488** PRENTICE, J. This case was sent to a committee to find and report the facts. The committee's report was accepted and thereon judgment was rendered. The court heard no evidence to determine any fact. The judgment file recites that it is found that the procurement by Francis M. Jennings of the deed from his sister Helmina was a fraud upon her, which was well known to all the defendants. The committee's report not only finds no such fact of knowledge on the part of the defendants Raymond, but expressly finds the contrary to be true. Here was error: *West v. Howard*, 20 Conn. 581; *Brady v. Barnes*, 42 Conn. 512; *Bennett v. Bennett*, 43 Conn. 313; *Farrell v. Waterbury Horse R. Co.*, 60 Conn. 239, 21 Atl. 615, 22 Atl. 544. If the fact thus improperly made the basis of the judgment was material thereto, the judgment must be set aside. We are thus led to inquire whether or not the judgment rendered can be supported by the facts as the committee found them. If the answer is in the negative a reversal must follow.

The contracts and conveyances of persons non compos mentis, when not under guardianship, are voidable, and not void: *Wait v. Maxwell*, 5 Pick. 217, 16 Am. Dec. 391; *Eaton v. Eaton*, 37

N. J. L. 108, 18 Am. Rep. 716; Ingraham v. Baldwin, 9 N. Y. 45; Hovey v. Hobson, 53 Me. 451, 89 Am. Dec. 705; Scanlan v. Cobb, 85 Ill. 296; Freed v. Brown, 55 Ind. 310.

The authorities differ as to the conditions under which, as between the parties, executed contracts or conveyances, voidable for the cause stated, may be avoided in equity. <sup>489</sup> There are cases which hold that restitution of the consideration received is not one of the conditions: Gibson v. Soper, 6 Gray, 279, 66 Am. Dec. 414; Hovey v. Hobson, 53 Me. 451, 89 Am. Dec. 705; Nichol v. Thomas, 53 Ind. 42; Crawford v. Scovell, 94 Pa. St. 48, 39 Am. Rep. 766. Much the greater number of cases, however, hold a contrary doctrine, and support the proposition that a deed cannot be set aside on the ground of the grantor's incompetency, where the grantee acted in ignorance of the incompetency and fairly and in good faith, unless the consideration received be refunded or the grantee restored to his original position, and injustice thus avoided: Eaton v. Eaton, 37 N. J. L. 108, 18 Am. Rep. 716; Lincoln v. Buckmaster, 32 Vt. 652; Scanlan v. Cobb, 85 Ill. 296; Rusk v. Fenton, 14 Bush (Ky.), 490, 29 Am. Rep. 296; Young v. Stevens, 48 N. H. 133, 2 Am. Rep. 202, 97 Am. Dec. 592; Boyer v. Berryman, 123 Ind. 451, 24 N. E. 249; Ashcroft v. De Armond, 44 Iowa, 229; Gribben v. Maxwell, 34 Kan. 8, 55 Am. Rep. 233, 7 Pac. 584; More v. Calkins, 85 Cal. 177, 24 Pac. 729; Riggan v. Green, 80 N. C. 236, 30 Am. Rep. 77; Pearson v. Cox, 71 Tex. 246, 10 Am. St. Rep. 740, 9 S. W. 124.

The English cases give their unqualified support to the rule last stated: Selby v. Jackson, 6 Beav. 192, 200; Niell v. Morley, 9 Ves. Jr. 478; Molton v. Camroux, 2 Ex. 487; Campbell v. Hooper, 3 Smale & G. 153. See, also, 2 Pomeroy's Equity Jurisprudence, sec. 946; 1 Story's Equity Jurisprudence, 12th ed., secs. 227, 228; 1 Devlin on Deeds, sec. 76.

The first case to assert the doctrine that there might be a rescission without restoration we believe to have been Gibson v. Soper, 6 Gray, 279, 66 Am. Dec. 414. The judge who wrote the opinion of the court found no little difficulty in harmonizing its views with the opinion rendered by Chief Justice Shaw in the then recent case of Arnold v. Richmond Iron Works, 1 Gray, 434, wherein a contrary doctrine was stated in plainest terms. The decision in Hovey v. Hobson, 53 Me. 451, 89 Am. Dec. 705, followed about ten years later and adopted the views of the Massachusetts case. These two cases contain all that has been or can be said in favor of the position assumed. The



reasoning of the court is grounded upon the watchful concern which equity maintains, and ought to maintain, over those who are incapable of managing their affairs. The law, it is said, makes their very incapacity their shield, so that <sup>490</sup> in their weakness they find their protection. An analogy is drawn between infants and persons non compos mentis, and it is said that the law intends that he who deals with either shall do so at his peril. Pursuing the assumed analogy, the proposition is laid down that the right of the insane to avoid their contracts, like that of infants, is absolute and paramount, and superior to all equities of other persons, however far removed in the chain of title. The argument is that if restitution was required as a condition precedent to cancellation, that might be indirectly accomplished which the law does not permit, and the great purpose of the law, in securing the protection of those who cannot protect themselves, be thus defeated.

The answer to this argument is obvious. It sees only the rights and interest of one party, and makes them paramount over all other considerations. A proceeding to set aside an incompetent's conveyance is one in equity. The powers invoked are equitable and call for the exercise of the broadest equity: 2 Story's Equity Jurisprudence, 12th ed., sec. 1365d. When the case involves an innocent, bona fide grantee, the court has before it two innocent parties between whom it is in duty bound to do equity to the best of its ability. It has no right to shut its ears to the claims of either party. To say that one, however innocent he may be and however fair his dealings, who chances to deal with an incompetent, does so at his peril, and can have no consideration in a court of equity when he is about to be deprived of both his property and the consideration paid for it, is to hold a harsh doctrine which might easily transform the incompetent's shield into a sword. Cases of this character furnish no exception to the maxim that he who seeks equity must do equity; so that if, on the whole case, it would be inequitable to set aside a conveyance, there is no inexorable rule that it must be done because, perchance, the grantor was deficient in mental capacity: 2 Story's Equity Jurisprudence, 12th ed., sec. 1365d.

The argument under review also forgets the provisions which are made by statute for the protection of the property interests of incapable persons and the prompt redress of <sup>491</sup> their wrongs. It is made easy to put such persons beyond the power of contracting or disposing of their estate, and to provide a competent

substitute to secure redress when occasion arises. It may be safely assumed that the friendly or selfish interest of friends or relatives will, in the presence of so simple a recourse, leave few incapable persons possessed of estate free to dissipate it, or, in the event of a wasteful bargain or disposition by one whose power has not been legally restrained, that such interest will prompt to speedy action which will lead to an intelligent conservation of the incompetent's interests before delay has witnessed the dissipation of the consideration received, or permitted substantial changes in the status of the bona fide grantee. These considerations deprive of much of their force the arguments for the extreme doctrine laid down in the Massachusetts and Maine cases, which is therein drawn so strongly from the necessities of the situation and the consequences to incompetents assumed to flow from any other doctrine.

The assumed analogy between the status of infants and incompetents, of which so much is made especially in the Maine case, is by no means a perfect one, and may easily be carried too far. It is one thing to hold that he who does not discover the tangible, definite and ascertainable status of minority must suffer the consequences, and quite another to say that he who fails to detect the existence of the subtle, elusive and sporadic condition of mental unsoundness, and to correctly measure its degree, cannot be heard in a court of equity to plead his ignorance and good faith. There are practical reasons for the protection of an infant who cannot be put into a position where his acts become a nullity, and who it is said cannot, or at least may not, make a disaffirmance of his conveyances of realty until time has brought him to his majority, which do not exist in the case of the incapable person: Reeve's Domestic Relations, 254. In this connection it is to be noticed that the cases in question do not stop with the logical consequences of the analogy assumed. In both states the contemporaneous view seems to have been that if an infant disaffirm his contract he must restore <sup>492</sup> the consideration in so far as he had it in his hands: *Badger v. Phinney*, 15 Mass. 359, 8 Am. Dec. 105; *Bartlett v. Cowles*, 15 Gray, 445; *Boody v. McKenney*, 23 Me. 517. In the case of incompetents there is no hint of a duty to restore under any circumstances, as involved in the right of equitable cancellation. In so far as this state is concerned, argument from the analogy referred to would support the proposition that restoration was a condition precedent to an incompetent's rescission of an executed contract or conveyance, where the other party had acted

in ignorance of the disability and fairly and in good faith; since the privilege of avoidance is under similar circumstances refused to an infant who has so enjoyed or availed himself of the consideration that the parties cannot be restored to their original position: *Riley v. Mallory*, 33 Conn. 201; *Gregory v. Lee*, 64 Conn. 407, 30 Atl. 53.

The true principle, however, would appear to be that the incidents of those contracts and conveyances which the law regards as voidable, whether by reason of fraud, duress, intoxication, infancy, mental disability, or other cause, differ according to the circumstance which gives rise to the defect, and that each class of cases stands in a court of equity upon a more or less independent footing, the status and incidents of each to be determined by all the conditions and considerations involved as they appeal to the judicial conscience. One deduction by analogy, however, seems fully justified, and that is, that if restitution is required of an infant, it should be required on the part of an incompetent not under guardianship, in favor of one who has dealt with him in ignorance and good faith. Both reason and authority by way of analogy, in this jurisdiction, therefore, appear to us to support, as the best general rule, the proposition hereinbefore stated as having the support of the English and the greater number of American cases.

It needs no argument to demonstrate that if restitution must be made to the immediate grantee of the incompetent, subsequent grantees, who take the title in like good faith and ignorance of the incompetent's disability, are entitled to be restored to their original position before they can be deprived <sup>493</sup> of their property by the intervention of a court of equity.

There remains to inquire whether the defendants Raymond stand in the position of bona fide grantees in ignorance of Helmina Jennings' incapacity. The report finds that none of the allegations of fraud and conspiracy on their part were true, that they supposed they were dealing with Francis M. Jennings alone, that they did not know that Helmina did not have sufficient capacity to make a deed, and that neither their bookkeeper nor their attorney, who were sent to procure the execution of the deeds, observed that she was not competent to understand them. It is, indeed, found that Thomas I. Raymond had met Helmina some years before and knew that she was not of average mental ability. But average mental capacity is not required for the execution of a valid deed: *Hale v. Hills*, 8 Conn.

39. The land records showed, concerning the chain of title of the land in question, that Helmina's mother and all her three brothers and sisters had dealt with her as one having capacity. Her then interest was one thus created. Her mother, not to mention her brother of the same household, was a participant with her in the present transaction, and stood by as she executed her conveyance. Clearly the defendants Raymond were not, under all the circumstances, negligent in assuming and believing that her deficiency in mentality was not such as to make her incapable of executing a valid deed.

There is one other aspect of the case which should not be overlooked. Subsequent to the filing of the committee's report Helmina died, survived by her mother who died later. The mother thus became the sole heir at law of Helmina: Gen. Stats., sec. 398. If Helmina left no creditors, the fruit of the action would inure to the benefit of the mother's estate. The mother, who was competent, was a party with Helmina in the transaction in question. She was present when her daughter executed the deed sought to be set aside. She knew the purpose of the deed and of the general transaction of which it formed a part. Thus standing by and ~~494~~ permitting the Raymonds to contract as they did upon the faith that they were receiving deeds from competent persons, and actively participating in the transaction, she would be estopped from thereafter setting up the incompetency of such persons, against those whom she thus assisted in deceiving: Gregg v. Wells, 10 Ad. & E. 90; Rusk v. Fenton, 14 Bush (Ky.), 490, 493, 29 Am. Rep. 413; Field v. Doyon, 64 Wis. 560, 25 N. W. 653; Ex parte Hall, 7 Ves. Jr. 261, 264.

If it should appear that the estate sought to be recovered was not needed for the payment of the debts of the deceased Helmina, and that therefore the benefits arising from the foreclosure would accrue to her mother's estate, the facts suggested would become of controlling importance in balancing the equities in the case and in determining whether or not it was, on the whole, equitable that the Raymonds should thus be deprived of that for which they have paid, for the benefit of the estate of one who occupied toward them the position of Mrs. Jennings.

The other claims of error need not be considered.

There is error and the judgment is reversed.

In this opinion the other judges concurred.



*The Deed of an Insane Person* before office found is voidable only, and not void: *Blinn v. Schwarz*, 177 N. Y. 252, 69 N. E. 542, 101 Am. St. Rep. 000, and cases cited in the cross-reference note thereto. But it cannot ordinarily be set aside without a restoration of the purchase money: *Eldredge v. Palmer*, 185 Ill. 618, 76 Am. St. Rep. 59, 57 N. E. 770; monographic note to *Flach v. Gottschalk*, 71 Am. St. Rep. 431, 432. But see *Simpson v. Prudential Ins. Co.*, 184 Mass. 348, ante, p. 560, 68 N. E. 673.

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## MOWER v. SANFORD.

[76 Conn. 504, 57 Atl. 119.]

**AN ANNUITY** is a Sum Payable Annually unless the language of the instrument creating it may properly be construed as providing a different time of payment. (p. 1009.)

**PAYMENT, When not Due in Advance.**—An agreement to pay a specified sum yearly cannot be construed as a promise to pay such sum in advance, or at the commencement of each year. The payment may be made in a single installment at the end of the year. (p. 1010.)

**IF AN ANNUITY** is to Commence at the Death of the Testator, the First Payment may be made at the expiration of a year from that date. (p. 1010.)

**ANNUITY, Apportionment of.**—If an annuity is made payable to the widow of the testator from and after his death, during her life, and she dies before the end of the year following the last payment, her administrator cannot recover for the proportionate part of the year which had expired at the time of her death. The annuity is not apportionable. (pp. 1010, 1011.)

Action by the administratrix of Sarah M. Sanford to recover a portion of an annuity. A demurrer to the complaint was sustained, and the plaintiff appealed.

Charles K. Bush, for the appellant.

William B. Boardman and Sanford Stoddard, for the appellee.

**504** **HALL, J.** The complaint in this action alleges these facts: On the 11th of November, 1869, the following agreement **505** under seal was entered into, in this state, between Glover Sanford, party of the first part, and Sarah M. Smith, party of the second part: "Whereas the said parties contemplate marriage, now prior thereto and in consideration thereof, said party of the first part hath given and doth hereby give to said party of the second part the sum and estate of one thousand dollars, lawful money of the United States, annually, so long as she shall remain his widow by way of jointure as a provision for her support during life, the same to take effect from and after

the death of her said husband, the said party of the first part, and to be in bar, and in full satisfaction and discharge of all the claim of said party of the second part for dower in the estate of her said husband. And said party of the second part hereby accepts and receives said sum and estate of one thousand dollars lawful money of the United States, annually, so long as she shall remain the widow of said party of the first part, the same to take effect from and after the death of my said husband, by way of jointure as a provision for the support of me, the said party of the second part during life, and the same to be in bar, and in full satisfaction and discharge of all my claim to dower in the estate of my said husband, pursuant to the provisions of the statute in such case made and provided."

Said persons afterward married, and both died intestate; Glover Sanford on the 31st of May, 1878, and his widow, Sarah M. Sanford, on the 30th of January, 1903. The plaintiff is the administratrix of the estate of the widow, and the defendant is administrator of the estate of Glover Sanford.

After the death of Glover Sanford, the defendant paid to his widow, under said agreement, one thousand dollars, in installments of varying amounts, between October, 1878, and June 2, 1879; and on or about the 2d of June of each year thereafter paid her the sum of one thousand dollars, making the last payment on the 2d of June, 1902. He has refused to make any payment to the plaintiff, under said contract, since the death of Sarah M. Sanford.

**506** Upon her appeal from the judgment of the trial court sustaining the defendant's demurrer to the complaint, the plaintiff makes two claims: 1. That by the terms of the contract, upon the death of Glover Sanford, May 31, 1878, the annuity for the first year became payable to the widow immediately, and for each succeeding year became payable in advance; and that the plaintiff, as her administratrix, is therefore entitled to recover the full amount of the unpaid annuity for the last year, commencing May 31, 1902; 2. That if the annuity did not become payable until the end of each succeeding year, after the death of Glover Sanford, the plaintiff is entitled to recover a proportionate part of the annuity for the last year, for the period between the date of the last payment, June 2, 1902, and the date of the death of the widow, January 30, 1903.

An "annuity" signifies a sum payable annually, unless the language of the instrument creating it may properly be construed as providing a different time of payment. By the agree-

ment before us the annuitant is expressly given, and expressly contracts to receive, the sum of one thousand dollars "annually," so long as she shall remain the widow of the grantor. The word "annually" as thus used, not only denotes the amount to be paid, but the time of payment: *Kearney v. Cruikshank*, 117 N. Y. 95, 99, 22 N. E. 580. It means not only that the annuitant is to receive the sum of one thousand dollars for each year, but that that sum is to be paid to her each year. An agreement to pay a fixed sum annually, or each year, in the absence of language modifying the ordinary meaning of these terms, cannot fairly be construed as a promise to pay such sum annually in advance, or at the commencement of each year. A contract for the payment of money in fixed installments, containing no other provision for the time of payment of such installments than that they are to be paid annually, is lawfully performed by the payment of a single installment at the end of each year. The words of the agreement, "the same to take effect from and after the death of her said husband," do not describe the time of the payment, but the event which brings the annuity into existence, <sup>507</sup> the time from which it begins to run: *Simmons v. Hubbard*, 50 Conn. 574, 576. "If an annuity is given by will, it will commence immediately after the testator's death, and the first payment shall be made at the expiration of a year from that event": 1 *Swift's Digest*, side p. 455. In *Barilett v. Slater*, 53 Conn. 102, 107, 55 Am. Rep. 73, 22 Atl. 678, an annuity is defined as "a yearly payment of a certain sum of money," and it is said in that case, citing 3 *Redfield on Wills*, 186: "In case of an annuity bequeathed, it begins from the death of the testator, and the first payment becomes due in one year thereafter"; and again, citing *Gibson v. Bott*, 7 Ves. Jr. 96: "If an annuity is given, the first payment is payable at the end of the year from the death." The claim that the annuity was payable in advance cannot be upheld.

As the annuitant died before the end of the year following the last payment, made in June, 1902, may her administratrix recover a part of the sum of one thousand dollars, proportionate to the part of that year which had expired at the time of the death of the annuitant, in January, 1903?

We think this question is very clearly answered in *Tracy v. Strong*, 2 Conn. 659, which in its principal features closely resembles the present action. In that case, as in this, the administratrix of an annuitant claimed to recover a fractional part of the annuity proportionate to the time which had intervened

between the fixed time of payment and the date of the annuitant's death. It was urged there, that as the annuity was a provision for a widow in lieu of her dower, it was an exception to the general rule that an annuity was not apportionable. The court overruled the plaintiff's claim, and, in the opinions by Chief Justice Swift and Judge Gould, held that the only two exceptions introduced by courts of equity to the fully settled common-law rule that there can be no apportionment of an annuity in respect of time, were "where an annuity is payable, by way of maintenance, to an infant or feme covert—who, by reason of their legal disabilities, might be unable to procure credit for necessities, if payment for them depended <sup>508</sup> upon their living till the annuity should, by the common rule, become payable." The present case does not come within these exceptions, since Mrs. Sanford, after the death of her husband, was under no legal disability to contract.

In England, and in Massachusetts, Rhode Island and New York, annuities are by statute made apportionable in respect of time. In some jurisdictions the exceptions to the common-law rule against apportionment have been extended to include an annuity given to a widow in lieu of dower, upon the ground that the annuity is necessary for the support of the widow until her death, or for the reason that that which is given in the place of dower should last as long as that for which it is given: In re Lackawanna Iron etc. Co., 37 N. J. Eq. 26; In re Cushing's Will, 58 Vt. 393, 5 Atl. 186; Rhode Island Hospital Trust Co. v. Harris, 20 R. I. 160, 163, 37 Atl. 701; Blight v. Blight, 51 Pa. St. 420. But the rule as laid down in Tracy v. Strong, 2 Conn. 659—perhaps fully understood by the parties to the present contract when it was drawn—has been so long recognized as the established law of this state, that if it is to be changed or the exceptions to it extended, it should be done by the legislature rather than by the courts.

There is no error.

In this opinion the other judges concurred.

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*Annuities* are held not apportionable, in the event of the death of the annuitant before the time of payment, in Chase v. Darby, 110 Mich. 314, 64 Am. St. Rep. 347, 68 N. W. 159; Heizer v. Heizer, 71 Ind. 526, 36 Am. Rep. 202.



**LAHIFF v. ST. JOSEPH'S TOTAL ABSTINENCE AND BENEVOLENT SOCIETY.**

[76 Conn. 648, 57 Atl. 692.]

**ASSOCIATIONS, Responsibility of for Illegal Expulsion of Member.**—If a member of an association is expelled at a special meeting not legally called, and the action thus taken is therefore not binding on the association, if it at a subsequent meeting in effect approves the action thus illegally taken by refusing him admission to the meeting, it becomes responsible for his illegal expulsion. (p. 1014.)

**ASSOCIATIONS, Remedy for Illegal Expulsion.**—An action may be sustained by a member against an association for his illegal expulsion by it. Mandamus to compel his readmission to membership is not his sole remedy. (p. 1015.)

**DAMAGES, Measure of for Illegal Expulsion by an Association.**—In estimating damages suffered by the plaintiff for his illegal expulsion by the defendant association, the loss sustained by him in being deprived of the use and enjoyment of the property of the association and the privileges of membership and the mental suffering caused by his wrongful expulsion and the manner in which it was effected are proper elements for allowance. (pp. 1015, 1016.)

Action to recover damages for the illegal expulsion of the plaintiff from membership in the defendant society. Judgment for the plaintiff; the defendant appealed.

Henry M. Hunter and Samuel B. Harvey, for the appellant.

Charles E. Searles and Thomas J. Kelley, for the appellee.

**649 HALL, J.** The defendant in this action is a voluntary unincorporated association, which, under section 588 of the General Statutes, may sue and be sued by its distinguishing name, and against which a suit may be brought by any individual member thereof.

The plaintiff claims damages, upon the ground that he has been unlawfully expelled from said association and deprived of all the rights and privileges incident to membership therein.

By its answer the defendant denied all the allegations of the complaint, excepting those describing the character and location of the defendant society.

It appears by the finding of facts, that at a special meeting of the society on the 1st of May, 1901, the plaintiff, who had long been a member of the society in good standing, and was then its vice-president and acting as president at said meeting, was declared expelled from the society.

It is found that the special meeting was not called for the purpose of acting upon the expulsion of the plaintiff, <sup>650</sup> that the plaintiff had no notice of such proposed action, that no charges were preferred against him, that he was given no opportunity to be heard, that the motion for his expulsion was put by a member of the society and declared carried without the votes being called for, and that the plaintiff was thereupon compelled to withdraw from the rooms of the society.

Afterward, at a regular meeting of the society, the plaintiff demanded admission to the defendant's rooms and to the privileges of membership in the society, but was refused; and he has ever since been debarred from all the rights and privileges of membership.

In the trial court the defendant claimed, upon these facts, that the plaintiff was not entitled to recover, because he had failed to prove that the acts complained of were in violation of the constitution and by-laws of the society, and that the plaintiff could recover, if at all, only to the extent of his pecuniary loss proved.

The trial court overruled these claims and rendered judgment for the plaintiff for two hundred dollars, basing said damages upon the injury sustained by the plaintiff in being deprived of his interest in the defendant's property, and of the rights and privileges of membership in the society, and upon the mental distress suffered by him "on account of the indignity put upon him." The overruling of the defendant's said claims in the trial court, and the rendering of a judgment for the plaintiff upon the facts found, are in substance the errors assigned in the appeal.

Upon this appeal the defendant abandons its claim made at the trial court, that the plaintiff was not illegally expelled, and concedes that the proceedings in the matter of expulsion were "in direct violation of law." We are now asked by the defendant to set aside the judgment of the superior court upon the ground, first, that the vote of expulsion at said special meeting was illegal and void, and not binding, either upon the plaintiff or the defendant society, or its absent or dissenting members, not only because of the manner in which the proceedings of that meeting were conducted, <sup>651</sup> but because no notice was given in the call for the meeting that action was proposed to be taken upon said matter of expulsion; and second, upon the ground that mandamus is the only remedy for such illegal expulsion.

Neither of these questions appears to have been so distinctly raised and decided in the trial court, nor to be so specifically stated in the reasons of appeal as to meet the requirements of section 802 of the General Statutes and entitle the defendant to have them considered here. But waiving the irregular manner in which these claims are presented in this court, they cannot be sustained upon the facts before us.

As to the first of these claims, if we assume, for the reasons stated by the defendant, that the special meeting of May 1, 1901, was not a lawful one for the purpose of acting upon the matter of expelling the plaintiff, and that the action taken upon that matter at such meeting was unauthorized by, and not binding upon, the defendant as an association, it still appears that the association is responsible for the illegal expulsion of the plaintiff, since the court finds that the defendant afterward, at a regular meeting of the society, in effect approved the action of the meeting of May 1, 1901, by refusing the plaintiff admission to its meeting, and that it has ever since debarred the plaintiff from all the rights and privileges of membership.

As to the second claim, we are not prepared to hold that a writ of mandamus to compel the association to readmit him to membership is the plaintiff's sole remedy for the illegal expulsion complained of, nor even that it is an available remedy to the plaintiff for such injury.

The writ of mandamus is an extraordinary remedy to be applied only under exceptional conditions, and is not to be extended beyond its well-established limits: *Duane v. McDonald*, 41 Conn. 517, 522. It lies to compel the performance of a public duty, or one imposed by public authority and for the nonperformance of which there is no other specific or adequate remedy at law, but not for the enforcement of merely private obligations such as those <sup>652</sup> arising from contracts: *Hartford v. Hartford Street Ry. Co.*, 74 Conn. 194, 196, 50 Atl. 393; *Bassett v. Atwater*, 65 Conn. 355, 360, 32 Atl. 937, 32 L. R. A. 575; *Tobey v. Hakes*, 54 Conn. 274, 1 Am. St. Rep. 114, 7 Atl. 551; *Parrot v. Bridgeport*, 44 Conn. 180, 182, 26 Am. Rep. 439; *American Asylum v. Phoenix Bank*, 4 Conn. 172, 178, 10 Am. Dec. 112. It is often an appropriate remedy for the reinstatement of a member of an incorporated benevolent or social society, who has been unlawfully and unreasonably deprived of the enjoyment of the rights and privileges of membership in such societies: 1 *Morawetz on Corporations*, 2d ed., sec. 277; 2 *Spelling on*

Extraordinary Remedies, 2d ed., sec. 1606; Commonwealth ex rel. Burt v. Union League, 135 Pa. St. 301, 20 Am. St. Rep. 870, 19 Atl. 1030, and note on same case, 8 L. R. A. 195. Such associations, although private corporations, are chartered by the state, and enjoy privileges and exercise powers expressly granted by the state, and for that reason the duties devolving upon them are regarded as of a public character, the performance of which may properly be compelled by writ of mandamus: State v. Milwaukee Chamber of Commerce, 47 Wis. 670, 3 N. W. 760; Burt v. Grand Lodge of Masons, 66 Mich. 85, 33 N. W. 13; Tobey v. Hakes, 54 Conn. 274, 1 Am. St. Rep. 114, 7 Atl. 551.

Otto v. Journeymen Tailors' Union, 75 Cal. 308, 7 Am. St. Rep. 156, 17 Pac. 217, and Von Arx v. San Francisco Gruetli Verein, 113 Cal. 377, 45 Pac. 685, are cited by the defendant as cases where writs of mandamus were issued against unincorporated associations to compel the reinstatement of members wrongfully expelled. Our attention has not been called to any other authorities holding that mandamus is an appropriate remedy against unincorporated societies for the restoration of an expelled member. It seems generally to have been held that writs of mandamus will be denied in such cases: People v. Board of Trade, 80 Ill. 134; Burt v. Grand Lodge of Masons, 66 Mich. 85, 33 N. W. 13; Lamphere v. Grand Lodge of Workmen, 47 Mich. 429, 11 N. W. 268. But whether or not a person might be expelled from an unincorporated society under such circumstances as to warrant the granting of a writ of mandamus to compel his restoration to membership, and what effect the granting of such writ might have upon one's right to recover damages for such illegal expulsion, are questions which we are not called upon to decide <sup>653</sup> in this case. No writ of mandamus has been issued or asked for in the present case. The circumstances of his expulsion were perhaps such that the plaintiff could not thereafter have enjoyed the privileges of membership, had his reinstatement been ordered. Mandamus might for that reason have been but a partial remedy for the injury sustained by his wrongful expulsion, and an action for damages a more complete remedy.

Upon the facts before us the plaintiff had the right to abandon all claim to reinstatement in the society and resort to an action for damages for the injury sustained by reason of the illegal expulsion: Burt v. Grand Lodge of Masons, 66 Mich. 85, 33 N. W. 13; Lamphere v. Grand Lodge of Work-



men, 47 Mich. 429, 11 N. W. 268; Washington Ben. Soc. v. Bacher, 20 Pa. St. 425; People v. Musical Union, 118 N. Y. 101, 23 N. E. 129; People v. German United Church, 53 N. Y. 103; Ludowski v. Polish Ben. Soc., 29 Mo. App. 337; State v. Lipa, 28 Ohio St. 665; Fraternal Mystic Circle v. State ex rel. Fritter, 62 Ohio St. 628, 76 Am. St. Rep. 446, 48 N. E. 940; Fisher v. Board of Trade, 80 Ill. 85. We cannot adopt the view which seems to be expressed in Lavallo v. Société St. Jean Baptiste, 17 R. I. 680, 24 Atl. 467, 16 L. R. A. 392, that the bringing of an action for damages in such a case is a waiver by the plaintiff of the illegality of his expulsion. The loss sustained by the plaintiff in being deprived of the use and enjoyment of the property of the society and the privileges of membership were proper elements of damage, as was also the mental suffering of the plaintiff caused by his wrongful expulsion and the manner in which it was effected: People v. German United Church, 53 N. Y. 103; Maisenbacker v. Society Concordia, 71 Conn. 369, 376, 71 Am. St. Rep. 213, 42 Atl. 67; Gibney v. Lewis, 68 Conn. 392, 396, 36 Atl. 799.

There is no error.

In this opinion the other judges concurred.

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*The Jurisdiction of Courts* over voluntary unincorporated associations is discussed in the monographic notes to Otto v. Journeyman Tailors, 7 Am. St. Rep. 160-170; Kearns v. Howley, 68 Am. St. Rep. 856-871; Morris Street Baptist Church v. Dart, 100 Am. St. Rep. 734-750. And the remedies of members of fraternal and other associations are discussed in the monographic note to Robinson v. Templar Lodge, 59 Am. St. Rep. 198-209.

**MATHEWS v. SHEEHAN.**

[76 Conn. 654, 57 Atl. 694.]

**EXECUTORS AND ADMINISTRATORS—Speculative Stock Accounts, Duty Respecting.**—When administrators have knowledge that a part of the estate is subject to the great hazard of the business of stock speculation, it becomes their duty not to carry the account for speculative gain, but to settle such account in a reasonable time, and thereby withdraw the securities from the perilous business in which they find them pledged. (p. 1022.)

**AN EXECUTOR or Administrator is not Permitted** to use any part of the estate in trade or manufacturing or stock speculation or other business venture whereby the trust fund is put at hazard, and the doing of any of these things is a breach of trust rendering him personally liable for the resulting losses. (p. 1022.)

**EXECUTORS AND ADMINISTRATORS, Liability of for not Closing Speculative Stock Accounts.**—Administrators who find that part of the estate is subject to the hazard of speculative accounts and who do not close such accounts within a reasonable time and withdraw the securities therefrom are liable for all resulting losses, though they acted in good faith for the benefit of the estate and with ordinary care and prudence. (p. 1023.)

**EXECUTORS AND ADMINISTRATORS—Consent of Heirs to Continuance of Speculative Accounts.**—If an executor or administrator acting in good faith and with ordinary care and prudence for the good of the beneficiaries and their estate, deviates, with their consent and approbation, from the strict line of his duty, as by permitting the property to remain subject to the hazard of stock speculation, such consenting beneficiaries cannot charge him with any resulting losses, unless they withdraw such consent and approbation, in which event the executor or administrator becomes answerable for losses resulting from subsequently continuing the account. (p. 1024.)

**EXECUTORS AND ADMINISTRATORS, Finding as to Charges of.**—If a committee to which an administrator's account is referred finds that the charges made for his services are reasonable and proper, this is sufficient to support the account. The finding need not disclose the evidence on which it is based. (pp. 1025, 1026.)

**COSTS.**—The taxation of costs is within the discretion of the superior court in proceedings in probate. (p. 1026.)

Appeal from an order relating to certain accounts of the administrator of the estate of Julius Converse. A committee was reported to hear evidence and report the facts to the court. A remonstrance was filed by Mrs. Mathews against the report. This remonstrance having been demurred to by the administrator, the demurrer was sustained, the report accepted, and judgment rendered in accordance therewith. Mrs. Mathews appealed.

Edward D. Robbins, for the appellant.

Charles E. Perkins, for the appellees.

**655** TORRANCE, C. J. When Mr. Converse died he was indebted to certain stock brokers in the sum of a little over \$286,000, "on margin account," secured by stocks and bonds purchased for him by such brokers and carried by them for him "upon the usual terms on which speculative accounts are carried" by brokers.

The appellant claims that the administrators, instead of settling these speculative accounts within a reasonable time, carried some of them along for an unreasonable time and for the purpose of speculative gains, and thereby caused loss to her as one of the heirs of the intestate, and that they are accountable to her therefor.

The committee has found that the course pursued by the administrators with respect to these accounts was one "which ordinary business men would have taken under similar circumstances," and that in pursuing it they acted in good faith and with due care and prudence.

Upon this finding the court held that the administrators were not accountable to the appellant for any losses that may have resulted to her from what they did with these speculative **656** accounts; and the main question in the case is whether the court erred in so holding.

In substance, the report shows the following facts bearing upon this question: At the time of his death Mr. Converse had speculative accounts with the following stock brokers, namely, Howard Lapsley & Co., Clark, Dodge & Co., Cordley & Co., and Samuel W. Boocock. For brevity these accounts will be called the Howard account, the Clark account, the Cordley account, and the Boocock account, respectively. The understanding between Mr. Converse and these brokers was the usual one in such cases: that the securities carried by them should at all times have a value exceeding the balance due upon his account by a margin of at least ten per cent of the par value of such securities; and that if Mr. Converse did not furnish such margin, when required to do so, the broker had the right to sell such securities upon the stock exchange, so far as might be necessary for the broker's protection. On July 1, 1892, there was due from the estate upon these four accounts the following sums (omitting the cents) namely: On the Howard account, \$44,610; on the Clark account, \$148,324; on the Cordley account, \$75,895; and on the Boocock account, \$15,275. In the inventory the administrators entered the net value of the securities held by the brokers for this indebted-

ness as "cash with bankers and brokers, \$45,000," that amount being their estimate of what might be realized from a sale of these securities above the indebtedness due on the several accounts. The administrators permitted all of the securities to remain in the hands of the brokers, but made no arrangements with them as to the terms on which the accounts should be carried for the estate, other than the arrangement which Mr. Converse had with them as hereinbefore stated, with the exception of an arrangement made with Cordley & Co. in July, 1893, as hereinafter stated. No advances were made to any of the brokers by the administrators to restore reduced margins, although in a few instances they were called upon to do so. If the margins were impaired by reason of the reduction in the market value of the <sup>657</sup> collateral, they were restored to the amount required for the proper security of the account, either by a sale of the stocks, or by a transfer by the administrators of stocks from the other brokers whose accounts showed a margin above what was required, the broker receiving the stock holding it as additional security for the money advanced. The interest on the balance due to the several brokers was adjusted in the accounts, and no money was ever advanced to the brokers by the administrators on account of this item, nor for any other purpose. The administrators bought no new stocks, and their transactions related wholly to the stocks belonging to the estate of Mr. Converse in the hands of said brokers at the time of his death. The Boocock account was closed out in August, 1892, by a sale of the securities held by him, leaving a balance due the estate of \$6,620.52, which was paid to the administrators and duly credited in their account. By February, 1893, the Cordley account had been reduced by sales or transfers of the securities to \$20,062.50; and on the 20th of that month, by order of the administrators, Howard Lapsley & Co. paid that indebtedness and took by transfer the securities then remaining in the hands of Cordley & Co., thus closing the Cordley account. In July, 1893, by sales of securities from time to time, the Clark account had been reduced to \$34,000.22, secured by certain stocks; and on July 5, 1893, by order of the administrators, these stocks were transferred to Cordley & Co. who then assumed the indebtedness to Clark, Dodge & Co., whose account was thus closed. On July 27, 1893, the Howard account had been reduced to \$25,594.61, secured by stocks; and on that day, by direction of the administrators, Cordley & Co. paid that



balance to Howard Lapsley & Co. and took a transfer of the securities held by the latter, and this closed the Howard account. On August 1, 1893, under this new account with Cordley & Co., the balance due to them from the estate was \$10,070.43 secured by certain stocks in their hands. Subsequently, by sales of these securities made in November, 1895, and in May, 1896, the indebtedness to <sup>658</sup> this firm was reduced to \$2,610.38. To secure this balance there was left five hundred shares of the common stock, and one hundred and fifty shares of the preferred stock, of the Buffalo, Rochester and Pittsburg Railroad Company. No further sales of the stock were made, and on June 24, 1897, Cordley & Co. became insolvent, and their estate is being wound up under the insolvent laws of Massachusetts. It is not probable that anything will ever be paid on this account. Cordley & Co., in order to secure their own private debts, either sold or pledged the stock in their hands belonging to the estate, being the five hundred shares of Buffalo, Rochester and Pittsburg common stock, and one hundred and fifty shares of the preferred stock of the same company, and at the time of the failure they held none of these shares. The new account was opened with Cordley & Co. with the agreement that the interest charge on balances should be at the rate of six per cent, and that it should not be considered or treated as a speculative account. Subsequently the accounts were rendered to the administrators in the form usually adopted in speculative accounts, but the administrators were not called upon for any money to increase or to restore the margins. In June, 1893, there was a financial panic, and the stock market became unsettled and irregular, and there was little opportunity of disposing of the stocks at fair prices. Some time afterward Clark, Dodge & Co. and Howard Lapsley & Co. each demanded twelve per cent interest on the balance due to them from the estate for carrying the stocks then in their hands. The administrators refused to comply with this demand, and made an agreement with Cordley & Co. to open a new account with them on August 1, 1893, the rate of interest on balances to be six per cent. Under this agreement the stocks in the hands of the two firms were transferred to Cordley & Co., as hereinbefore stated.

Between July 1, 1892, and February 1, 1893, "many attempts were made by the administrators and the heirs to divide the property and settle the estate, by some agreement which should cover all of the property, including the <sup>659</sup> brok-

ers' accounts. No agreement was reached at this time, and with the approval of the widow and all of the heirs, except Mrs. Mathews, who did not participate in these attempts at settlement, the brokers' accounts were permitted to remain as they then were, in the expectation that such an agreement would be accomplished. It did not appear that Mrs. Mathews either approved or disapproved of this arrangement."

It is further found, in substance, that between the dates last mentioned all of the securities held by the four brokers had a current market value, varying somewhat from time to time; that many of said securities were, during that time, sold at current market prices; that with reasonable effort all of them could have been so sold; but that the "administrators in the exercise of their best judgment, and with the approbation of the widow and the three heirs living in Connecticut, decided that it was not for the best interest of the estate to place all of said stocks on the market at that time and force their sale, but thought it best to hold them for better prices or for a distribution to the widow and heirs, as hereinbefore stated." It is further found that in this matter the administrators acted in good faith, in the exercise of their best judgment, upon the best advice and counsel obtainable.

These are in substance the controlling facts found upon this part of the case. From them it appears that one of the four speculative accounts, Boocock's, was settled in August, 1892; that the Cordley account was settled in February, 1893, by transfer to the Howard account; that the Howard and Clark accounts were settled in July, 1893, by transfer to Cordley & Co.; that the new Cordley account thus opened continued down to the time of the insolvency of that company in June, 1897; and that these accounts of Howard, Clark, and Cordley, might have been settled, without loss of other than speculative gains, within a reasonable time after July 1, 1892, just as the Boocock account was.

Upon the facts found, the question arises whether the administrators are accountable for any losses that may have occurred from the course pursued with reference to these last-named speculative accounts. The answer to this question depends upon the answer to two other questions: 1. What was the duty of the administrators with reference to these accounts; and 2. Did they perform that duty?

The securities held by the brokers when Mr. Converse died were clearly a part of his estate, subject to the claims of the

brokers. All the property of the estate, including these securities, was in a certain sense a trust fund in the hands of the administrators: *Robbins v. Coffing*, 52 Conn. 118, 144. By the 1st of July, 1892, the administrators had full knowledge that a part of that fund, which they inventoried at \$45,000, was subject to the great hazards of the business of stock speculation. In these circumstances it was clearly their duty not to carry the speculative accounts for speculative gains, but to settle those accounts in a reasonable time, and thereby withdraw the securities from the perilous business in which they found them pledged. An administrator, or an executor, in the absence of authority therefor, is not permitted to use any part of the estate in trade, or manufacturing, or stock speculation, or other business venture, whereby the trust fund is put at hazard; and the doing by them of any of these things has generally been regarded as a breach of trust, rendering them personally liable for resulting losses, while incapable of sharing in accruing gains: *King v. Talbot*, 40 N. Y. 76; *Warren v. Union Bank*, 157 N. Y. 259, 268, 68 Am. St. Rep. 777, 51 N. E. 1036, 43 L. R. A. 256; *Ward v. Tinkham*, 65 Mich. 695, 698, 32 N. W. 901; *Mattocks v. Moulton*, 84 Me. 545, 24 Atl. 1004; *Lucht v. Behrens*, 28 Ohio St. 231, 238, 22 Am. Rep. 378; *Alsop v. Mather*, 8 Conn. 584, 587, 21 Am. Dec. 703; *Hallock v. Smith*, 50 Conn. 127; *Guthrie v. Wheeler*, 51 Conn. 207, 214.

As the law imposed upon the administrators the duty of settling the speculative accounts in a reasonable time, the next question is whether they performed that duty. That is largely a question of fact, and we think the clear import of the finding is that they did not, but that they carried these accounts along as speculative accounts, for speculative purposes, in <sup>661</sup> the hope of gains purely speculative and problematical. After July 1, 1892, these accounts were carried along in the name of the estate very much as they had been carried during the lifetime of Mr. Converse, except that no new stocks were purchased. It is true, also, that the administrators advanced no money upon these accounts either for margin or interest; but it is equally true that whatever the brokers required by way of margin or interest was in some way furnished and paid, and ultimately came out of the estate. The committee has found, in effect: 1. That at all times between July 1, 1892, and February 1, 1893, the securities held by the brokers had a current market value that varied but little, from time to

time, from the value they held in July, 1892; 2. That with reasonable effort they could have been disposed of at any time during that period with advantage to the estate; and 3. That they probably would have been disposed of within some reasonable time during that period, but for the fact that the administrators, with the consent and approbation of the widow and the three heirs living in Connecticut, "thought it best to hold them for better prices or for distribution to the widow and heirs." We think that this part of the report must be treated as finding that the administrators did not settle or attempt to settle three of the speculative accounts within a reasonable time after July 1, 1892, as they might and should have done, but that they carried them along as speculative accounts subject to all the hazards of stock speculation. In doing so they clearly deviated from the strict line of their duty. The committee has found, in effect, that, in doing this, they acted in good faith for the benefit of the estate, and with ordinary care and prudence. Be it so. This finding can only mean that they conducted the business of stock speculation in good faith and with ordinary care and prudence. But the law forbade them to enter upon or to continue in that business, and when charged with disobeying the law it is no answer to say that the forbidden thing was done in good faith and with ordinary care and prudence.

For loss resulting from this breach of duty the administrators are accountable to the widow and heirs, unless the acts which <sup>662</sup> caused the loss were done with the consent and allowance of the widow and heirs; and whether these acts were so done is next to be considered.

Where an administrator or an executor, acting in good faith and with ordinary care and prudence for the good of the beneficiaries of the estate, deviates, with their consent and approbation, from the strict line of his duty, and loss results therefrom—as for instance by continuing the property in business without authority—the consenting beneficiaries cannot charge the representative of the estate with such loss: *Poole v. Munday*, 103 Mass. 174; *Duffield v. Brainerd*, 45 Conn. 424. The committee has found, in effect, that what the administrators did with these speculative accounts, from first to last, they did with the full knowledge, consent, approbation and allowance of the widow and the three heirs who resided in Connecticut; and of this finding no one complains, and those whom it most affects appear to be entirely satisfied with the conduct to which



they consented. But during the settlement of the estate Mrs. Mathews lived in Chicago, and with reference to her consent the finding is not as clear and explicit as it is with respect to the consent of the widow and the other heirs. Upon that point the facts found are these, in substance: In July, 1892, she knew of the situation in regard to these accounts. She was then in this state and present at some conferences between the administrators and the widow and heirs, at which were discussed plans for distributing among the heirs such securities in the brokers' hands as might remain after the debts due to the brokers had been paid. No agreement as to this matter was then reached, but Mrs. Mathews then told the administrators that she would enter into any arrangement to which the others would consent. In December, 1892, and in January, 1893, Mrs. Mathews and her husband, who acted as her agent in this matter, were in this state and had interviews with the administrators. The husband suggested that the estate should be closed; he told the administrators that it would be unwise to continue the stock accounts; that he thought the stocks could have been sold out in November, 1892; and said that <sup>663</sup> while he did not want the stocks to be slaughtered, it was desirable to have the estate settled as speedily as possible. "A general scheme for the distribution of all the property, including an adjustment of the stock accounts, was considered at this time, and presented to the parties interested, including the appellant and her husband"; but it was not completed, because, though approved by the appellant, it failed to get the approval of the other parties. Previous to this Mrs. Mathews had expressed to the administrators a wish to obtain her share of the estate as soon as possible; and was "anxious at all times after this that the stocks should be sold and the estate settled, and of this the administrators had notice." Subsequently, in April, 1893, Mr. Mathews expressed his regret to one of the administrators that the stocks had not been sold. In April, 1893, the widow and heirs, including Mrs. Mathews, entered into a written agreement for a mutual distribution of most of the estate (except the stocks in the hands of brokers) as provided by statute. It was filed in the court of probate in June, 1893, and the property embraced in it was turned over to the parties entitled to it as of July 1, 1893. Subsequently, in 1895 and 1896, efforts were made from time to time by the administrators to settle with and turn over to Mrs. Mathews her remaining share of the estate, but it was never

done. There are no other facts found having any material bearing upon the point now in question.

The committee has not found specifically that Mrs. Mathews did or did not consent to the course pursued by the administrators with the speculative accounts; but we think the fair import of the report upon this point is, that up to the first of February, 1893, she did consent, as the others did, to the acts of the administrators with reference to the speculative accounts; and that the finding must be so construed. It follows from this, that for losses to the appellant, if any, resulting from continuing the speculative accounts up to the end of January, 1893, the administrators are not accountable to her; but that for losses so resulting after that time they are accountable.

664 The committee has thus found, in effect, that the administrators, in violation of their duty and against the expressed wish of the appellant, continued to carry the speculative accounts as such after January, 1893. It has also found, in effect, that for any loss resulting to her after that time, from the course thus taken by the administrators, they are not accountable, because they acted with ordinary care and prudence and in good faith. This last finding states a conclusion of law rather than one of fact; and it is a conclusion not warranted by the law as applied to the facts found; it is an erroneous conclusion. The appellant remonstrated against the acceptance of the report on account of this erroneous conclusion of the committee, and to this ground of remonstrance the administrators demurred. The court below sustained the demurrer upon this point, accepted the report, and rendered judgment thereon. In so doing we think the court erred, and that for this reason the judgment must be set aside.

In the view we take of this case the other grounds of remonstrance either become of no importance or require but a brief consideration.

The second ground, founded upon the alleged failure of the committee to find definitely the market value of the speculative accounts at a certain time, becomes of no importance in view of the fact that there must be a further hearing and finding in the case. This is true also of the third ground of remonstrance, based upon certain alleged inaccuracies in the report.

The fourth ground of remonstrance alleges, in effect, that the committee has not found the facts upon which it bases its finding that the charges made by the administrators for their services were reasonable and proper. The committee has found

the fact itself, and that is sufficient in the absence of anything to show that it committed an error of law in so doing. It was not obliged, nor would it have been proper, to report the evidence on which its finding was based. Under the circumstances disclosed by the record we think the payments made by the administrators to the widow and <sup>665</sup> J. Carl Converse, to which exception is taken in the fifth and sixth grounds of remonstrance, were by the committee properly credited to the administrators.

In the sixth ground of remonstrance the appellant also excepts to certain interest charges paid to brokers, for which the committee allowed the administrators credit. In the further disposition of this case to be made as hereinafter stated, this ground of remonstrance becomes unimportant. This disposes of all the grounds of remonstrance.

The appellant in the court below claimed that the administrators should not be allowed their costs in that court, but that costs should be taxed against them personally. The court overruled this claim and allowed the administrators their costs. As the judgment below must be reversed on other grounds, this ruling falls with it, and can do the appellant no harm. It should be noted, however, that in cases like the present the allowance of costs is a matter within the discretion of the superior court: *Smith v. Scofield*, 19 Conn. 534; *Canfield v. Bostwick*, 22 Conn. 270; *Adams' Appeal*, 38 Conn. 304.

We think that the report as it now stands should be supplemented by a further finding, after a proper hearing, upon these two grounds: 1. Whether after January 31, 1893, any loss resulted to the appellant, as an heir, to her portion of the estate, from the cause thereafter pursued by the administrators in dealing with the speculative accounts; and 2. The extent of the loss, if any; and that the report of the committee as modified by such supplemental finding should stand.

There is error, the judgment appealed from is set aside and the cause remanded to be proceeded with according to law.

In this opinion the other judges concurred.

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*An Executor* ordinarily has no authority to carry on the business of his decedent, and does so at his own risk. He may be authorized, however, by the will: See the monographic note to *Fletcher v. American Trust etc. Co.*, 78 Am. St. Rep. 196, 197; *Furst v. Armstrong*, 202 Pa. St. 348, 90 Am. St. Rep. 653, 51 Atl. 996. As to what securities an executor is authorized to invest in, see the note to *Fletcher v. American Trust etc. Co.*, 78 Am. St. Rep. 197-200. A reference to page 199 of this note will show that he has no right to retain doubtful securities which were held by his testator.

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2. **ACCORD AND SATISFACTION.**—To Constitute an accord and satisfaction, dependent upon the offer of the payment of money, it is necessary that the money be offered in full satisfaction of the demand of the creditor, and be accompanied by such acts or declarations as amount to a condition that if the money is accepted it is to be in full satisfaction, and be of such character that the creditor is bound so to understand the offer. (Kan.) Harrison v. Henderson, 386.

3. **ACCORD AND SATISFACTION**—"Balance."—Payment by a debtor of a "balance" upon an account rendered and its retention by the creditor, do not constitute an accord and satisfaction. (Kan.) Harrison v. Henderson, 386.

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A notary public who is an owner of, and stockholder in, a corporation is disqualified from taking the acknowledgment of a mortgage executed for its benefit, though it is not named as a party therein, as where a note and mortgage are on their face in favor of a natural person, but the debt secured in fact belongs to the corporation. (Wyo.) *First Nat. Bank v. Citizens' State Bank*, 924.

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### ADEMPTION.

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### ADMINISTRATORS.

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### ADVERSE POSSESSION.

**1. ADVERSE POSSESSION—Innocent Purchaser.**—If a railroad company claiming a strip of land one hundred feet wide on either side of its track, under an unrecorded contract to purchase constituting a mere option, incloses a strip fifty feet wide on either side of its track, and sufficient for all its purposes and uses that much for



ten years, allowing the land owner to inclose and use the balance of the strip, it is estopped to claim such balance by adverse possession, or as against an innocent purchaser, that he holds the legal title thereto in trust for it. (Miss.) Louisville etc. R. R. Co. v. Gulf of Mexico Land etc. Co., 627.

**2. ADVERSE POSSESSION — Constructive — Extent.**—Constructive adverse possession coextensive with the description in an unrecorded contract to convey under which the possessor claims, will extend only to such land as is used in connection with the land actually possessed, and to only so much as is reasonable and proper for that purpose according to the custom of the country. (Miss.) Louisville etc. R. R. Co. v. Gulf of Mexico Land etc. Co., 627.

**3. ADVERSE POSSESSION.—Mixed Possession** is not enough to warrant disturbance of the record rights of innocent purchasers for value. (Miss.) Louisville etc. R. R. Co. v. Gulf of Mexico Land etc. Co., 627.

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### ANNUITY.

**1. AN ANNUITY** is a Sum Payable Annually unless the language of the instrument creating it may properly be construed as providing a different time of payment. (Conn.) Mower v. Sanford, 1008.

**2. PAYMENT, When not Due in Advance.**—An agreement to pay a specified sum yearly cannot be construed as a promise to pay such sum in advance, or at the commencement of each year. The payment may be made in a single installment at the end of the year. (Conn.) Mower v. Sanford, 1008.

**3. IF AN ANNUITY is to Commence at the Death of the Testator,** the First Payment may be made at the expiration of a year from that date. (Conn.) Mower v. Sanford, 1008.

**4. ANNUITY, Apportionment of.**—If an annuity is made payable to the widow of the testator from and after his death, during her life, and she dies before the end of the year following the last payment, her administrator cannot recover for the proportionate part of the year which had expired at the time of her death. The annuity is not apportionable. (Conn.) Mower v. Sanford, 1008.

**APPEAL AND ERROR.**

**1. APPEAL AND ERROR—Time for Taking Appeal.**—A statute providing that an appeal or writ of error shall not be granted except within one year next after the rendition of judgment, unless the party applying therefor was an infant or of unsound mind, in which case the appeal may be granted within six months after the removal of the disability, is prospective, and does not apply to judgments rendered prior to its enactment. (Ark.) *Rankin v. Schofield*, 59.

**2. CONSTITUTIONAL LAW—Time of Taking Appeal—Persons Under Disability.**—A statute limiting the time within which an appeal may be taken from all judgments, and making no provision for an appeal, after the removal of disability, by a person then under disability by reason of infancy, coverture, insanity, or otherwise, is unconstitutional as depriving them of the right of appeal. (Ark.) *Rankin v. Schofield*, 59.

**3. APPEAL AND ERROR—Restriction to the Record.**—If a request is made for a separate statement of the conclusions of fact and of law, the record should show such request and that it was made in due season. (Wyo.) *First Nat. Bank v. Citizens' State Bank*, 924.

**4. APPEAL AND ERROR—Facts Relied upon Must Appear by the Record.**—It is not sufficient, to entitle a party on appeal to rely upon his request that the law and the facts be separately found, that he append an affidavit to the motion for a new trial deposing to such request. (Wyo.) *First Nat. Bank v. Citizens' State Bank*, 924.

**5. APPEAL AND ERROR.—A Request for a Separate Statement of Conclusions of Fact and of Law Comes too Late** if first made after the judge has announced his decision and directed the preparation of a decree in accordance therewith. Such request should be made at the time of the trial, or not later than the final submission of the case for decision, or some later time fixed by the court. (Wyo.) *First Nat. Bank v. Citizens' State Bank*, 924.

**6. APPEAL AND ERROR—Presumption in Favor of the Action of the Trial Court.**—Where an action is brought for a continuing act of trespass, recovery for part of which is barred by the statute of limitations, it will be presumed that the trial court, in assessing damages, considered such only as followed from the continuation of the trespass within three years prior to the commencement of the suit. (Conn.) *Knapp etc. Mfg. Co. v. New York etc. R. R. Co.*, 994.

**7. APPEAL AND ERROR—Conflict Between Finding and Judgment.**—Where a cause is assigned to a committee to find and report the facts, and its report is received and no other evidence heard by the court, the judgment must be set aside if contrary to the finding of facts so reported. (Conn.) *Coburn v. Raymond*, 1000.

**8. APPEAL.—Judgments Resting on Correct Conclusions will not be reversed** because based on erroneous reasons. (S. C.) *Brown v. Carolina Midland Ry. Co.*, 756.

**9. APPEAL AND ERROR—Judgment of Reversal, When Presumed not to be on the Weight of the Evidence.**—Where a statute makes it the duty of the appellate court to pass on all errors assigned, and when the judgment is reversed and the cause remanded for a new trial, that mandate shall state the errors found in the record on which the judgment is founded, it will be presumed that if the reversal was on the weight of the evidence that the mandate would have so declared. (Ohio St.) *Rheinstrom v. Steiner*, 699.

**10. APPEAL AND ERROR—Judgment of Reversal, When may be Reviewed, Though Declared to be on the Weight of the Evidence.**—If the entry of a judgment of reversal declares that it is because the judgment reversed is contrary to the evidence on the question of acceptance, this means that, giving proper construction to the evidence on the question of the acceptance and retention of goods, the rule of law applied in the trial court was erroneous. Such judgment of reversal may therefore be reviewed by the supreme court without departing from the rule which forbids the weighing of evidence. (Ohio St.) *Rheinstrom v. Steiner*, 699.

See Constitutional Law, 1; Infants, 3.

### ARGUMENT OF COUNSEL.

See Trial, 5-13.

### ARREST.

**1. ARREST in Civil Action, Affidavit for.**—In an affidavit to procure an order for the arrest of the defendant under the statutes of Ohio, certainty to a general intent is all that is required. Such certainty consists of such clearness and distinctness of statement of the facts constituting the cause of action that they may be understood by the party who is to answer them, by the jury who are to ascertain the truth of the allegations, and by the court who is to give judgment. (Ohio St.) *Luhrig Coal Co. v. Ludlum*, 675.

**2. ARREST in Civil Action—Affidavit, When Sufficient.**—An affidavit which states the nature of the claim sued upon, that all the averments of the petition are true, and that the defendant fraudulently contracted the debt and had at the time no intention or expectation of making payment, and was indebted to an amount largely in excess of the value of all his property, is sufficient to authorize the arrest of the defendant in a civil action under the statutes of Ohio. (Ohio St.) *Luhrig Coal Co. v. Ludlum*, 675.

**3. DEBT, When Deemed to be Fraudulently Contracted.**—If a debt is contracted by one whose indebtedness to his knowledge largely exceeds in amount the value of his property, and when he does not intend or expect to pay and has no reasonable expectation of paying, the debt is fraudulently contracted. (Ohio St.) *Luhrig Coal Co. v. Ludlum*, 675.

See Master and Servant, 27.

### ASSAULT.

**ASSAULT—"Kissing Sign."**—If a man makes a kissing sign at a woman by puckering up his lips and smacking them, without showing any intent to lay hands on her and kiss her without her consent, he is not guilty of an assault. (Tex. Cr. Rep.) *Fuller v. State*, 871.

See Innkeepers.

### ASSIGNMENT.

See Torts, 3; Usury.

### ASSOCIATIONS.

**1. ASSOCIATIONS, Responsibility of for Illegal Expulsion of Member.**—If a member of an association is expelled at a special meet-

ing not legally called, and the action thus taken is therefore not binding on the association, if it at a subsequent meeting in effect approves the action thus illegally taken by refusing him admission to the meeting, it becomes responsible for his illegal expulsion. (Conn.) *Lahiff v. St. Joseph's Total Abstinence etc. Society*, 1012.

**2. ASSOCIATIONS, Remedy for Illegal Expulsion.**—An action may be sustained by a member against the association for his illegal expulsion by it. Mandamus to compel his readmission to membership is not his sole remedy. (Conn.) *Lahiff v. St. Joseph's Total Abstinence etc. Society*, 1012.

**3. DAMAGES, Measure of for Illegal Expulsion by an Association.**—In estimating damages suffered by the plaintiff for his illegal expulsion by the defendant association, the loss sustained by him in being deprived of the use and enjoyment of the property of the association and the privileges of membership and the mental suffering caused by his wrongful expulsion and the manner in which it was effected are proper elements for allowance. (Conn.) *Lahiff v. St. Joseph's Total Abstinence etc. Society*, 1012.

See Benefit Societies; Religious Societies.

## ATTORNEY AND CLIENT.

**1. ATTORNEY AND CLIENT—Control of Action by Client.**—A plaintiff may dismiss his suit at pleasure, without the intervention of his attorney, notwithstanding there is a statute giving attorneys who begin a suit a lien upon the plaintiff's right of action from the date of filing the suit. (Tenn.) *Tompkins v. Railroad*, 795.

**2. ATTORNEYS—Compensation for Prosecuting Disbarment Proceedings.**—An attorney appointed by the court to act for the public in the prosecution of disbarment proceedings is entitled to reasonable compensation, to be paid by the county in which his services are performed. (Iowa.) *Hyatt v. Hamilton County*, 354.

See Champerty and Maintenance; Witnesses, 2.

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## BANKRUPTCY.

**BANKRUPTCY—Preference.**—If the holder of an unrecorded chattel mortgage executed two years before the bankruptcy of the mortgagor and while he was solvent, first takes possession under his mortgage three weeks before the mortgagor files his petition in bankruptcy, he being insolvent at the time, and the mortgagee having reasonable cause to believe him insolvent, the transfer dates from the time that the mortgagee takes possession, and is voidable as an unlawful preference under the United States bankruptcy act of 1898. (Mass.) *Tatman v. Humphrey*, 562.

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**BENEFIT SOCIETIES.**

1. **BENEFIT ASSOCIATIONS—Limitation of—Powers.**—Benefit associations must be administered for the sole benefit of their members and their beneficiaries, by means of assessments and dues collected from their members, and such associations have power to make payment of benefits only to their members or their named beneficiaries. (Kan.) Bankers' Union of the World v. Crawford, 465.

2. **BENEFIT ASSOCIATIONS have no Right to Consolidate.** (Kan.) Bankers' Union of the World v. Crawford, 465.

3. **BENEFIT ASSOCIATIONS—Consolidation—Contract Ultra Vires.**—A contract by one benefit association to pay an already accrued death loss of another similar association, in consideration of the transfer to it of the membership and offices of such other association, is unauthorized, ultra vires, and void. (Kan.) Bankers' Union of the World v. Crawford, 465.

4. **BENEFIT ASSOCIATIONS—Contract Ultra Vires—Estoppel.** A contract by a benefit association to pay an already accrued death loss in another benefit association, in consideration of the transfer to it of the membership and offices of other association, is ultra vires and void, and such association is not estopped to plead the invalidity of such contract because the transfer of such membership and offices has been made to it. (Kan.) Bankers' Union of the World v. Crawford, 465.

5. **PLEADING—Declaration when in Contract.**—A declaration against a benefit association by a member thereof, alleging a breach by such association of its implied contract to levy a disability assessment with which to pay indemnity to such member, is a declaration in contract, and allegations therein as to bad faith, fraudulent purpose, and unlawful action on the part of such association, make it neither a declaration in tort, nor a declaration having one count in contract and one in tort. (Mass.) Garcelon v. Commercial Travelers' etc. Assn., 540.

See Associations; Insurance.

**BILLS AND NOTES.**

1. **NEGOTIABLE INSTRUMENTS of Married Women—Consideration—Evidence.**—If a note is made by a wife and indorsed by her husband, it imports a consideration paid to her, and the holder makes out a prima facie case by introducing the note in evidence. (Mich.) National Lumberman's Bank v. Miller, 623.

2. **NEGOTIABLE INSTRUMENTS of Married Women—Estoppel.** If a married woman obtains money on her note representing that it is for herself individually, and for her separate estate, she is estopped to contend that her husband persuaded her to take this means to obtain the money for him. (Mich.) National Lumberman's Bank v. Miller, 623.

3. **NEGOTIABLE INSTRUMENTS—Conflict of Laws—Demand and Notice to Indorser.**—If a bank in one state holding an overdue note made and indorsed in another, asks the maker for a new note with the same indorser to take up the old note, and such maker sends a new note for a smaller amount, payable at such bank and

signed in blank upon the back by such indorser, together with a check for the balance, whereupon the bank returns the old note, the new note takes effect, as a contract, when accepted by the bank with the check in payment of the old note, and such contract is governed, as to demand and notice to the indorser, by the law of the state in which such bank is located. (Mass.) *Nashua Sav. Bank v. Sayles*, 573.

**4. NEGOTIABLE INSTRUMENTS—Demand and Notice—Indorser.**—A person who signs a note in blank upon the back is liable, under the law of New Hampshire, as a joint maker, without demand upon the other maker, or a notice of his failure to pay it. (Mass.) *Nashua Sav. Bank v. Sayles*, 573.

**5. NEGOTIABLE INSTRUMENTS—Liability of Indorser of New Note Given for Old One—Consideration.**—The surrender of an overdue note is a good consideration for a new note given in part payment of the old one and signed as a joint maker by the indorser of the old note, when such surrender is made in reliance upon his signature. It is immaterial that he was not liable on the old note for want of notice of nonpayment, and that he received no personal benefit from signing the new one. (Mass.) *Nashua Sav. Bank v. Sayles*, 573.

**6. COLLATERAL SECURITY.**—If a note has been transferred as collateral security, the original payee cannot, by agreement with the maker, extend the time for payment. (Wyo.) *First Nat. Bank v. Citizens' State Bank*, 924.

## BILL OF EXCEPTIONS.

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## BILL OF PARTICULARS.

See Pleading, 6.

## BOUNDARIES.

**1. DEEDS.—Boundaries on Ways, public or private, contained in deeds,** include the soil to the center of the way, if owned by the grantor, and the way thus referred to is a monument, which controls courses and distances, unless the deed, by explicit statement or necessary implication, requires a different construction. (Mass.) *McKenzie v. Gleason*, 566.

**2. DEEDS—Boundaries—Ways.**—A boundary in a deed running from "a stake and stones near an old road," thence by said road "to a stake and a pair of bars," includes the fee to the center of such road and a right of way thereon to the grantee and others, when such road is over the land of the grantor and its use is required for the reasonable enjoyment of the land conveyed. (Mass.) *McKenzie v. Gleason*, 566.

**3. DEEDS—Boundaries—Ways—Estoppel.**—A boundary in a deed as by the designated side of a private road over the land of the grantor, excludes the road, but the grantor is estopped to deny its existence. (Mass.) *McKenzie v. Gleason*, 566.

**4. DEEDS—Boundaries—Ways—Estoppel.**—A boundary in a deed of land on a private road over land of the grantor carries the land to the center of such road, estops the grantor from denying the existence of the road, and gives the grantee a right of way through

its entire length and width as it existed at the date of his deed. (Mass.) *McKenzie v. Gleason*, 566.

## BUILDING AND LOAN ASSOCIATIONS.

**1. FOREIGN BUILDING AND LOAN ASSOCIATIONS—Insolvency—Conflict of Laws.**—If upon the insolvency of a foreign building and loan association its bonds and securities are assigned to a stranger, the rights of an association member must be determined by the law of his domicile, if no place of payment is named and a local treasurer of the association is designated in the application as the person to whom payments shall be made, and this although the association by law requires payments to be made at the home office, from which the loan is approved and the money sent. (Iowa.) *Spinney v. Chapman*, 305.

**2. FOREIGN LOAN ASSOCIATIONS—Insolvency—Rights of Members.**—Although the by-laws of a going foreign building and loan association must be resorted to, to determine the conditions of performance of all contracts made by it, yet when its insolvency has intervened and its affairs have passed into the hands of a receiver, there is then no association, no by-laws, and no home office, and a borrowing member is entitled to have his rights according to the law of his domicile. (Iowa.) *Spinney v. Chapman*, 305.

**3. FOREIGN BUILDING AND LOAN ASSOCIATIONS—Insolvency—Rights of Borrowing Member.**—If a foreign building and loan association has become insolvent and its affairs have passed into the hands of a receiver, they are no longer governed by its by-laws, and a borrowing member has a right to have his liability determined by the law of his domicile. He is entitled to credit for interest paid, premiums paid as of the time paid and to the actual value of his shares of stock, being liable for the balance due with interest from the date of the appointment of the receiver. (Iowa.) *Spinney v. Chapman*, 305.

## BURGLARY.

**BURGLARY.**—To **Constitute a Burglarious Entry** it is not necessary that the act of entry be a trespass or without the consent of the owner, provided such entry was with intent to steal. (Cal.) *People v. Brittain*, 95.

## CARRIERS.

**1. RAILWAYS, Passenger on, Who is not.—An Express Messenger** is not a person who has applied to a common carrier for transportation and is not entitled to that transportation without condition upon payment of fare, but is one who voluntarily goes upon the train to transact business for his employer, not because the railway company is a common carrier, but because by contract between it and his employer the latter has been granted rights which the railway could not be compelled to grant as a common carrier. (Wis.) *Peterson v. Chicago etc. Ry. Co.*, 879.

**2. CARRIER'S Duty to One not a Passenger.**—When, as between a railroad company and a person riding on its train, the relation of carrier and passenger has not been established, or, if established, has been forfeited by the passenger, the company owes him no duty, and is liable to him only for willful, wanton, or intentional injury. (Tenn.) *Railroad Co. v. Smith*, 799.

**3. CARRIER—Passengers Alighting from Train.**—The Conductor on a railroad cannot be required absolutely to know and see at all

hazards every person who may attempt to get on or off his train. (Tenn.) Railroad Co. v. Smith, 799.

4. **CARRIER—Passengers Alighting from Train.**—When the Conductor on a train has called for tickets and ascertained the destination of his passengers, he can be required to see after only those whom, by proper diligence, he has been able to discover, and not after those who have evaded or neglected to pay fare or to notify him of their destination. Especially is this true as to persons who enter or leave the car improperly and at a point where they cannot be seen by him. (Tenn.) Railroad Co. v. Smith, 799.

5. **CARRIER—Destination of Passengers.**—It is the Duty of a Passenger, when the conductor approaches him, calling for and collecting fares, to tender his ticket or money, and, in the latter event, to notify the conductor of his destination; and the conductor must take notice of the destination of each passenger known to him, or that, in the discharge of his duty, he may be able to discover, but he cannot be held liable for those who, by evading the payment of fare, do not come under his notice. (Tenn.) Railroad Co. v. Smith, 799.

6. **CARRIERS—Loss of Ticket.**—If a passenger fails to produce his ticket, he cannot establish a right to transportation by making proof to the conductor that he has purchased a ticket but has lost it, even though such proof includes the testimony of another employé on the train to the effect that the passenger just showed him the ticket, and that as he handed it back the wind blew it away. (Ga.) Harp v. Southern Ry. Co., 212.

7. **CARRIERS.—A Ticket is Only the Evidence of the Contract** as made between the passenger and carrier; and if it fails to disclose the true contract, its infirmity must be charged to the carrier; and the latter is liable for the natural consequences flowing from the defects in the ticket due to the negligence of its agents. (Ind.) Indianapolis Street Ry. Co. v. Wilson, 261.

8. **CARRIERS—Correctness of Ticket.**—A Passenger has the Right to Presume that the ticket furnished him is a correct expression of the contract made between him and the carrier. (Ind.) Indianapolis Street Ry. Co. v. Wilson, 261.

9. **CARRIERS—Defective Ticket.**—Where a passenger is aboard the cars of a carrier without the proper evidence of his right of passage, due to the mistake or fault of the carrier's agent, and not to the fault of the passenger, the carrier's agent in charge of the train must heed or accept the reasonable explanations of the passenger in respect to the ticket in dispute. (Ind.) Indianapolis Street Ry. Co. v. Wilson, 261.

10. **RAILROAD'S PASSENGERS on Freight Trains.**—It is Contributory Negligence, as matter of law, barring recovery for injury, for a passenger on a freight train to take a loose chair near an open door in a caboose, instead of a fixed seat provided for passengers, when the passenger knows that at the time the train men are engaged in making up the train. (Mich.) Freeman v. Pere Marquette R. R. Co., 621.

See Railroads; Street Railways.

Note.

Carriers, negligence of third persons, when cannot recover for, 201.



**CEMETERIES.**

1. **CEMETERY LOT**—Nature of Title to.—The Purchaser of a lot in a public cemetery for burial purposes does not acquire the fee to the soil, but only the easement or license of burial therein. (Ga.) *Stewart v. Garrett*, 179.

2. **CEMETERY LOT**.—Ejectment does not Lie to Recover a cemetery lot. (Ga.) *Stewart v. Garrett*, 179.

**CHAMPERTY AND MAINTENANCE.**

1. **CHAMPERTY**—Husband and Wife.—A wife who renders her husband financial aid in securing a judgment is not guilty of champerty. (S. C.) *Ex parte Hiers*, 713.

2. **CONTRACTS**—Champerty.—A contract by an attorney to prosecute an action for a percentage of the proceeds without compensation in case of failure, and in case of success a debt for services not being in the contemplation of the parties, is void for champerty. (Mass.) *Gargano v. Pope*, 575.

3. **CONTRACTS** Void for Champerty —Setting Aside in Equity—**Estoppel**.—A person who has made a contract with an attorney, which is void for champerty, is not estopped, as one in *pari delicto*, from setting it aside in equity. The rule that one must come into equity with clean hands does not apply. (Mass.) *Gargano v. Pope*, 575.

See Equity, 4.

**CHARITIES.**

1. **CHARITY** must be a Gift to a general public use. (Iowa.) *Grant v. Saunders*, 310.

1a. **WILLS**—Charitable Bequests.—A bequest in trust for the benefit of the poor, to be given to such objects as the trustee named shall deem worthy, is a charitable bequest. (Iowa.) *Grant v. Saunders*, 310.

2. **WILLS**—Charitable Bequests—Uncertainty.—A specific bequest in trust specially for the benefit of the poor, as a class, remaining uncertain only as to the selection of the beneficiaries by the trustee named, is not so uncertain as to render the bequest invalid, and the trustee may designate the beneficiaries without confining himself in their selection to any particular locality. (Iowa.) *Grant v. Saunders*, 310.

3. **WILLS**—Charitable Bequests—Failure for Want of Trustee.—A specific bequest in trust for the benefit of the poor, otherwise valid, will not fail because the will fails to provide for the appointment of a successor in case of the death, failure, or inability of the trustee named to act. A trust never fails for want of a trustee. (Iowa.) *Grant v. Saunders*, 310.

**CHATTEL MORTGAGE.**

See Crops.

**CHEATING.**

See Conspiracy.

**CHURCHES.**

See Religious Societies.

**COLLATERAL SECURITY.**

See Pledge.

Note.

**Composition**, difference between, and accord and satisfaction, 394.

**COMMERCE.**

**TAX ON MERCHANTS—Interstate Commerce.**—A merchant's tax on a nonresident manufacturing corporation that ships its goods to a distributing point in the state, where a local transfer company takes charge of, assort, and stores them in a warehouse, and then delivers and distributes them in the original package to customers of the manufacturer both in and out of the state, either in accordance with its express directions, or general directions in favor of recognized and approved customers, whose names are furnished to the local company, does not contravene the commerce clause of the federal constitution. The goods at the warehouse are not in transit from one state to another; they are a part of the common mass of the property of the state. (Tenn.) *American Steel etc. Co. v. Speed*, 814.

Note.

**Compromise**, difference between, and accord and satisfaction, 394.  
dispute or doubt, sufficient to sustain, 412.

**COMPROMISE AND SETTLEMENT.**

1. **COMPROMISE**—Rescission of Must be Attended with a Return of the Benefits Received.—Where a party to a compromise desires to set aside or avoid it and be remitted to his original cause of action, he must place the other party in statu quo by returning or tendering the return of whatever has been received by him under the compromise if of any value, and, so far as possible, any right lost by the other party in consequence thereof. (Ohio St.) *Manhattan Life Ins. Co. v. Burke*, 666.

2. **PLEADING in Action to Rescind a Compromise.**—Where a party seeks to rescind a compromise, his petition should allege the return or tender prior to, or at least contemporaneous with, the commencement of the suit. This rule obtains as a general proposition, though the contract of settlement was induced by the fraud or fraudulent representation of the other party. (Ohio St.) *Manhattan Life Ins. Co. v. Burke*, 666.

3. **ATTORNEY AND CLIENT.**—A husband cannot escape from a conveyance or agreement in favor of his wife, on the ground that the attorneys who acted for her in the transaction fraudulently represented to him that they were acting for him, and that he relied on them to protect his interests, where it appears that such attorneys had at times acted for him, that he was informed that they were acting for his wife prior to his making the settlement with her, and he in fact fully understood all the terms of such settlement before executing it. (Wis.) *Burnham v. Burnham*, 895.

**4. CONTRACT Procured by Fraud, Ratification of.**—If a plaintiff claims that a contract and conveyance were procured by fraud, still if it appears that he had taken counsel, insisted on having certain terms of the agreement carried out, and treated the whole matter in controversy as satisfactorily arranged, he must be deemed to have irrevocably ratified such contract and conveyance, although it be assumed that he was induced to make them through the wrong of another. (Wis.) *Burnham v. Burnham*, 895.

See Accord and Satisfaction; Insurance, 27.

### CONFLICT OF LAWS.

See Bills and Notes, 3; Building and Loan Associations, 1, 4; Death, 1; Insurance, 21, 22.

### CONSPIRACY.

**CONSPIRACY to Cheat and Defraud.**—A finding that the defendant entered into a conspiracy to cheat and defraud plaintiff of his property cannot be sustained if it appears that he was capable of transacting and comprehending his business and affairs. (Wis.) *Burnham v. Burnham*, 895.

### CONSTITUTIONAL LAW.

**1. CONSTITUTIONAL LAW—Authority to Settle Bill of Exceptions.**—A statute authorizing a judge, after his official term has expired, to settle and sign bills of exceptions in cases tried by him during such term, has been so long acquiesced in and recognized as valid that its constitutionality cannot be assailed on the ground that it attempts to confer judicial powers on one who is not a judicial officer. (Cal.) *Miller & Lux v. Enterprise etc. Co.*, 115.

**2. CONSTITUTIONAL LAW—Property Right, What is not a Deprivation of.**—A judgment against an elevated railway company for damages caused to a land owner whose property abuts on a public street by its occupation of such street with its apparatus and materials during the time it was reconstructing its road does not take from it any property right, nor deprive it of the protection of the laws. (Conn.) *Knapp etc. Mfg. Co. v. New York etc. R. R. Co.*, 994.

**3. CONSTITUTIONAL LAW—Impairment of Obligation of Contracts.**—One legislature has no power to prohibit a subsequent legislature from changing, altering or annulling existing laws, when, in the judgment of the latter, the public interests require it, although such change may impair the obligation of a contract. (Kan.) *Board of Education v. Phillips*, 475.

**4. CONSTITUTIONAL LAW—Impairment of Obligation of Contracts.**—The rule that no statute can be enacted impairing the obligation of a contract does not apply to a contract made by persons dealing with a department of the government, concerning the future exercise of governmental powers conferred for public purposes by legislative acts, when the subject matter of the contract is one which affects the safety and welfare of the public. (Kan.) *Board of Education v. Phillips*, 475.

**5. CONSTITUTIONAL LAW—Alien Barbers.**—A statute prohibiting an alien barber from obtaining a certificate to ply his vocation as a barber, while not denying this right to other barbers, is unconstitutional as a denial of the equal protection of the laws. (Mich.) *Templar v. State Board of Examiners, etc.*, 610.

**6. CURATIVE STATUTE.**—The Legislature may Ratify and Confirm any act which it might lawfully have authorized in the first instance, where the defect arises out of the neglect of some legal formality, and the curative act interferes with no vested rights. (Ill.) *Steger v. Traveling Men's etc. Assn.*, 225.

**7. CURATIVE STATUTE.**—A Statute Validating Prior Acknowledgments of deeds and mortgages taken before an officer who was a stockholder in the grantee corporation is not invalid as being an exercise of judicial power or as impairing the obligation of contract between grantee and grantor. (Ill.) *Steger v. Traveling Men's etc. Assn.*, 225.

**8. CURATIVE STATUTE—Vested Rights.**—A statute legalizing prior acknowledgments of deeds and mortgages taken before an officer who was a stockholder in the grantee corporation can have no effect as against intervening judgment and mortgage liens. (Ill.) *Steger v. Traveling Men's etc. Assn.*, 225.

See Appeal and Error, 2; Contempt, 2; Railroads, 16; Taxation, 6.

### CONTEMPT.

**1. CONTEMPT—Jurisdiction—Practice.**—It is not within the jurisdiction of the court of its own motion, without an affidavit or prohibitive order, to adjudge a person guilty of contempt for violating a verbal order of the court not to publish the testimony in a criminal case then on trial until after verdict, and then attach him to show cause why the judgment of the court should not be made final. (Tex. Cr. Rep.) *Ex parte Foster*, 866.

**2. CONTEMPT—Constitutional Law—Liberty of Press.**—A court has no power, where the evidence is not obscene, to prohibit the publication of the testimony of the witnesses in a case, and the punishment of a person for contempt in violating an order not to publish such testimony in a newspaper is without jurisdiction and void, as being in violation of a constitutional provision guaranteeing the liberty of the press and freedom of speech. (Tex. Cr. Rep.) *Ex parte Foster*, 866.

**3. CONTEMPT—Habeas Corpus.**—A person who is committed for contempt to the custody of the sheriff, who does not confine him in jail, but allows him the liberty of the city, with the understanding that he is at all times amenable to the sheriff's custody, is so deprived of his liberty and freedom of action, as to entitle him to a writ of habeas corpus to be relieved of such restraint. (Tex. Cr. Rep.) *Ex parte Foster*, 866.

### CONTRACTS.

**1. RESTRAINT OF TRADE.**—Contracts in Themselves Reasonable and based upon good consideration, will be enforced according to the rights of the respective parties thereto, although it may appear that in some respects, or in a limited way, the enforcement of such contracts, has, for a result, the partial restraint of trade. (Iowa.) *Swigert v. Tilden*, 374.

**2. RESTRAINT OF TRADE—Test of Validity of Contract.**—Contracts in restraint of trade are valid if the restraint is such only as affords a fair protection to the interests of the person in whose favor they are given, and not so large as to interfere with the interests of the public. The restriction as to time and place, must be reasonable, not oppressive, or out of proportion to the benefits which the vendee may, in reason, expect to flow from the restrictive measures of the contract. (Iowa.) *Swigert v. Tilden*, 374.



**3. RESTRAINT OF TRADE—Sale of Business and Goodwill—Public Policy.**—A contract, based on a good consideration, for the sale of the goodwill of a mail order shirt business, with an agreement, without limitation of time, to abstain from engaging in the shirt business within a radius of one hundred miles of a specified city, and not to engage in the shirt business or in selling shirts in two states named for a period of ten years, is not opposed to public policy as being in general restraint of trade. (Iowa.) *Swigert v. Tilden*, 374.

See *Insane Persons*, 7-12.

## CONVERSION.

See *Trover*.

## CONVEYANCES.

See *Deeds; Vendor and Vendee*.

## CORPORATIONS.

**1. CORPORATIONS—Powers.**—A corporation has only such power as is conferred upon it by its charter, either expressly or by implication, to enable it to carry out the objects of its creation. The exercise of any other power by it is *ultra vires*. (Kan.) *Bankers' Union of the World v. Crawford*, 465.

**2. CORPORATIONS—Powers.**—The right of a corporation to act must be conferred expressly or by necessary implication, or it does not exist. It is not sufficient to authorize it to act that no limitation is found in the law forbidding the act. (Kan.) *Bankers' Union of the World v. Crawford*, 456.

**3. CORPORATIONS—Increase in Stock—Right of Subsisting Stockholders.**—If a corporation increases its capital stock, an existing stockholder is entitled to subscribe for his pro rata share of the increased stock at par, and the majority of the stockholders cannot put a premium on the new stock in the absence of express authority. (Mich.) *Hammond v. Edison Illuminating Company*, 582.

**4. CORPORATIONS.—By-laws may be Adopted by the Acts and Conduct of the Corporation** as well as by express vote or adoption in writing, unless it is otherwise provided. (Wis.) *Graebner v. Post*, 890.

**5. CORPORATIONS.—By-laws Prepared and Approved at a Stockholders' Meeting Held Before Recording the Articles of Incorporation**, if they are afterward relied on and treated as by-laws of the corporation by the directors and stockholders, must be regarded as in law the by-laws of the corporation. (Wis.) *Graebner v. Post*, 890.

**6. CORPORATIONS—Subscriptions to Stock, Waiver of Irregularities in Calls for.**—A subscriber to stock may by his acts or express agreement waive a call itself, or informalities in its making, or notice thereof. (Wis.) *Graebner v. Post*, 890.

**7. CORPORATIONS—Subscriptions and Calls—Estoppel to Urge Irregularities.**—The failure to provide the notice to be given stockholders of a call for unpaid stock subscriptions cannot be urged by one who is a stockholder and directly participated in all the proceedings and attended the meeting at which the call was ratified and another meeting at which the time for payment was extended, and

at no time interposed any objections. (Wis.) Graebner v. Post, 890.

**8. CORPORATIONS—Setoff Against, When Will be Allowed.—**Where One Sued Upon a Subscription to the Stock of a Corporation had employed counsel to represent it and paid the fees of such counsel, and the amount so paid was ordered by the board of directors to be credited on his subscription, it is error to refuse to set off such amount in an action brought by a receiver of the corporation on a call on such subscription. (Wis.) Graebner v. Post, 890.

See Acknowledgment; Franchise.

### COSTS.

**1. COSTS.**—The taxation of costs is within the discretion of the superior court in proceedings in probate. (Conn.) Mathews v. Sheehan, 1017.

**2. COSTS OF ACTION to Quiet Title.**—Where persons by their cross-complaint filed in an action to quiet title make it necessary for another party to such action to continue his appearance in court, he may recover whatever costs he is thus compelled to incur from the parties who unjustly bring or keep him in court. (Cal.) Summer-ville v. March, 145.

See Religious Societies, 7.

### COTENANCY.

See Tenants in Common.

### COUNSEL.

See Trial, 5-13.

### COUNTERCLAIM.

See Setoff and Counterclaim.

### COURTS.

**1. COURTS.**—The Jurisdiction of the Supreme Court upon Reserved and Difficult Questions should be invoked by the trial court by making a statement of the question upon which the opinion of the higher court is desired. (Wyo.) Willey v. Decker, 939.

**2. SUPREME COURT, Jurisdiction of.**—Under the Statute of Wyoming Authorizing the Reservation of Important and Difficult Questions for the decision of the supreme court, it will not pass upon questions of fact, nor upon the cases themselves. (Wyo.) Willey v. Decker, 939.

**3. COURTS—Jurisdiction Over Water Rights, When not Exhausted.**—The decision of the board of control and of the district court on appeal therefrom adverse to a water right does not deprive the courts of the state of jurisdiction to inquire into and determine an alleged water right. (Wyo.) Willey v. Decker, 939.

**4. COURTS—Jurisdiction.**—A Former Adjudication is not a Bar to Jurisdiction, though it may constitute a good defense to the action. (Wyo.) Willey v. Decker, 939.

**CRIMINAL CONVERSATION.**

See Husband and Wife.

**CRIMINAL LAW.**

1. **EVIDENCE—Res Gestae.**—What was said between a defendant and the person from whom money is alleged to have been stolen, from the time of their meeting, up to the time of the commission of the larceny, is admissible as part of the *res gestae*. (Ala.) *Viberg v. State*, 22.

2. **TRIAL, CRIMINAL—Conduct of Prosecuting Attorney.**—If after an objection to a question by the prosecuting attorney has been sustained, he remarks to defendant's attorney in an undertone, sufficiently loud to be heard by one of the jurors, "That is getting on dangerous ground, isn't it?" and the original question is immaterial and the remark uncalled for, no prejudice accrues to the defendant. (Cal.) *People v. Brittain*, 95.

3. **TRIAL, CRIMINAL—Error, When not Prejudicial.**—Though it appears that a statement made by the witness was hearsay, an error of the court in overruling a question showing it to be hearsay, is immaterial, if it clearly appears by the testimony of the same witness and that of several others that the matter testified to by the witness was not within his own knowledge. (Cal.) *People v. Brittain*, 95.

4. **CRIMINAL LAW.—An Erroneous Instruction** is not ground for a new trial, if it is manifest that the accused was in no way prejudiced thereby. (Ga.) *McCollum v. State*, 171.

5. **CRIMINAL LAW.—An Excessive Sentence** is not cause for a new trial. (Ga.) *McCollum v. State*, 171.

**CROPS.**

**GROWING CROPS—Effect of a Chattel Mortgage as a Severance Thereof as Against the Holder of a Trust Deed.**—The execution of a chattel mortgage on growing crops of fruit after the giving of a trust deed by the mortgagor cannot operate as a severance of such crop from the land, nor otherwise prejudice the rights of the holder of such deed or a purchaser thereunder who obtains title and takes possession while such fruit remains on the trees. (Cal.) *Penryn Fruit Co. v. Sherman etc. Co.*, 150.

See Trusts, 6.

**CURATIVE STATUTE.**

See Constitutional Law, 6-8.

**DAMAGES.**

**DAMAGES, EXEMPLARY, When may not be Awarded.**—Nothing beyond compensatory damages can be recovered, unless the malice or oppression characterizing the injury has been authorized or ratified by the defendant. (Cal.) *Foley v. Martin*, 123.

See Associations; Death; Negligence, 1; Officers; Sale, 4; Sheriffs.

**DEATH.**

1. **CONFLICT OF LAWS—Death by Wrongful Act.**—If a parent is killed by wrongful act in another state, and the statute of that

state and of the state where action is brought both give a minor child the right to recover for such act, the cause of action is transitory, and an action thereon may be maintained in the latter state. (Ark.) *St. Louis etc. Ry. Co. v. Haist*, 65.

**2. NEGLIGENCE—Death by Wrongful Act—Measure of Damages.**—In an action by a minor to recover for the death of her father caused by wrongful act, if the evidence shows that plaintiff's intestate was an honest, hard-working man, who had provided for plaintiff and treated her properly, she is entitled to recover for such care, support, and maintenance, and such advantages and benefits in the way of training and education, both moral and intellectual, as she would have received from him if his injury and death had not occurred. (Ark.) *St. Louis etc. Ry. Co. v. Haist*, 65.

**3. DEATH—Excessive Damages for Causing.**—The damages recovered by a widow for the death of her husband, who was twenty-one years of age, in good health, industrious, and sober, and who gained a livelihood partly by farming on a small tract of rented land and partly as a laborer in the field, his earnings not exceeding forty dollars per month, should be reduced to three thousand dollars for the widow individually and three thousand in her capacity as tutrix for her child. (La.) *Hebert v. Lake Charles Ice etc. Co.*, 505.

#### DEBT.

See Arrest.

#### DEEDS.

**1. DEED—Signing by Mark, Error in Name.**—When the grantor in a deed, being unable to write, signs by his mark, and the notary undertakes to write the grantor's name, the true signature is the grantor's act in making his mark, and not what the notary writes. An error in the name as written by the notary does not, therefore, vitiate the instrument. (La.) *Agurs v. Belcher*, 485.

**2. DEED—Error in Grantor's Name—Registration.**—If the name of the grantor is correctly written in the body of a deed, which he signs by his mark, but the notary, undertaking to write the grantor's name as a signature, makes an error in such name, which is carried into the index to conveyances, the instrument imparts notice, and the error does not deprive the grantee of his property. (La.) *Agurs v. Belcher*, 485.

**3. DEEDS—Acknowledgment in Blank—Estoppel.**—If a person signs and acknowledges a deed, leaving the name of the grantee in blank, and intrusts it to another on his statement of his desire to show it to a friend who is going to advance a part of the purchase money, and that he will return it in a few minutes, and he then fraudulently inserts his own name in the blank and mortgages the property to a mortgagee, who acts in good faith, the original signer of the deed is not estopped to assert his title against the mortgagee, nor from maintaining suit in equity to set aside the deed and cancel the mortgage. (Mass.) *Westlake v. Dunn*, 557.

**4. DEEDS, Capacity Required for Execution of.**—Average mental capacity on the part of the grantor is not required for the execution of a valid deed. (Conn.) *Coburn v. Raymond*, 1000.

**5. A PERSON Addicted to the Habitual and Excessive Use of Intoxicating Liquors is not Incompetent** to enter into contracts and convey property, unless it appears that actual intoxication dethroned his reason, or that his understanding was so impaired as to render him



mentally unsound when the act was performed. (Wis.) *Burnham v. Burnham*, 895.

**6. FRAUD—Evidence Required to Prove.**—Where relief is sought on the ground that a conveyance was procured by fraud in obtaining it from the defendant when he was incapable of comprehending and transacting his business, on the ground of mental impairment due to the excessive use of intoxicating liquors, the fraud must be proved by clear and satisfactory evidence leaving no substantial doubt. (Wis.) *Burnham v. Burnham*, 895.

See Acknowledgment; Boundaries; Insane Persons, 7-12; Vendor and Vendee.

## DEED OF TRUST.

See Trusts, 5-6.

Note.

**Definition of accord and satisfaction**, 392.

of composition, 394.

of compromise, 394.

of due care and ordinary diligence, 516.

of fidelity insurance, 775.

of idem sonans, 322.

of payment, 393.

of release, 394.

## DEVISES.

See Wills.

## DIVORCE.

**DIVORCE—Constructive Service—Misnomer.**—A decree of divorce from a woman named Wilhelmina G., based upon constructive service by publication without actual notice, is void, if the name given in the complaint, warning order, and decree is Minnie G., a name by which she was never known. (Ark.) *Grober v. Clements*, 91.

Note.

**Divorce**, incorrect statement of the defendant's name in proceedings for, 332-336.

## DOCKS.

See Wharves.

## DOWER.

**1. DOWER—Misconduct of Wife.**—The fact that a married woman contracts a second and bigamous marriage does not bar her right of dower out of the estate of her first husband in the absence of a divorce on the ground of such bigamous marriage, under a statute providing that in case of divorce for the misconduct of the wife, she shall not be endowed. (Ark.) *Grober v. Clements*, 91.

**2. DOWER—Adverse Possession by Heir.**—If an heir claims title to the estate and is in possession thereof by virtue of a tax deed acquired by him as agent for his father, the statute of limitation does not run against the widow's claim of dower. (Ark.) *Grober v. Clements*, 91.

**3. DOWER.**—Statute of Limitations does not run against the claim of the widow for dower so long as the heir is in possession by virtue of his inheritance. (Ark.) *Grober v. Clements*, 91.

**DRUNKARD.**

See Deeds, 5, 6.

**EASEMENTS.**

**1. DEEDS—Construction—Easement.**—A deed to a strip of land limiting the grantee's interest to a private easement or for street purposes only, does not authorize such grantee to take exclusive possession of the land. (Miss.) *Lott v. Payne*, 632.

**2. WAYS—Obstruction—Pleading and Evidence—Estoppel.**—If a declaration prays damages for the obstruction of a right of way by a fence, and it is stipulated or agreed by the parties that if plaintiff is entitled to the right of way, the fence constitutes such obstruction as to support the declaration, the defendant is estopped to contend that the evidence shows a fence to exist across the way at a point not included in the description given in the declaration. (Mass.) *McKenzie v. Gleason*, 566.

See Ejectment.

**EJECTMENT.**

**EJECTMENT—Possession—Easement.**—The owner of a strip of land over which another has a right of way may maintain ejectment against such other when he exercises exclusive possession over such strip. (Miss.) *Lott v. Payne*, 632.

See Cemeteries, 2.

**ELECTRIC COMPANIES.**

**1. ELECTRIC COMPANY—Degree of Care Exacted of.**—The care and caution required of electric companies is not simply the ordinary care of a reasonably prudent man, but it is bound to use the very highest degree of care practicable to avoid injury to everyone who may lawfully be in proximity to its wires, and likely to come, accidentally or otherwise, in contact with them. (La.) *Hebert v. Lake Charles Ice etc. Co.*, 505.

**2. ELECTRIC COMPANY—Fallen Wire—Burden of Proof.**—If a traveler on a public street, without contributory negligence, comes in contact with a fallen electric wire, the burden of proof is on the electric company to show that the wire was not there by its negligence. (La.) *Hebert v. Lake Charles Ice etc. Co.*, 505.

**3. ELECTRIC COMPANY—Uninsulated Wire.**—If, during a storm, a telephone wire, which was negligently strung, falls upon an electric light wire below at a point where the insulation has been worn off, and burns the latter wire in two because of its want of insulation, so that the severed ends fall to the street, the electric light company is liable for the death of a traveler who comes in contact therewith. (La.) *Hebert v. Lake Charles Ice etc. Co.*, 505.

**4. ELECTRIC COMPANY—Negligence.**—The Want of Means of an electric corporation cannot be advanced in extenuation of its failure to place and keep its wires in legal condition. (La.) *Hebert v. Lake Charles Ice etc. Co.*, 505.

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### ELEVATED RAILWAY.

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### EMINENT DOMAIN.

1. **EMINENT DOMAIN**—Strict Construction.—Statutes conferring the right of eminent domain must be construed strictly. (Ga.) *Chestatee Pyrites Co. v. Cavenders Creek etc. Min. Co.*, 174.
2. **EMINENT DOMAIN**.—A Foreign Corporation cannot exercise the power of eminent domain in this state without affirmative authority from the legislature. (Ga.) *Chestatee Pyrites Co. v. Cavenders Creek etc. Min. Co.*, 174.
3. **EMINENT DOMAIN**—Foreign Corporations.—A statute conferring the right of eminent domain on any mining corporation does not include foreign companies. (Ga.) *Chestatee Pyrites Co. v. Cavenders Creek etc. Min. Co.*, 174.
4. **INJUNCTION** Against Eminent Domain Proceedings.—A court of equity may restrain the condemnation of private property by a foreign corporation which has no authority to exercise the right of eminent domain. (Ga.) *Chestatee Pyrites Co. v. Cavenders Creek etc. Min. Co.*, 174.

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### EMPLOYER'S LIABILITY.

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### EQUITY.

1. **EQUITY JURISPRUDENCE**—Limits Upon.—While equity is based on moral right and natural justice, it is not coextensive with them. Equities are rights which are established and enforced in accordance with principles of equity jurisprudence under some general principle or acknowledged rule governing courts of equity. (Ill.) *Steger v. Traveling Men's etc. Assn.*, 225.
2. **MAXIMS** of Law and Equity, When Will not be Applied.—The maxims that "No one acquires a right of action from his own wrong," "Out of a base transaction no cause of action arises," and "He who comes into equity must come with clean hands," cannot ordinarily be invoked when the objectionable act in no way



affects equitable relations existing between the parties. (Cal.) *Miller & Lux v. Enterprise etc. Co.*, 115.

**3. EQUITY—Jurisdiction.**—Although a plaintiff in equity could have set up the facts on which he relies as an equitable defense to an action at law, this does not deprive a court in equity of jurisdiction. (Mass.) *Gargano v. Pope*, 575.

**4. EQUITY—Jurisdiction—Champerty.**—A court of equity has jurisdiction to set aside a contract void for champerty, on the ground of constructive fraud. (Mass.) *Gargano v. Pope*, 575.

**5. MASTER'S REPORT—What Should Contain.**—In a master's report the conclusions of fact and law should be clearly and concisely stated, and there should not be lengthy arguments and quotations from reports. (Ill.) *Steger v. Traveling Men's etc. Assn.*, 225.

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### ESTATES OF DECEDENTS.

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### EVIDENCE.

**1. IF EVIDENCE is Objected to as a Whole, When Some Parts of it are admissible, it is not error to overrule the objection.** (Ga.) *Sweeney v. Sweeney*, 159.

**2. EVIDENCE—Admission of**—Defendant cannot complain of error in admitting evidence, when he subsequently introduces the same kind of testimony which he insists should have been introduced by the plaintiff. (S. C.) *Brown v. Carolina Midland Ry. Co.*, 756.

**3. EVIDENCE—Witnesses.**—The occupation, residence and whereabouts of a witness at a certain time may always be shown by his own testimony. (Ala.) *Viberg v. State*, 22.

**4. EVIDENCE.—If a Party on Cross-examination of a witness, himself calls out evidence, he cannot afterward have it excluded.** (Ala.) *Hunnicutt v. Higginbotham*, 45.

**5. EVIDENCE—Former Testimony.**—The testimony of a witness given on a former trial may be proved by a witness who was present and heard him testify. (Ark.) *Kansas etc. Coal Co. v. Galloway*, 79.

**6. EVIDENCE OF TITLE.**—The Declarations of an Agent, in possession of real estate merely to manage and care for it, are not admissible against the principal to disparage his title. (Ga.) *Sweeney v. Sweeney*, 159.

**7. EVIDENCE.—Ownership of Property** is a fact to which a witness may always testify. (Ala.) *Hunnicutt v. Higginbotham*, 45.

**8. EVIDENCE OF AGE.**—A Witness may Testify as to His Own Age, although his information has been derived solely from his mother, who is in the county of the trial. (Ga.) *McCullum v. State*, 171.

**9. WITNESSES—Opinion Evidence.**—On the question as to whether a person insured against accident came to his death through murder or suicide, a witness is not competent to give his opinion or conclusion from the condition of the snow in which the body of the insured was found lying, the condition of such body, and the sur-

roundings, as to whether such body fell or was placed in such position, or whether a man shot while in a certain position could have fallen in the position in which the body of the insured was found. (Mich.) *Furbush v. Maryland Casualty Co.*, 605.

See Witnesses.

### EXCEPTIONS, BILL OF.

See Constitutional Law.

### EXECUTION.

1. **EXECUTION—When Presumed Lost.—Unavailing Searches** for an execution, made by the proper officers in the sheriff's and the clerk's offices, as well as by the plaintiff, raise the presumption of its loss or destruction. (Ga.) *Sweeney v. Sweeney*, 159.

2. **EXECUTION, LOSS OF—Proof of Title.—If a Sheriff's Deed** is accompanied by an exemplification of a valid judgment and proof of the loss of the execution, it is admissible as evidence of title and not merely as color of title. (Ga.) *Sweeney v. Sweeney*, 159.

See Exemptions; Judicial Sales.

### EXECUTORS AND ADMINISTRATORS.

1. **EXECUTORS AND ADMINISTRATORS—Speculative Stock Accounts, Duty Respecting.**—When administrators have knowledge that a part of the estate is subject to the great hazard of the business of stock speculation, it becomes their duty not to carry the account for speculative gain, but to settle such account in a reasonable time, and thereby withdraw the securities from the perilous business in which they find them pledged. (Conn.) *Mathews v. Sheehan*, 1017.

2. **AN EXECUTOR or Administrator is not Permitted** to use any part of the estate in trade or manufacturing or stock speculation or other business venture whereby the trust fund is put at hazard, and the doing of any of these things is a breach of trust rendering him personally liable for the resulting losses. (Conn.) *Mathews v. Sheehan*, 1017.

3. **EXECUTORS AND ADMINISTRATORS, Liability of for not Closing Speculative Stock Accounts.**—Administrators who find that part of the estate is subject to the hazard of speculative accounts and who do not close such accounts within a reasonable time and withdraw the securities therefrom are liable for all resulting losses, though they acted in good faith for the benefit of the estate and with ordinary care and prudence. (Conn.) *Mathews v. Sheehan*, 1017.

4. **EXECUTORS AND ADMINISTRATORS—Consent of Heir to Continuance of Speculative Accounts.**—If an executor or administrator acting in good faith and with ordinary care and prudence for the good of the beneficiaries and their estate, deviates, with their consent and approbation, from the strict line of his duty, as by permitting the property to remain subject to the hazard of stock speculation, such consenting beneficiaries cannot charge him with any resulting losses, unless they withdraw such consent and approbation, in which event the executor or administrator becomes answerable for losses resulting from subsequently continuing the account. (Conn.) *Mathews v. Sheehan*, 1017.

**5. EXECUTORS AND ADMINISTRATORS, Finding as to Charges of.**—If a committee to which an administrator's account is referred finds that the charges made for his services are reasonable and proper, this is sufficient to support the account. The finding need not disclose the evidence on which it is based. (Conn.) *Mathews v. Sheehan*, 1017.

**6. TORTS, Waiver of.**—Presentation of Claim Against an Estate after the time allowed therefor has expired does not show an election to charge the estate therewith, nor a waiver of any tort committed by the executor or administrator in connection with such claim. (Ala.) *Hunnicut v. Higginbotham*, 45.

**7. EXECUTORS AND ADMINISTRATORS—Debt Due from Executor to Testator—Demand.**—If a debt from an executor to his testator is due on demand, the former cannot set up that no such demand was made, or that he could not make a demand on himself. (Mass.) *Bassett v. Fidelity etc. Co.*, 552.

**8. EXECUTORS AND ADMINISTRATORS—Insolvency—Liabilities of Sureties.**—The surety on an executor's bond is liable for the full amount of a debt due the testator from an insolvent partnership of which the executor was a member, although such insolvency existed at the time of the testator's death. (Mass.) *Bassett v. Fidelity etc. Co.*, 552.

**9. EXECUTORS AND ADMINISTRATORS—Liability of Sureties—Interest.**—If an executor is chargeable with funds in his hands for which he has negligently failed to account, to an amount in excess of the penal sum named in his bond, he and his sureties are liable for the penal sum named in the bond with interest from the date of the issue of execution on the judgment rendered for the recovery of such sum. (Mass.) *Bassett v. Fidelity etc. Co.*, 552.

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**Executor and Administrator**, accord and satisfaction, power of to bind estate by, 405.

## EXEMPTIONS.

**EXEMPTIONS.**—A Dentist's Chair is not exempt from execution as a "common tool of trade," nor as a chair suited to the "use of the family." (Ga.) *Burt v. Stocks Coal Co.*, 203.

## EXPRESS MESSENGER.

See Carriers, 1; Railroads, 22, 23.

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**Extradition**, habeas corpus, evidence, sufficiency of, whether may be considered, 37, 38.

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## FELLOW-SERVANTS.

See Master and Servant, 6-21.

**FENCES.**

See Highways, 5.

**FIDELITY INSURANCE.**

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**FINES.**

**CRIMINAL LAW.**—The Amount of a Fine, within the limits prescribed by statute, rests in the discretion of the trial judge, and is not subject to review. (Ga.) *McCullum v. State*, 171.

**FIRES.**

See Railroads, 11-16.

**FLOOR-WALKER.**

See Master and Servant, 27.

**FOREIGN CORPORATIONS.**

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**FOREIGN STATUTE.**

See Pleading, 1.

**FORGERY.**

1. **FORGERY**—Indictment—Explanatory Averments—Burden of Proof.—Explanatory averments may be inserted in an indictment for forgery, as to the name forged, and this simply casts upon the state the burden of proving them. (Tex. Cr. Rep.) *Allen v. State*, 839.

2. **FORGERY**—Indictment.—The name of the person intended to be injured or defrauded need not be alleged in an indictment for forgery. (Tex. Cr. Rep.) *Allen v. State*, 839.

3. **FORGERY**—Indictment.—If a name is wrongly written but intended for a specific individual, it may be forgery, and it is proper to so aver in the indictment. (Tex. Cr. Rep.) *Allen v. State*, 839.

4. **FORGERY**.—An Instrument may be the Subject of Forgery although not addressed to anyone. (Tex. Cr. Rep.) *Allen v. State*, 839.

**FORMER CONVICTION.**

See Larceny, 3.

**FRANCHISES.**

1. **FRANCHISES, CORPORATE**, What is.—Whenever a corporation is legally formed, the right to be and exist as such and as a corporation to do the business specified in its articles is a grant by the sovereign of a valuable right, which is usually known as the corporate franchise. (Cal.) *Bank of California v. San Francisco*, 139.

2. **FRANCHISE, CORPORATE**, Property in.—A corporate franchise is considered as property separate and distinct from the so-



called franchises which the corporation may acquire subsequent to its incorporation. (Cal.) *Bank of California v. San Francisco*, 130.

See *Municipal Corporations*, 7, 8; *Taxation*, 3-6.

### FRAUDULENT CONVEYANCE.

#### FRAUDULENT CONVEYANCES—Effect Between Parties.—

Conveyances made to hinder, delay, or defraud creditors are binding between the parties when fully consummated. Neither can rescind nor defeat them, nor will a court of equity lend its aid to disturb the acquired rights of either, at the instance of the other. (Ala.) *Kirby v. Raynes*, 39.

### FREIGHT TRAIN.

See *Carrier*, 10.

### FRUIT.

See *Crops*; *Trusts*, 6.

### GAMING.

#### 1. GAMBLING—Recovering Loss from Proprietor of House.—

One who loses by gambling with a person employed to play for the "house" may, under a statute giving the loser in gambling a right to recover his loss, sue either the proprietor of the house or the employé. (Ill.) *Zellers v. White*, 243.

#### 2. GAMBLING—Use of Chips Instead of Money.—

The fact that poker players use chips, when they are merely markers to indicate the amount of money lost or won, does not render inapplicable a statute giving one a right to recover "money, goods, or valuable thing" lost in gambling. (Ill.) *Zellers v. White*, 243.

#### 3. GAMBLING—What is a "Sitting" at Draw Poker.—

All that transpires in playing the game of draw poker from the time certain players begin playing together on any one occasion until they cease playing together on that occasion, no matter how many hands are played, may be regarded as one transaction or "sitting," within the meaning of that word as used in a statute authorizing the recovery of money or property lost in gaming. (Ill.) *Zellers v. White*, 243.

#### 4. GAMBLING—Winners and Losers at Poker.—

In a game of draw poker all those who have won more than they have lost during a sitting are "winners," and all those who have lost more than they have won during the sitting are persons "losing," within the meaning of a statute authorizing the recovery of money or property lost in gaming, and the liability of the winner to the person or persons losing is measured by the net amount of his own winnings. (Ill.) *Zellers v. White*, 243.

### GUARDIAN AND WARD.

See *Infants*, 2, 3; *Insane Persons*, 1-5.

### HABEAS CORPUS.

1. **HABEAS CORPUS.**—Any Character or Kind of Restraint that precludes an absolute and perfect freedom of action on the part of the relator, authorizes him to make application to the court for a writ of habeas corpus for release from such restraint. (Tex. Cr. Rep.) *Ex parte Foster*, 866.

**2. HABEAS CORPUS—Discharge After Commitment.**—If the statute forbids a conviction for felony upon the uncorroborated testimony of an accomplice, such evidence alone is not sufficient to justify a magistrate in committing a prisoner for trial for a felony, and he is entitled to his discharge upon habeas corpus. (Ala.) *State v. Smith*, 26.

See Contempt, 3.

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## HIGHWAYS.

**1. HIGHWAYS.**—An Abutting Property Owner has No Absolute Right at the Common Law to Occupy the Whole of the Adjoining Highway with apparatus or materials to facilitate the construction of improvements on his lands. He may thus occupy part or the whole of it only when reasonably necessary to facilitate such work and compatible with the right of the public and the neighboring proprietors to the use of the highway. (Conn.) *Knapp etc. Mfg. Co. v. New York etc. R. R. Co.*, 994.

**2. HIGHWAYS, Right of Land Owner to Fill with Apparatus and Materials.**—A street railway corporation owning a tract of land on which its road is constructed and abutting on a public street has no right, while reconstructing its road, to fill the entire street with apparatus and materials to the injury of others whose lands abut on such street. (Conn.) *Knapp etc. Mfg. Co. v. New York etc. R. R. Co.*, 994.

**3. HIGHWAYS, Taking of Land Abutting on, What is.**—The use of a public street by putting up a fence which shuts off all access to abutting property and occupying the street with building apparatus and materials and a double track railway two feet above the sidewalk is not a mere source of consequential damages, but a direct taking of the land of an abutting owner for a purpose to which it had never been dedicated or appropriated. (Conn.) Knapp etc. Mfg. Co. v. New York etc. R. R. Co., 994.

**4. HIGHWAYS, Notice of Defects in, When not Required.**—A statute giving a right of action to anyone injured in person or property by a defective road against the party bound to keep it in repair, but denying such right unless written notice of the injury is given, is merely designed to give an action to one injured while using the highway in consequence of a defect therein, and does not apply to an action brought by an abutting property owner to recover damages from one occupying the street in front of his property with apparatus and building materials. (Conn.) Knapp etc. Mfg. Co. v. New York etc. R. R. Co., 994.

**5. NEGLIGENCE—Proximate Cause.**—If a traveler on the traveled track in a highway is thrown by his horse into a wire fence wrongfully maintained by a land owner in the highway, but not in such way as to necessarily obstruct travel, the latter is not liable for the injury, as there is no causal connection between it and the land owner's wrong. (Iowa.) Anderson v. Schurke, 358.

See Boundaries; Easements.

## HOMESTEADS.

**1. HOMESTEAD—Mortgages Upon.**—An Acknowledgment Taken as Required by the Statute is Essential to the validity of a mortgage of a homestead or of any release or waiver of the homestead right. (Wyo.) First Nat. Bank v. Citizens' State Bank, 924.

**2. HOMESTEAD.**—A Mortgage of a Homestead the Acknowledgment to Which was Taken and Certified by an Officer Disqualified to Act is void. (Wyo.) First Nat. Bank v. Citizens' State Bank, 924.

**3. HOMESTEAD—Debt for Its Improvement.**—If a building association makes a loan to one who intends to apply the proceeds to the payment of a new building, and part of the loan is advanced for other purposes, and the balance is held until the building is practically completed, when, for its own protection, the association requires releases of mechanics' liens, and at a meeting of interested parties distributes the money to the contractor and subcontractors, the debt, as between the borrower and lender, is not for the making of an improvement of the homestead. (Ill.) Steger v. Traveling Men's etc. Assn., 225.

**4. HOMESTEADS—Conveyance—Insane Grantor.**—A conveyance of a homestead made by a husband and the guardian of his insane wife is ineffectual, and does not convey anything so long as the property remains a homestead. (Kan.) Adams v. Gilbert, 456.

**5. HOMESTEADS.**—Equitable Estoppel may be invoked to defeat the operation of the homestead law. (Kan.) Adams v. Gilbert, 456.

**6. HOMESTEADS—Ratification of Void Deed.**—A conveyance of a homestead, void because not joined in by the wife of the grantor, may become effective after her death by being recognized and adopted by the grantor, and he may be estopped by his acts and conduct from claiming that such deed does not convey the title. (Kan.) Adams v. Gilbert, 456.

**7. HOMESTEADS—Abandonment.**—The protection to a homestead, afforded by constitutional and statutory provisions lasts no longer than the occupancy of the premises as a homestead. (Kan.) *Adams v. Gilbert*, 456.

See Public Lands.

### HOMICIDE.

**1. MURDER—Evidence—Threats.**—On a trial for murder it is competent to prove threats of the deceased against the life of the accused, although no actual demonstration has been shown on the part of the deceased to execute such threats. (Tex. Cr. Rep.) *Wallace v. State*, 855.

**2. MURDER—Self-defense—Brutal Conduct of Deceased.**—If, on the trial of a wife for the murder of her husband, the evidence tends to show self-defense from apparent danger, evidence of previous acts of brutality and cruelty committed by her husband upon her is admissible as tending to explain the action of the parties at the time of the killing. (Tex. Cr. Rep.) *Wallace v. State*, 855.

**3. MURDER—Self-defense.**—If the accused, who has provoked a difficulty with the deceased, abandons it and is leaving the vicinity, when the deceased approaches and renews the difficulty in such a manner as to cause the accused to believe that the deceased intends to kill him or do him great bodily harm, his right of self-defense is revived and perfected, and he has a right to kill the deceased in self-defense. (Tex. Cr. Rep.) *Hooper v. State*, 845.

**4. MURDER—Self-defense—Manslaughter.**—If the accused, who has provoked a difficulty with the deceased, abandons it, and it is renewed by the deceased, but the accused is not in danger of his life or great bodily harm, or the deceased is not seeking to get some advantage by which he could take the life of the accused or do him great bodily harm, the law of manslaughter would apply to that portion of the difficulty which may have resulted fatally to the deceased after such abandonment by the accused, and the jury should be instructed thereon. (Tex. Cr. Rep.) *Hooper v. State*, 845.

### HUSBAND AND WIFE.

**1. ACTION for Alienating Affections.**—A Wife may Maintain an Action Against Another Woman for seducing the husband of the former and alienating his affections. (Conn.) *Hart v. Knapp*, 989.

**2. ACTION of Criminal Conversation—Defense that the Defendant was Seduced.**—In an action by a wife against another woman for alienating the affections of the former's husband by living in adultery with him and causing him to abandon the plaintiff, it is no defense that he was the active and aggressive party and that the defendant yielded to his persuasions and afterward lived in adulterous intercourse with him. (Conn.) *Hart v. Knapp*, 989.

**3. EVIDENCE—Business Relations Between Husband and Wife.** If a husband and wife are sued on a note and the defense is set up that it was given solely for his benefit, evidence as to the business relations between them, and the amount of property and extent of the business of each, is admissible. (Mich.) *National Lumberman's Bank v. Miller*, 623.

See Bills and Notes, 1, 2; Champerty and Maintenance, 1; Trusts, 3, 4; Witnesses, 4-9.



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**Husband and Wife**, accord and satisfaction, his power to bind her by, 407.

### IDEM SONANS.

See Names.

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### IMPROVEMENTS.

See Vendor and Vendee, 1, 2.

### INDICTMENT.

1. **INDICTMENT—Sufficiency—Averment of Surname.**—An indictment averring the surname of the defendant under an alias is sufficient on demurrer. (Ala.) *Viberg v. State*, 22.

**2. MURDER—Indictment—Name of Deceased.**—If the deceased is known by one name as well as by another, an indictment for murder may allege either name, without creating a variance. (Tex. Cr. Rep.) *Addison v. State*, 841.

See Forgery; Larceny.

Note.

**Indictment**, *idem sonans*, application of rules of to proceedings for, 337.

## INFANTS.

**1. INFANCY.—In Order to Avoid His Contract**, an infant is not obliged to put the other party in statu quo. (Mass.) *Simpson v. Prudential Ins. Co.*, 560.

**2. INFANCY.—Substitution of Guardians.**—If a suit is brought by an infant through a foreign guardian, such infant has a right to substitute a resident of the state as next friend. (Ark.) *St. Louis etc. Ry. Co. v. Haist*, 65.

**3. JUDGMENTS—Consent Decree—Right of Infant to Appeal.**—An infant, on arriving of age, is not barred from taking an appeal from a compromise decree, assented to by his guardian, unless the court concurrently sanctioned such compromise. (Ark.) *Rankin v. Schofield*, 59.

See Insurance, 19, 20.

Note.

**Infants**, accord and satisfaction, next friend, power of to bind by an, 409.

## INJUNCTIONS.

**INJUNCTIONS to Restrain Monopoly—Unresponsive Answer.** In a suit by one telephone company to enjoin another from erecting its poles and stringing its wires on the same side of the street, averments in an answer tending to show complainant's purpose to maintain a monopoly in the city are not responsive to the bill, when considered as one for present injunctive relief. (Ala.) *American Telephone etc. Co. v. Morgan County Tel. Co.*, 53.

## INNKEEPERS.

**AN INNKEEPER is not Liable for an Assault Committed by One of His Waiters upon a Guest.**—Innkeepers do not owe to their guests the absolute duty of protection against servants and other employés, and are not answerable to guests for the misconduct of employés, in the absence of negligence in selecting or retaining employés of known violent or dangerous propensities. (Cal.) *Rahmel v. Lehdorff*, 154.

## INSANE PERSONS.

*Guardianship.*

**1. GUARDIAN AND WARD.**—The power to appoint a guardian depends on the statute, and cannot be exercised unless the conditions prescribed by the statute exist, though it may appear that the person for whom the guardian is sought is not capable of caring for his property judiciously. (Wis.) *In re Streiff*, 903.

**2. GUARDIAN AND WARD.**—It is not Essential to Justify the Appointment of a Guardian for an Adult that he be shown to be insane or imbecile in the technical sense. It is sufficient that he is

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as incapable of managing his affairs as if he were insane. (Wis.) In re Streiff, 903.

3. **GUARDIAN AND WARD.**—The Rule of the English Courts of Chancery Concerning the Appointment of a Guardian for an Adult is, that where the party, though not absolutely insane, is unable to act with prudent management and is liable to be robbed by anyone, a guardian should be appointed. (Wis.) In re Streiff, 903.

4. **GUARDIAN AND WARD.**—Appointment of Guardian for an Adult, When Sustainable.—The appointment of a guardian for an adult is proper when it appears that she is of extreme age and so weak in mind that she submits to the will of others to the extent of depriving herself of her property without making any provision for her own support, and has no power to assert her rights in her own home, nor to disassociate herself from her surroundings and obtain assistance and care from others. (Wis.) In re Streiff, 903.

5. **GUARDIAN AND WARD.**—Mental incompetency of one to manage his property, as distinguished from insanity in the ordinary sense, gives the court jurisdiction to appoint a guardian of an adult. (Wis.) In re Streiff, 903.

6. **EVIDENCE.**—Proving Incompetency.—In an application for the appointment of a guardian for an adult, it is proper to receive evidence tending to prove that those with whom she resided had, because of her broken-down condition, been able to keep her in subjection and had exercised that power to obtain a conveyance of her property without consideration. (Wis.) In re Streiff, 903.

#### *Contracts and Conveyances.*

7. **INSANE PERSONS.**—The Contracts and Conveyances of Persons Non Compos Mentis when not under guardianship, are voidable, but not void. (Conn.) Coburn v. Raymond, 1000.

8. **INSANE PERSON'S** Incompetency to Execute a Deed, Notice of.—One who has met a grantor of a deed and knows she is not of average mental capacity is not chargeable with notice that she has not capacity to execute a deed, where it appears that her near relatives had all dealt with her as a person having such capacity. (Conn.) Coburn v. Raymond, 1000.

9. **INSANE PERSONS.**—Estoppel to Urge Insanity.—One of several grantors who was present at the execution of a deed and knew its purposes and actively participated in the transaction is, on the death of another of such grantors, estopped as her heir or a successor in interest from urging that such deed is as to such other grantor void, on the ground that she was incompetent to execute it by reason of mental incapacity. (Conn.) Coburn v. Raymond, 1000.

10. **INSANE PERSONS.**—Suits to Set Aside Contracts or Deeds of insane persons who are not under guardianship furnish no exception to the maxim that he who seeks equity must do equity; so that if, on the whole case, it would be inequitable to set aside the conveyance, there is no inexorable rule that it must be done because, perchance, the grantor was deficient in mental capacity. (Conn.) Coburn v. Raymond, 1000.

11. **INSANE PERSONS.**—Restoration Necessary to Disaffirmance of Deeds of.—Before an incompetent person can disaffirm his deed made when he was not under guardianship, he must make restitution of the consideration so far as it remains in his hands in favor of one who has dealt with him in ignorance and in good faith. (Conn.) Coburn v. Raymond, 100.

12. **INSANE PERSONS,** Rights of Subsequent Grantees Under Deeds Made by.—Subsequent grantees who acquired title in good

faith and in ignorance of the incompetency of a remote grantor when he executed his conveyance are entitled to be restored to their original position before they can be deprived of their property by the intervention of a court of equity. (Conn.) *Coburn v. Raymond*, 1000.

See Deeds, 4, 5; Homesteads, 4.

## INSTRUCTIONS.

See Trial.

## INSURANCE.

### *Fire Insurance.*

**1. ESTOPPEL to Urge that a Member of a Mutual Protective Association did not Sign the Constitution.**—If a policy insuring against loss by fire is issued by a mutual protective association to one who has not signed its constitution, he may be estopped when sued for an assessment, and the association when sued upon a liability arising under the policy, from asserting that he is not a member of the association because of such failure to sign. (Ohio St.) *Richards v. Louis Lipp Co.*, 679.

**2. INSURANCE POLICY Void in Part, When Void as a Whole.**—If a policy issues insuring several articles separately valued, with a condition that the entire policy shall be void if the interest of the insured is not stated therein, and such interest is not so stated as to one of such articles, the policy is wholly void. (Ohio St.) *Germania Fire Ins. Co. v. Schild*, 663.

**3. INSURANCE—Additional Waiver.**—A provision in an insurance policy and in the by-laws of the insurer, that procuring additional insurance on the insured property shall avoid the policy unless the written consent of the insurer shall be indorsed thereon, is waived by the failure of the insurer to cancel the policy or indorse its consent thereon within a reasonable time after notice to it of the additional insurance before the loss. (Kan.) *Swedish American Ins. Co. v. Knutson*, 382.

**4. INSURANCE—Instructions.**—Failure of the court to instruct the jury with reference to a certain provision in an insurance policy is not error when the record fails to show affirmatively that such provision was brought to the attention of the court before the submission of the case. (Kan.) *Swedish American Ins. Co. v. Knutson*, 382.

### *Fidelity Insurance.*

**5. FIDELITY INSURANCE—Warranties and Representations.**—A Statute declaring that no misrepresentation or warranty by an insured shall be deemed material or affect the contract of insurance, unless made with an intent to deceive, or unless the matter represented increases the risk, applies to fidelity insurance contracts. (Tenn.) *First Nat. Bank v. Fidelity etc. Co.*, 765.

**6. FIDELITY INSURANCE—Representations.** Findings by the Tennessee court of chancery appeals as to the truth and materiality of statements made in negotiating a contract of fidelity insurance are conclusive upon the supreme court. (Tenn.) *First Nat. Bank v. Fidelity etc. Co.*, 765.

**7. FIDELITY INSURANCE—Renewal not a Separate Bond.**—When a bond guaranteeing the fidelity of an employé is renewed, there is still only one contract and one penalty, the renewal certificate being a new bond only in extending the indemnity provided by the original bond to a new period of time. (Tenn.) *First Nat. Bank v. Fidelity etc. Co.*, 765.



*Accident Insurance.*

8. **INSURANCE—Accident—Murder or Suicide—Evidence.**—On the question as to whether a person insured against accident met his death by murder or suicide, evidence that he had been intemperate in his habits next prior to his death and was in straitened circumstances financially, and worried about his affairs, is admissible. (Mich.) *Furbush v. Maryland Casualty Co.*, 605.

9. **INSURANCE—Accident.—Intentional Homicide** is an accident within the meaning of an accident insurance policy, if the insured was in no wise responsible for his death. (Mich.) *Furbush v. Maryland Casualty Co.*, 605.

10. **INSURANCE—Accident—Murder or Suicide.**—If the evidence is not necessarily inconsistent with the theory that a person insured against accident came to his death through homicide rather than suicide, the cause of his death must be determined by the jury. (Mich.) *Furbush v. Maryland Casualty Co.*, 605.

11. **INSURANCE—Accident—Liability of Benefit Association.**—A member of a benefit association entitled to a definite sum under the terms of his certificate payable out of a disability assessment levied upon the members of such association may recover the amount in an action of contract against the association for breach of its implied agreement to levy such assessment. (Mass.) *Garcelon v. Commercial Travelers' etc. Assn.*, 540.

12. **INSURANCE—Accident—Loss of Arm.**—The amputation of an arm a little below the elbow is the "loss of an arm" within the meaning of that term as used in a certificate of a benefit association agreeing to indemnify the holder for the loss of an arm without specifying what part thereof shall be lost. (Mass.) *Garcelon v. Commercial Travelers' etc. Assn.*, 540.

*Life Insurance.*

14. **INSURANCE, LIFE—Warranties in Application.**—If answers given in an application for life insurance are made warranties, replies to questions as to how long since the applicant was attended by a physician and as to the nature of the ailment, must be construed as referring to some ailment that would affect the contract of insurance; and the failure of the applicant to mention some slight indisposition or trivial or temporary ailment, for which he was treated, but which in no wise affected his general health, and did not increase the risks of insurance, does not avoid the policy. (Ark.) *Franklin Life Ins. Co. v. Galligan*, 73.

15. **INSURANCE, LIFE—Warranties—Estoppel Against Insurer.** Knowledge on the part of an examining physician of an insurance company that the answers given to, and written by, him in an application for life insurance are false estops the insurer from forfeiting the policy for such false answers, although under the contract of insurance such answers are made warranties. (Ark.) *Franklin Life Ins. Co. v. Galligan*, 73.

16. **INSURANCE, LIFE—Warranties in Application—Answer as to Attending Physician.**—If answers given in an application for life insurance are made warranties, and the applicant, in response to an inquiry, gives the name of the physician who attended him during the greater portion of his last illness, without giving the name of the physician who attended him during the earlier part of such illness, his answer does not constitute a breach of warranty avoiding the policy. (Ark.) *Franklin Life Ins. Co. v. Galligan*, 73.

17. **INSURANCE, LIFE—Warranties—Use of Liquor and Tobacco.** If answers given in an application for life insurance are made war-

ranties, inquiry as to the appellant's use of liquors and tobacco calls for the habit of the insured in these respects at the time of the application, and does not direct his mind to a single or incidental use. (Ark.) *Franklin Life Ins. Co. v. Galligan*, 73.

**18. INSURANCE, LIFE—Vested Rights—Change of Beneficiary.** The interest of a beneficiary in a policy of life insurance is vested by the terms of the contract, and the assured cannot change the beneficiary without authority derived from the contract itself. (Ark.) *Franklin Life Ins. Co. v. Galligan*, 73.

### *Infancy.*

**19. INFANCY—Avoidance of Contract of Insurance.**—A policy of life insurance taken out by an infant is not necessary. He may avoid it, and recover the money paid by him as premiums thereon. (Mass.) *Simpson v. Prudential Ins. Co.*, 560.

**20. INFANCY—Avoidance of Contract of Insurance—Demand.**—If an action to avoid a contract of insurance and to recover the premiums paid under such contract is brought by an infant, notice of the rescission of the contract and a demand for such premiums through an attorney appointed by the infant are good and sufficient until avoided by the latter. (Mass.) *Simpson v. Prudential Ins. Co.*, 560.

### *Conflict of Laws.*

**21. INSURANCE, LIFE—Conflict of Laws—Place of Contract.**—A policy of life insurance, by its terms to be performed in another state, is governed by the statute of that state providing that no misrepresentation made in obtaining or securing a policy of life insurance shall be deemed material, or render the policy void, unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due and payable. (Ark.) *Franklin Life Ins. Co. v. Galligan*, 73.

**22. INSURANCE, LIFE—Conflict of Laws—Amendment of Statute.**—A contract of life insurance, by its terms to be performed in another state, is governed by the statute of that state as it existed at the time the contract was entered into, and an amendment to such statute does not affect a nonresident policy-holder, whose contract was entered into prior to such amendment. (Ark.) *Franklin Life Ins. Co. v. Galligan*, 73.

### *Agent's Waiver of Conditions.*

**23. INSURANCE—Waiver of Conditions by Agents.**—There is no difference between mutual and stock insurance companies in respect to the power of officers or agents to waive provisions in their policies or by-laws. (Kan.) *Swedish American Ins. Co. v. Knutson*, 382.

**24. INSURANCE—Waiver of Warranty by Agent.**—A warranty in a policy of insurance that the title to the property insured is in the insured, is waived when the authorized agent of the insurer, before delivery of the policy and payment of the premium, is informed that the title to the property is in the wife of the insured, and stated that that made no difference. (Ark.) *State Mutual Ins. Co. v. Latourette*, 63.

**25. INSURANCE—Power of Agent to Waive Warranty.** An insurance agent with power to forward applications, receive and deliver policies, and accept premiums, has power to waive a warranty contained in the contract of insurance, notwithstanding conditions against such waiver contained in the application for insurance. (Ark.) *State Mutual Ins. Co. v. Latourette*, 63.

*Payment and Compromise.*

26. **INSURANCE—Liquidated Demand, Policy is not a.**—A policy of insurance is not a liquidated demand which cannot be satisfied by the payment of a sum less than its face where there is a dispute whether liability under it exists. (Ohio St.) *Manhattan Life Ins. Co. v. Burke*, 666.

27. **A COMPROMISE cannot be Vacated on the Ground that the Plaintiff Signed a Contract of Release Without Knowing Its Contents** and accepted a check from the insurance company in the supposition that he was receiving payment of his policy, if it appears that, though he did not read the release, he understood that the agents of the insured were there to settle the entire claim and had no other purpose, and that by signing and delivering the release and surrendering the policy he was assenting to a settlement for the amount paid. (Ohio St.) *Manhattan Life Ins. Co. v. Burke*, 666.

*Note.*

**Insurance**, fidelity, bonds for, are not void, though the employé signs with the insurer, 780.

fidelity, commencement of the risk, 777.

fidelity, concealment of fact that an employé engages in speculation, 786.

fidelity, conditions fatal to the risk, failure of the insured to disclose, 781.

fidelity, conditions subsequent, omission of by the insured, 782, 783.

fidelity, condonation of acts of employés, when avoids, 785.

fidelity, construction of contracts of, 775.

fidelity, delay in giving notice of loss or dishonesty of employé, 788, 789.

fidelity, diligence of employer, want of, when will release insurer, 787.

fidelity, duration and termination of the risk, 778.

fidelity, duties of employés, effect of changes in, 784.

fidelity, evidence sufficient to sustain an action on the ground that employé was guilty of larceny or embezzlement, 786.

fidelity, failure of the assured to examine the books and accounts of an employé, as stipulated for, 783.

fidelity, failure to discharge employé after notice of his misconduct, 784.

fidelity, false answers made by the assured, 781.

fidelity, is not controlled by the rules applicable to suretyship, 775.

fidelity, limitation of to losses disclosed during the continuance of the bond, 778.

fidelity, knowledge which is imputed to employers of acts of employés, 785.

fidelity, losses covered by bonds of, 784.

fidelity, misrepresentations made by officers of the insured corporation, 782.

fidelity, misrepresentations of the assured not fraudulently made, 781.

fidelity, nature of, 775.

fidelity, notice of loss, immediate, what deemed to be, 789.

fidelity, notice of loss or dishonesty of employé, failure to give, 788.

fidelity, policies susceptible of two constructions are construed against the insurer, 775, 776.

**Insurance**, fidelity, principles controlling are those applicable to other contracts of insurance, 775.  
 fidelity, proofs of loss and their sufficiency, 790.  
 fidelity, prosecution of employé by an employer may be made a condition precedent to recovery, 786, 787.  
 fidelity, public policy, contracts for are not against, 779.  
 fidelity, release of, 790.  
 fidelity, renewals of, and their effect, 780.  
 fidelity, signature of the employé, omission of, when not fatal, 779.  
 fidelity, statements made by an employer respecting the duties of his employé, 784.  
 fidelity, statements relative to the accounts of employés, 782, 783.  
 fidelity, statutes relating in general terms to insurance corporations apply to, 775.  
 fidelity, subrogation, right of the insurer to, 791.  
 fidelity, validity of contracts of, 779.  
 fidelity, warranties, statements made by the insured, whether deemed to be, 780, 781.

### INTERSTATE COMMERCE.

See Commerce.

### INTOXICATION.

See Deeds, 5, 6.

### JUDGE.

See Trial, 4.

### JUDGMENTS.

#### *Miscellaneous.*

1. **JUDGMENT**—Judge's Signature.—If a judgment in a suit upon an unconditional contract in writing where no issuable defense was filed on oath, appears to have been rendered "by the court," and was entered on the minutes, the presumption is that the court did its duty by signing the minutes. (Ga.) *Sweeney v. Sweeney*, 159.

1a. **JUDGMENTS**—Idem Sonans.—If the record of a judgment entered upon substituted service or notice presents the use of a name other and different than that borne by the person against whom judgment is sought to be enforced, the rule of idem sonans is not applicable, and the adjudication is of no validity against such person. (Iowa.) *Thornily v. Prentice*, 317.

2. **JUDGMENTS**—Compromise Decree.—A decree reciting that in order "to put an end to tedious litigation, and as an amicable settlement and adjustment of a family affair," "it is hereby ordered, considered, and decreed by the court, as well as by the consent and agreement of the parties," shows affirmatively on its face that it is merely a consent decree, without investigation of the merits, enforcing the compromise of the parties. (Ark.) *Rankin v. Schofield*, 59.

3. **JUDGMENT LIEN on Land Passing Through Debtor as a Medium of Transmission**.—If one makes a conveyance before a judgment is rendered against him, and the grantee informs an intending purchaser from her that she will not make a deed directly to him, but will convey to the original owner, who will make the desired conveyance, which is done, the two deeds being withheld by the



respective grantors and simultaneously delivered to the purchaser, who at the same moment delivers them for registration, the lien of the judgment does not attach to the property during the transmission of title. And it is immaterial, the purchaser being in good faith, whether or not the original transfer was fraudulent. (Tenn.) *Gordon v. Cox*, 812.

4. **RES JUDICATA.**—A Judgment Abating an Action because the plaintiff has not paid the costs of a previous suit involving the same property and against the same defendant, which had been begun and dismissed by him, does not bar a third suit for the same cause of action against the same defendant, if, before instituting it, the plaintiff pays the costs of the two prior suits. (Ga.) *Sweeney v. Sweeney*, 159.

#### *Collateral Attack.*

5. **JUDGMENTS—Collateral Attack.**—A judgment without jurisdiction is absolutely void, and may be denied or contested in any proceeding, direct or collateral, in which a person seeks to assert a right under such pretended adjudication. (Iowa.) *Thornily v. Prentice*, 317.

6. **JUDGMENTS—Collateral Attack—Defective Notice.**—A judgment entered on a defective notice is not, for that reason alone, subject to collateral attack. (Iowa.) *Thornily v. Prentice*, 317.

7. **JUDGMENTS—Collateral Attack—Want of Notice.**—A judgment without notice, either by personal or substituted service, is void and subject to collateral attack. (Iowa.) *Thornily v. Prentice*, 317.

#### *Reversal and Restitution.*

8. **JUDGMENTS—Reversal—Restitution.**—If payment has been coerced on a judgment which is afterward reversed, the party paying has an absolute right to restitution of the money paid from the party to whom it was paid. (Ala.) *Florence Cotton etc. Co. v. Louisville Banking Co.*, 50.

9. **JUDGMENTS—Reversal—Restitution—Setoff.**—If payment has been made on a judgment afterward reversed and upon the calling of the case for another trial, the plaintiff renounces his cause of action and dismisses his suit, the defendant has a right to recover the money thus paid, and the fact that the debt claimed in the first suit is unpaid is no defense, nor can it be set off in a suit to recover the money paid under the reversed judgment. (Ala.) *Florence Cotton etc. Co. v. Louisville Banking Co.*, 50.

10. **JUDGMENTS—Reversal—Restitution—Assignment.**—An assignee of a judgment afterward reversed, to whom money has been paid thereon, is in the same position as his assignor or the plaintiff in the judgment, and is liable for restitution of the money thus received from the defendant in such judgment. (Ala.) *Florence Cotton etc. Co. v. Louisville Banking Co.*, 50.

11. **JUDGMENTS—Reversal—Restitution—Accrual of Right.**—If money has been paid on a judgment afterward reversed, the right to restitution accrues from the date of the judgment of reversal, with interest on the amount paid from that date. (Ala.) *Florence Cotton etc. Co. v. Louisville Banking Co.*, 50.

See Courts, 4; Infants, 3; Mortgages, 15; Setoff and Counterclaim.

#### *Note.*

**Judgments**, accord and satisfaction, whether subject to agreements for, 417-420.

- Judgments, idem sonans, application of rules of to, 331, 336.**  
 names of the parties incorrectly stated, where the service is by publication, 332-336.  
 when the name of a party is incorrectly stated, 331, 332.

### JUDICIAL SALE.

1. **JUDICIAL SALES—Execution Sales.**—A sale by a sheriff under a general execution is not a judicial sale, strictly speaking. (Kan.) Norton v. Reardon, 459.

2. **JUDICIAL SALES—Special Execution Sales.**—The execution for a sale of property under a decree of foreclosure of a mortgage is special and must conform to the order of the court. (Kan.) Norton v. Reardon, 459.

3. **JUDICIAL SALES—Return of Special Execution.**—An execution for the sale of property under a decree of foreclosure of a mortgage is special, and a statute requiring the sheriff to return a general writ of execution within sixty days from its date has no application to special executions. (Kan.) Norton v. Reardon, 459.

4. **JUDICIAL SALES—Sale After Return Day—Confirmation.**—If a special execution issues for the sale of property under a decree foreclosing a mortgage, and such sale is made six days after the return day named in the execution, the subsequent confirmation of the sale, as made by the court, renders it valid, as being an approval of that which, as to time of performance, the court had power to order in the first instance. (Kan.) Norton v. Reardon, 459.

5. **JUDICIAL SALES—Confirmation—Collateral Attack.**—An order of a court of competent jurisdiction confirming a judicial sale cannot be collaterally attacked for any irregularity in the proceedings under which such sale was made. (Kan.) Norton v. Reardon, 459.

6. **JUDICIAL SALE.**—Inadequacy of Price Alone is not a sufficient ground for setting aside a foreclosure sale. (Cal.) Summerville v. March, 145.

7. **JUDICIAL SALE in Parcels When the Decree Directs a Sale as a Whole.**—Though a decree of foreclosure directs the property to be sold in one parcel and as a whole, a sale thereof in parcels is not void and works no prejudice to parties claiming under the mortgagor, when the parcel not sold is one which, as between them and a prior grantee of the mortgagor, they have no right to insist upon the sale of. (Cal.) Summerville v. March, 145.

8. **JUDICIAL SALE, When will not be Set Aside for Irregularity.**—A court will not entertain proceedings to set aside a foreclosure sale for irregularity in offering the property for sale in a mode different from that provided in the decree, the price realized being adequate, on the ground that if offered for sale in a different manner, the property might by some fortuitous circumstance have brought more than its value. (Cal.) Summerville v. March, 145.

9. **JUDICIAL SALE, Irregularity, Burden of Proof, Prejudice from.**—One who seeks to set aside a judicial sale for irregularity in the mode of offering the property for sale must assume the burden of proving that injury resulted to him therefrom. (Cal.) Summerville v. March, 145.

10. **JUDICIAL SALE, Irregularity will not Alone Justify Setting Aside of.**—An irregular foreclosure sale will not be set aside unless it is shown, either from the nature of the irregularity itself or by extrinsic evidence, that injury was caused thereby. (Cal.) Summerville v. March, 145.

**JURISDICTION.**

See Courts; Judgments, 5-7.

**LANDLORD AND TENANT.**

**1. LANDLORD AND TENANT—Lien of Landlord—Products Out of State.**—The lien of the landlord for rent and advances on agricultural products raised on the leased premises, does not follow such products out of the state. One who purchases them outside the state with notice of the landlord's lien is not liable to him. (Miss.) *Ball v. Sledge*, 654.

**2. LANDLORD AND TENANT—Lien of Landlord as Against Purchaser.**—A landlord has a lien on all the agricultural products raised on the leased premises to secure his rent and supplies furnished, and such lien may be successfully asserted not only on the products themselves, but also against the purchaser thereof with or without notice of such lien. (Miss.) *Ball v. Sledge*, 654.

**LARCENY.**

**1. LARCENY—Indictment.—Ownership of Money** stolen is properly alleged to be in one who holds it as a bailee. (Ala.) *Viberg v. State*, 22.

**2. LARCENY—Evidence.**—If it is shown that the defendant charged with larceny and the person from whom the money is alleged to have been stolen were strangers, and that immediately after the taking of the money the defendant fled, the prosecution may show by the person from whom the money is alleged to have been stolen that when he next saw the defendant he was under a circus tent and under arrest. Such evidence tends to identify the defendant and has some bearing on the question of his flight. (Ala.) *Viberg v. State*, 22.

**3. LARCENY—Former Conviction as Evidence.**—The record of a former conviction for larceny is admissible against a person charged with larceny, although such record shows a pending appeal from such former conviction. (Ala.) *Viberg v. State*, 22.

**LEGACIES.**

See Wills.

**LIBEL AND SLANDER.**

**1. LIBEL—False Entry in Baptismal Record.**—If a minister of a church makes an entry upon the church record of the birth and name of a bastard, thus naming a certain person as its father, after he has been requested by him not to make such entry, and after he has knowledge of the trial and acquittal of such imputed father on a charge of seduction of the mother of the child, upon whose statement and refusal to recant he makes such entry, he is guilty of libel. (Tex. Cr. Rep.) *Kubricht v. State*, 842.

**2. SLANDER—Communications, Concerning a Man, to Relatives of his Fiancée.**—If the wife of a half-brother of a woman engaged to be married communicates to the latter's sister a serious charge which she has heard against the woman's fiancée, in order to have the charge brought to the attention of the woman's mother that she may investigate it, the communication is privileged; and it is not necessary that the one making it should have such information on the subject as to make her believe the charge, nor is she responsible

for the injudicious action of a member of the family in speaking of the charge outside the family circle or councils. (La.) McBride v. Ledoux, 491.

### LIBERTY OF PRESS.

See Contempt, 2.

### LICENSE TAX.

**TAX ON MERCHANTS.**—A Manufacturing Corporation of another state selling and distributing its goods from warehouses in Tennessee through its representative there, is a merchant and taxable as such under the statutes of that state. (Tenn.) American Steel etc. Co. v. Speed, 814.

See Commerce.

### LIMITATION OF ACTIONS.

**1. LIMITATION OF ACTIONS—Trespass.**—Where an action is brought for constructing and maintaining a railway on plaintiff's land, the statute of limitation applicable to trespass bars so much of the cause of action as rests on acts done more than three years before the suit was brought, but does not preclude a recovery for acts done or damages suffered within the three years. (Conn.) Knapp etc. Mfg. Co. v. New York etc. R. R. Co., 994.

**2. LIMITATION OF ACTIONS—Statute, When not Sufficiently Plead.**—If, in an action to foreclose a mortgage, a junior mortgagee made a party defendant, answers, alleging that his lien is prior and superior to that of the plaintiff, this is not a pleading of the statute of limitations against the plaintiff's claim, nor can it entitle such defendant to resist plaintiff's suit on the ground that his cause of action is a note in renewal of a debt which is barred by the statute. (Wyo.) First Nat. Bank v. Citizens' State Bank, 924.

**3. LIMITATION OF ACTIONS—Leave to Plead the Statute of Limitations, What does not Amount to.**—Where the defendant does not plead the statute of limitations, an order made after the trial granting the parties the privilege of amending their pleadings to conform to the facts proved does not entitle the defendant to file an answer pleading such statute, and if filed, the court may strike such answer out. (Wyo.) First Nat. Bank v. Citizens' State Bank, 924.

See Adverse Possession; Dower.

### LIS PENDENS.

**1. LIS PENDENS.**—A Purchaser of Securities pendente lite takes them subject to all equities existing against them in the hands of his assignor, and subject to any decree which might have been entered against him. (Ill.) Steger v. Traveling Men's etc. Assn., 225.

**2. LIS PENDENS.**—Where a Foreclosure Sale is Valid, it is immaterial what rights have been acquired by the mortgagor during the pendency of the action. Such rights are all subject to the decree of foreclosure and are extinguished by a sale thereunder and a conveyance executed pursuant thereto. (Cal.) Summerville v. March, 145.

### LOTTERIES.

**1. LOTTERIES—Gift Enterprises.**—A lottery, or gift enterprise, is a scheme for the division or distribution of certain articles



of property, to be determined by chance, among those who have taken shares in the scheme. The element of chance must enter into the scheme to render it unlawful. (Ala.) *State v. Shugart*, 17.

2. **LOTTERIES—Gift Enterprise—Trading Stamps.**—A person or corporation issuing trading stamps to merchants under contract with them that they are to issue such stamps to cash customers, who, when they have a designated number of stamps, can select and take one of a number of articles of property exhibited at the store of the person or corporation originally issuing such stamps, does not maintain or carry on an unlawful lottery or gift enterprise. (Ala.) *State v. Shugart*, 17.

### MALICIOUS PROSECUTION.

1. **MALICIOUS PROSECUTION.—Probable Cause** in criminal cases is such a state of facts known to the prosecutor or such information received by him from sources entitled to credit, as would induce a man of ordinary caution and prudence to believe that the accused was guilty of the crime alleged. (Ark.) *Kansas etc. Coal Co. v. Galloway*, 79.

2. **MALICIOUS PROSECUTION.—Probable Cause.**—One who is going to institute a criminal prosecution need not, in order to protect himself, make inquiry of the suspected person as to his guilt. (Ark.) *Kansas etc. Coal Co. v. Galloway*, 79.

3. **MALICIOUS PROSECUTION.—Probable Cause—Advice of Counsel.**—It is a good defense to an action for malicious prosecution that the defendant acted on the advice of learned counsel in the law advised of the full facts, in instituting the prosecution. (Ark.) *Kansas etc. Coal Co. v. Galloway*, 79.

4. **MALICIOUS PROSECUTION.—Burden of Proof.**—In malicious prosecution it devolves upon plaintiff to show affirmatively that there was both malice and want of probable cause on the part of the defendant in instituting the prosecution complained of. (Ark.) *Kansas etc. Coal Co. v. Galloway*, 79.

5. **MALICIOUS PROSECUTION.—Evidence.**—The testimony of the judge who dismissed a prosecution alleged to have been malicious and his written opinion rendered at the time, tending to show that he hesitated in dismissing such prosecution, are admissible in the action for malicious prosecution to rebut the charge of want of probable cause in instituting it. (Ark.) *Kansas etc. Coal Co. v. Galloway*, 79.

6. **MALICIOUS PROSECUTION.**—An instruction that probable cause for a prosecution is such a state of facts known to the prosecutor, or which he could have ascertained by reasonable diligence as would induce a man of ordinary caution and prudence to believe that the accused was guilty of the crime alleged, is fatally defective, as imputing to the prosecutor a knowledge of whatever he could have ascertained by the exercise of reasonable diligence when there was nothing to put a cautious man on inquiry. (Ark.) *Kansas etc. Coal Co. v. Galloway*, 79.

7. **MALICIOUS PROSECUTION.—Damages.**—In malicious prosecution plaintiff is not entitled to recover damages to compensate him for peril caused him in regard to his life or liberty if there is neither allegation nor proof of peril of his life. (Ark.) *Kansas etc. Coal Co. v. Galloway*, 79.

Note.

*Mandamus*, to compel restoration to membership in a religious society, 739.

**MARK.**

See Deeds, 1, 2.

**MARRIED WOMEN.**

See Husband and Wife.

**MASTER AND SERVANT.***Injuries to Employee.*

**1. MASTER AND SERVANT—Safe Place in Which to Work.**—Though the work is of a dangerous character, as where it is an open quarry, and the workmen, unless properly warned, are in peril from the firing of blasts, the duty of the master is not so imperative and absolute that he is liable to one servant for injuries received from the negligence of another in failing to give notice of such firing. (Ohio St.) *Kelly Island Lime etc. Co. v. Pachuta*, 706.

**2. MASTER AND SERVANT—Injury to Servant in Attempting a Rescue.**—If a person is put in great peril through the negligence of a master or his servants, and another servant attempts a rescue and is injured thereby, his right to recover for such injury is not unfavorably affected by the fact that he was an employé of the master. (Ohio St.) *Pittsburg etc. Ry. Co. v. Lynch*, 658.

**3. EMPLOYER'S LIABILITY—Instruction Without a Special Request.**—If, in an action against an employer for injuries received by an employé, there is evidence to warrant the defendant's contention that the injuries were due to an accident, he is entitled to a charge adjusted to that theory, without a special request therefor. (Ga.) *Hilton & Dodge Lumber Co. v. Ingram*, 204.

*Assumption of Risks.*

**4. MASTER AND SERVANT—Assumption of Risk.**—The head sawyer in a sawmill who is struck and injured by a piece of timber caught and thrown by an edger, with the operation of which he had nothing to do and which was distant fifty-seven feet from the place where he was at work, cannot be held to have been guilty of contributory negligence nor to have assumed the risk, where he is not shown to have had any familiarity with the edger or to have passed closer than twenty-five feet from it as he went to and from his work, and neither saw nor knew of any boards coming back from the edger or being thrown by it before that by which he was hurt. (Wis.) *Grant v. Keystone Lumber Co.*, 883.

**5. MASTER AND SERVANT.—An Employé cannot be Said, as a Matter of Law, to Have Assumed the Risk of His Employment unless such assumption is shown by undisputed evidence and is so clearly proven that no reasonable inference can be drawn to the contrary.** (Wis.) *Grant v. Keystone Lumber Co.*, 883.

*Fellow-servants and Vice-principals.*

**6. MASTER AND SERVANT.—To Constitute Fellow-servants it is not necessary that the negligent workman causing the injury and the one injured both be engaged in the very same particular work. It is sufficient that both are employed by the same master, under the same control, and perform duties and services for the same general purpose.** (Wis.) *Grant v. Keystone Lumber Co.*, 883.

**7. MASTER AND SERVANT—Fellow-servants.**—The Head Sawyer in a Sawmill and the Man in Charge of an Edger Therein are

fellow-servants. Hence the former cannot recover of the common master for an injury due to the negligence of the latter. (Wis.) *Grant v. Keystone Lumber Co.*, 883.

**8. MASTER AND SERVANT—Fellow-servants—Injury, When cannot be Held to be Due to the Negligence of.**—Where the head sawyer is injured by a board thrown by an edger, and some of the evidence tends to show that the accident may have been due to some of the appliances being out of repair, it cannot be held, as a matter of law, that the injury resulted solely from the negligent manner in which the edger-man put the boards between the saws. (Wis.) *Grant v. Keystone Lumber Co.*, 883.

**9. MASTER AND SERVANT—Injuries Due to Defective Machinery and the Negligence of a Fellow-servant.**—An employer who has negligently permitted the use of a machine in doing his work, which by reason of its defects is unnecessarily dangerous to his employés, is liable if an injury results from its use to an employé who is not himself negligent, though a coemployé was guilty of contributory negligence in managing a machine, and if it had been rightly managed, the accident would not have occurred. (Wis.) *Grant v. Keystone Lumber Co.*, 883.

**10. MASTER AND SERVANT—Fellow-servants.**—A master is not liable to his servant for injuries resulting from the negligence of a fellow-servant. (Ohio St.) *Kelly Island Line etc. Co. v. Pachuta*, 706.

**11. MASTER AND SERVANT—Fellow-servants, Tests to Determine Who Are.**—The test to determine whether a particular servant is a vice-principal or fellow-servant, where the rule has not been modified by statute, is whether or not he has been placed by his employer in a position of control or authority over his coemployé. This, rather than the nature and character of the work being done, is the controlling and governing test. (Ohio St.) *Kelly Island Line etc. Co. v. Pachuta*, 706.

**12. MASTER AND SERVANT—Fellow-servants, Who are.**—A workman employed in manual labor in a stone quarry and whose duty it was to superintend the preparation and firing of blasts and to give warning to other workmen when a blast was to be fired, and an assistant of the latter, being under and subject to the instructions of the general foreman, are fellow-servants, and the first named cannot recover of the common master for injuries received through the negligence of the assistant in failing to give warning that a blast was to be fired. (Ohio St.) *Kelly Island Line etc. Co. v. Pachuta*, 706.

**13. FELLOW-SERVANT—Burden of Proof as to the Relation.**—In an action by an employé against his employer for injuries caused by the negligence of another employé, the burden of proof is on the plaintiff to show that he and the negligent employé were not fellow-servants. (Ill.) *Chicago City Ry. Co. v. Leach*, 216.

**14. FELLOW-SERVANT—Question of Law.**—What facts will create the relation of fellow-servants between two employés is a question of law. (Ill.) *Chicago City Ry. Co. v. Leach*, 216.

**15. FELLOW-SERVANT—Question of Law.**—If there is no controversy about the facts, and they bring the parties within the relation of fellow-servants so that a verdict to the contrary would not be supported by any evidence, the court should not submit the question to the jury. (Ill.) *Chicago City Ry. Co. v. Leach*, 216.

**16. FELLOW-SERVANTS.**—They are Fellow-servants who are co-operating, at the time of an injury, in the particular business in

hand, or whose usual duties are of a nature to bring them into habitual association, or into such relations that they can exercise an influence upon each other promotive of proper caution. (Ill.) Chicago City Ry. Co. v. Leach, 216.

**17. FELLOW-SERVANTS.**—The Relation of Fellow-servants Depends upon the existence of association between employes which enables them, better than the employer, to guard against risks or accidents resulting from the negligence of each other. (Ill.) Chicago City Ry. Co. v. Leach, 216.

**18. FELLOW-SERVANTS**—Previous Association and Personal Acquaintance.—The existence of the relation of fellow-servants does not rest in any degree upon personal acquaintance or actual previous association between the employes, but upon the relation of their duties to each other and the respective positions which they hold. (Ill.) Chicago City Ry. Co. v. Leach, 216.

**19. FELLOW-SERVANTS**—Co-operation in Some Particular Work. The rule that they are fellow-servants who are directly co-operating with each other in some particular work must have a reasonable and practical interpretation; it should not be construed to mean identical work, nor, on the other hand, to include the general business of the employer. (Ill.) Chicago City Ry. Co. v. Leach, 216.

**20. EMPLOYER'S LIABILITY** When One Servant Assigns a Task to Another.—If a master employs competent employes, and a fellow-servant of the plaintiff, without the master's knowledge or authority, selects one of such employes and transfers him from work he can do to work he cannot do, the act of thus assigning him is not the negligence of the master, but that of a fellow-servant. (Ga.) Hilton & Dodge Lumber Co. v. Ingram, 204.

**21. VICE-PRINCIPAL, Fellow-Servant Assuming to Act as.**—A fellow-servant, without his master's knowledge, cannot, by an assumption of authority, convert himself into a vice-principal. (Ga.) Hilton & Dodge Lumber Co. v. Ingram, 204.

#### *Torts of Employe.*

**22. MASTER AND SERVANT**—Tort of Servant, Liability for.—A master is not liable for the malicious torts of his servants committed outside the scope of their employment, as where a servant is guilty of assault and battery, and his employment does not contemplate that he shall commit any acts of this character. (Cal.) Rahmel v. Lehndorff, 154.

**23. MASTER AND SERVANT.**—A Master is Responsible for Willful Acts of His Employé within the scope of his duty or the line of his employment. (S. C.) Polatty v. Charleston etc. Ry. Co., 750.

**24. MASTER AND SERVANT.**—Questions of fact must be solved by the jury, under proper instructions, as to what in law is meant by the expression, acting "within the scope or line of his employment," as applied to a servant. (S. C.) Polatty v. Charleston etc. Ry. Co., 750.

**25. MASTER AND SERVANT**—Liability of the Former for the Acts of the Latter.—A master is liable for the negligent or wrongful acts of his servant committed in endeavoring to perform a duty delegated to him by the master, and this is so notwithstanding that the method adopted by the servant may not have been authorized, or may even have been prohibited by the master. (Wis.) Cobb v. Simon, 909.

**26. MASTER AND SERVANT**—Nonliability of the Former for the Acts of the Latter.—A master is not liable if his servant steps aside



from the master's business and maliciously and wantonly commits a tort for the accomplishment of his own purposes. The test is not whether the act was done during the existence of the employment, but whether it was done in the transaction of the master's business. (Wis.) *Cobb v. Simon*, 909.

**27. MASTER AND SERVANT—Arrest and Search by the Servant—Liability of Master for.—A Floor-walker Employed in a Department Store** whose duty it is to watch customers and prevent them from doing wrongful acts and to take stolen merchandise away from them if he finds them in the act of stealing, represents his employer in temporarily imprisoning and searching a person whom he believes to be guilty of theft, and his act renders his employer liable to an action for false imprisonment. If, on the other hand, the floor-walker knew nothing had been stolen, and the imprisonment and search were for the purpose of extorting money, his employer is not answerable, because the act of the floor-walker would be a tort committed for his own purpose. (Wis.) *Cobb v. Simon*, 909.

**28. MASTER AND SERVANT—Merchant and Employé.—An instruction** that a master is liable for a wrong done by his servant, whether through the negligence or malice of the latter and in the course of the employment in which the servant is engaged to perform a duty which the master owes to the person injured, is inapplicable and prejudicially erroneous in an action by a customer against a merchant for false imprisonment due to an employé of the latter. (Wis.) *Cobb v. Simon*, 909.

**29. MASTER AND SERVANT—Ratification of a Servant's Tort is not Assumed Against the Master Unless Such Information** comes to the master not as a mere idle rumor, but in a manner so persuasive as to convince the mind of an ordinarily prudent employer that facts exist which call for the servant's discharge. (Wis.) *Cobb v. Simon*, 909.

**30. MASTER AND SERVANT—Ratification of Tort of Servant. Retention of a Servant** in his employment after notice to the master of a tort committed by the servant is evidence of ratification by the former, but the information to him must be full and complete to justify the conclusion of ratification on this ground. (Wis.) *Cobb v. Simon*, 909.

See Innkeepers.

Note.

**Master and Servant, electricity, liability of the former to the latter,** for injuries due to, 537, 538.

## MAXIMS.

See Equity, 2.

## MORTGAGES.

*Validity, Interpretation and Effect.*

**1. MORTGAGES.—Mortgagees have No Estate or interest in the land mortgaged.** (Miss.) *Adams v. Colonial etc. Mortgage Co.*, 633.

**2. MORTGAGES to Secure Future Advances.—It is not necessary to the validity of a mortgage to secure future advances that it should express on its face that it was given for such purpose.** If it is not attended with fraud or bad faith, it is valid, not only between the parties, but also as against subsequent purchasers or encumbrancers, so far at least as respects advances made before the

equities of the latter persons have attached. (Ala.) Kirby v. Raynes, 39.

**3. MORTGAGES to Secure Future Advances.**—Parol Proof is admissible to show that a mortgage was given to secure future advances. (Ala.) Kirby v. Raynes, 39.

*Description of Property.*

**4. MORTGAGE.**—A Description in a Mortgage of a tract of land in a named county as the "Zachariah Emerson place, part of lots No. 125 in the 11th district, one part number not known," and containing a certain number of acres, is not so uncertain and indefinite as to render the mortgage void. Extrinsic evidence may be resorted to to show what land was intended. (Ga.) Johnston v. McKay, 166.

**5. MORTGAGE.**—The Description in a Mortgage of a tract of land as the "Thomas Bazemore place," containing a specified number of acres, and joining the lands of certain named persons, is not so uncertain and indefinite as to render the mortgage void. Parol evidence may be resorted to to show what land was intended. (Ga.) Johnson v. McKay, 166.

**6. MORTGAGE.**—In the Description of Mortgages, that is certain which is susceptible of being made certain, and a description is sufficient if it affords means of identifying and ascertaining the land conveyed. (Ga.) Johnson v. McKay, 166.

**7. MORTGAGE.**—When the General Description in a mortgage is sufficient, a particular description repugnant thereto is treated as surplusage. (Ga.) Johnson v. McKay, 166.

**8. MORTGAGE.**—A Mere Error in the Number of a Lot in a mortgage does not vitiate the instrument, when there is a general description therein from which the property can be identified. (Ga.) Johnson v. McKay, 166.

**9. MORTGAGE.**—If Extrinsic Evidence is Necessary to Identify land described in a mortgage which has been foreclosed, and a claim is interposed to the levy of the mortgage execution, the plaintiff in execution carries the burden of identifying the property with reasonable certainty. (Ga.) Johnson v. McKay, 166.

*Renewals.*

**10. MORTGAGE, Renewal of, Effect upon a Second.**—If the note to secure which a mortgage is given is renewed after the execution of a second mortgage to another party, such second mortgage does not thereby become entitled to priority on the ground that the renewal increases the burden on the encumbered premises, where there is nothing to show that the rate of interest on the renewal note is greater than on the original. (Wyo.) First Nat. Bank v. Citizens' State Bank, 924.

**11. MORTGAGE—Effect of Renewal as Against a Second Mortgage.**—The taking of a new note in place of one to secure which the mortgage was given does not operate to extinguish the lien of the mortgage, in the absence of an agreement between the parties to that effect, and the first mortgage may therefore be foreclosed against a junior mortgagee whose rights accrued before such renewal. (Wyo.) First Nat. Bank v. Citizens' State Bank, 924.

*Foreclosure.*

See Judicial Sales.

**12. MORTGAGE—Foreclosing for Interest.**—If a note given in renewal of a pre-existing note which was secured by a mortgage is by its terms due two years after date, but provides for annual pay-

ment of interest, and that the failure to pay any interest within thirty days after due shall cause the whole note to become due at once at the option of the holder, he is entitled, as against a junior mortgagee, to foreclose before the expiration of the two years if the interest becomes due within that time and remains more than thirty days unpaid. (Wyo.) *First Nat. Bank v. Citizens' State Bank*, 924.

**13. MORTGAGES—Rights of Purchasers of Parcels in the Event of Subsequent Foreclosure.**—The fact that a purchaser of part of the mortgaged premises does not appear in a suit to foreclose and there seek to obtain relief by having the parcels other than that sold to him first offered for sale, does not destroy his right. The only effect of such failure is that the right is transferred to any surplus that may arise on the foreclosure sale, and his interest in such surplus may be presented and determined upon the sheriff's return of the sale. (Cal.) *Summerville v. March*, 145.

**14. MORTGAGE—Foreclosure—Right of Purchaser to Deny Mortgagor's Title.**—A purchaser at a foreclosure sale under a mortgage, holding under the mortgagor, cannot deny the latter's original estate in the land, in an action of unlawful detainer brought by such mortgagor against such purchaser. (Ala.) *Harden v. Collins*, 42.

**15. JUDGMENTS—Trusts and Trustee—Want of Notice.**—Service upon the trustee holding the legal title, while it may be sufficient to sustain a decree of foreclosure of the mortgage does not authorize the trustee to appear for the cestui que trust, so that a binding personal judgment can be rendered against him. (Iowa.) *Thornily v. Prentice*, 317.

See Homesteads; Railroads, 2-8; Taxation, 2; Tenants in Common, 1-3; Trusts, 5, 6.

## MUNICIPAL CORPORATIONS.

**1. MUNICIPAL CORPORATIONS—Judicial Control of Legislative Discretion of.**—The honest judgment of the municipal authorities as to what is promotive of the public welfare must ordinarily control, although not in accord with the views of the court. Nevertheless, the delegation of legislative power to subordinate political divisions of the state is solely for public purposes and must be exercised with reference to them. If an act is so remote from every such purpose that no relation thereto can, within human reason, be discovered, such act must be deemed excluded from the delegation. To that extent courts will inquire into the purposes and policy of municipal conduct, and will hold unauthorized and invalid acts which are wholly unreasonable. (Wis.) *Le Feber v. Village of West Allis*, 917.

**2. MUNICIPAL CORPORATIONS—An Ordinance Submitted to the Popular Vote may, Nevertheless, be Declared Void and Unreasonable.**—An ordinance, if unreasonable, is as much void when approved by a vote of the electors as if the municipality had acted through any other of its authorized agencies, though doubtless the assent of the large part of the community may be recognized by the courts as a cogent circumstance in support of the reasonableness of the ordinance. (Wis.) *Le Feber v. Village of West Allis*, 917.

**3. MUNICIPAL CORPORATIONS—Ordinances of, When Must be Declared Wholly Void.**—If an ordinance contracting for the supply of light to a village is unreasonable and void, because of the great length of the term and the excessive prices by which it seeks to bind the municipality, the courts cannot single out parts of the

ordinance which it deems reasonable and declare it valid as to them. (Wis.) *Le Feber v. Village of West Allis*, 917.

**4. MUNICIPAL CORPORATIONS—Ordinances for Supplying Light, When Unreasonable.**—An ordinance whereby a village contracts for thirty years certainly, and fifty years contingently, to take all its lights from a company and pay for them at a rate fixed by such ordinance is unreasonable, and hence void, especially when the village has already reached a population entitling it to become a city and it is practically a part of a great city, though not yet within its corporate limits, and the prices to be paid are in excess of those elsewhere paid under similar circumstances. (Wis.) *Le Feber v. Village of West Allis*, 917.

**5. MUNICIPAL CORPORATIONS—Liability of for Failure to Supply Water to Extinguish Fires.**—If a municipal corporation establishes or acquires its own waterworks, and undertakes to provide an adequate supply, it is not liable to its citizens whose property is destroyed by fire for its failure to provide such a supply. (Cal.) *Ukiah v. Ukiah Water etc. Co.*, 107.

**6. MUNICIPAL CORPORATIONS—Right of to Recover for Loss of Their Own Property Through Failure of a Water Company to Furnish an Adequate Supply of Water.**—Where a municipal corporation enters into a contract with a company to supply water for the extinguishment of fires through hydrants connected with its mains, such contract being entered into for general purposes and for the benefit of all its inhabitants, no protection to any specified property being contemplated, the relation of the water company is not different, as to the property of the municipality from the relation of any of its citizens to such company, and it cannot recover for the loss of its property from the failure of the water company to furnish an adequate supply of water as provided for in such contract. (Cal.) *Ukiah v. Ukiah Water etc. Co.*, 107.

**7. MUNICIPAL CORPORATION — Exclusive Franchise in Street.**—If a city street has sufficient width and capacity to admit of more than one public enterprise therein without unduly obstructing it as a public highway, an exclusive right in the street should not be granted, nor can it be claimed by any one corporation. (Ala.) *American Telephone etc. Co. v. Morgan County Tel. Co.*, 53.

**8. MUNICIPAL CORPORATIONS — Exclusive Franchise in Street—Injunction—Want of Equity.**—If a bill and answer in a suit by one telephone company against another to enjoin the latter from erecting its poles and stringing its wires on the same side of the street as those of the complainant, shows that the defendant's poles are being placed between those of the complainant, but of sufficient height to enable the stringing of wires without interference by contact with those of the complainant and that defendant's poles were being well set into the ground and well braced, that any contact with complainant's wires during the process of stringing would be of a temporary and incidental character, and that scientific appliances for insulation would be provided, preventing defendant's wires from acting as conductors from those of complainant, except from possible unavoidable causes, such as winds, storms or electrical disturbances, that defendant's system is not complete but in a formative state, and, that the things complained of and damages arising therefrom are not in existence, but are conjectural and imaginary, no such case of pressing necessity is shown as authorizes injunctive relief. (Ala.) *American Telephone etc. Co. v. Morgan County Tel. Co.*, 53.

**9. EASEMENTS in Streets—Additional Servitudes.**—The owner of land taken for a public street holds it subject to the right of ap-



propriation of the space above and below the surface for the purpose of public travel without compensation. (Mass.) *Sears v. Crocker*, 577.

**10. EASEMENTS in Streets—Additional Servitude—Subway.**—The construction of a subway for public travel below the surface of a public street imposes no additional servitude on land owned by abutters to the center of the street, for which they are entitled to compensation. (Mass.) *Sears v. Crocker*, 577.

**11. MUNICIPAL CORPORATIONS—Property in Subways.**—A statute providing that a city "shall have, hold and enjoy in its private or proprietary capacity, for its own property" the several subways and a tunnel built and to be built under existing statutes, gives title to such subways and tunnel merely as structures, but does not transfer to the city the title to the land occupied by such structures. (Mass.) *Sears v. Crocker*, 577

See Constitutional Law, 2.

Note.

**Municipal Corporations**, electricity, liability of for injuries due to, 535.

electricity, duty of to exercise supervision over wires and other appliances in the public streets charged with, 535, 536.

## MURDER.

See Homicide.

## MUTUAL BENEFIT SOCIETY.

See Benefit Society.

## NAMES.

**JUDGMENTS—Idem Sonans.**—Judgment against William M. T., upon substituted service upon W. M. T., while the true name of the defendant is Willis H. T., is void as to him and not within the rule of idem sonans. (Iowa.) *Thornily v. Prentice*, 317.

See Deeds, 1, 2; Judgments, 1.

Note.

**Names.** See Idem Sonans.

## NAVIGABLE WATERS.

**1. WATERS AND WATERCOURSES—Navigable Streams, What are.**—A stream on which boats and barges pass up and down at certain seasons of the year is navigable. (Cal.) *Miller & Lux v. Enterprise etc. Co.*, 115.

**2. WATERS AND WATERCOURSES—Water Obtained by Unlawful Obstruction of a Navigable Stream.**—One who acquires and appropriates water by an unauthorized, and, therefore, unlawful, damming and obstructing of a navigable stream is, nevertheless, entitled to relief in equity against a third person who, by another unauthorized obstruction of the same stream, diverted such waters, where the original obstruction has never been objected to or complained of by the state or any other person or authority authorized by law to object thereto. (Cal.) *Miller & Lux v. Enterprise etc. Co.*, 115.

See Wharves.

**NEGLIGENCE.**

**1. TORT—Absence of Privity as Affecting Liability.**—The Manufacturer of a buggy, who sells it to a city for the use of one of its employés, representing it to be in good condition, but in fact concealing a defect, is answerable for injuries caused by the defect to the person for whose use the vehicle was contemplated when sold, notwithstanding there was no privity between them in the contract of sale. (Ga.) *Woodward v. Miller*, 188.

**2. NEGLIGENCE—Proximate Cause.**—One who does a negligent act is liable for the consequences resulting therefrom, whether he has reason to anticipate them or not, if they are the natural result of his wrong, but if the result is purely accidental, and such wrong has no causal connection with the injury suffered, then no matter how great the wrong, the injury cannot be charged to him. (Iowa.) *Anderson v. Schurke*, 358.

**3. NEGLIGENCE—Proximate Cause.**—If an edger in a sawmill was defective and out of repair, and to this condition was due the throwing of a board by it which struck and injured the head sawyer working fifty-seven feet away, the jury should be permitted to decide whether the injury was the natural and probable consequence of such defect, and whether injury to any person ought to have been foreseen in the light of attending circumstances by persons of ordinary knowledge and prudence. (Wis.) *Grant v. Keystone Lumber Co.*, 883.

**4. NEGLIGENCE—Rescuer of Person in Peril from, may Recover Notwithstanding His Contributory Negligence.**—If a person is placed in great peril through the negligence of a railway corporation, and his rescue is attempted, resulting in injury to the rescuer, he may recover of the corporation if his attempt is not made under circumstances or in a manner constituting rashness or recklessness, though the person rescued was guilty of such contributory negligence that he could not have recovered had he been injured. (Ohio St.) *Pittsburg etc. Ry. Co. v. Lynch*, 658.

**5. NEGLIGENCE.**—Children of Tender Age, while travelers upon public ways, are held to the exercise of that degree of care which may reasonably be expected of children of their age, or which children of that age ordinarily exercise. (Mass.) *McDermott v. Boston Elevated Ry. Co.*, 548.

**6. CONTRIBUTORY NEGLIGENCE** is want of ordinary care on the part of a party injured which contributes to produce the injury. (Wis.) *Grant v. Keystone Lumber Co.*, 883.

See Death; Highways.

Note.

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- New Trials**, for misconduct of attorneys, discretion of the court in granting or refusing, 696.  
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### OFFICERS.

**DAMAGES, EXEMPLARY**, as Against Officer for Act of His Deputy.—An officer is not answerable in exemplary damages for the acts of his deputies, except under circumstances in which a master would be answerable in such damages for the acts of his servant. (Cal.) *Foley v. Martin*, 123.

### OPTION TO PURCHASE.

See Vendor and Vendee, 1.

### OWNERSHIP.

See Evidence, 6, 7.

Note.

- Partnership**, accord and satisfaction by one member of, 403.

### PAYMENT.

**1. PAYMENT**—Evidence Sufficient to Establish.—An instruction to a jury that a defendant alleging payment must establish it by clear and satisfactory evidence is erroneous and prejudicial. It is sufficient that such allegation be established by a fair preponderance of the evidence. (Wis.) *Meyer v. Hafemeister*, 900.

**2. PAYMENT IN PROPERTY Subject to Lien—Right to Repayment.**—One who receives an agricultural product from a debtor and applies its proceeds to the satisfaction of an existing debt, giving receipts therefor, if afterward forced to pay such proceeds to a landlord or one holding a paramount lien on the product sold, is entitled to demand and enforce repayment from his debtor. (Miss.) *Ball v. Sledge*, 654.

See Bills and Notes, 6.

Note.

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## PIERS.

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## PLEADING.

**1. PLEADING FOREIGN STATUTES.**—A pleading need not set out the statute of another state in *haec verba*. To set out its substance and effect is sufficient. (Ark.) *St. Louis etc. Ry. Co. v. Haist*, 65.

**2. PLEADING—Averment of Facts, What is not.**—A statement in an answer by a defendant corporation that it “proceeded in no respect under or by virtue of its charter” is a mere matter of argument and not a statement of fact. (Conn.) *Knapp etc. Mfg. Co. v. New York etc. R. R. Co.*, 994.

**3. PLEADING—Amendment.**—If a general demurrer to a petition is sustained, and the judgment affirmed in the supreme court, there is nothing to amend by. (Ga.) *Harp v. Southern Ry. Co.*, 212.

**4. PLEADING.**—Amendments to a Petition which merely amplify it, setting out more in detail the cause of action, are not objectionable. (Ga.) *Woodward v. Miller*, 188.

**5. PLEADING.**—A Variance between the averments of a declaration and the proof, which is the ground for a motion to instruct the jury to find for the defendant at the close of the plaintiff's evidence, must be particularly specified in the motion. (Ill.) *Zellers v. White*, 243.

**6. BILL OF PARTICULARS.**—A Variance Between the Proof fixing the date when the gambling occurred and the bill of particulars, in an action to recover money lost in gaming, is not fatal, when it does not appear that the plaintiff ever played in the defendant's gaming-room except on that occasion. (Ill.) *Zellers v. White*, 243.

See Statute of Limitations, 2, 3.

## PLEDGE.

See Bills and Notes, 6.

## PRINCIPAL AND AGENT.

**PRINCIPAL AND AGENT—Presumption as to Power of Agent.**—Third persons have the right to assume that when they find



an agent in possession of the principal's property, managing it, that such possession and management by the agent are by permission of the principal, and in case of injury, need only show his tortious act, but not his authority to act. (S. C.) *Polatty v. Charleston etc. Ry. Co.*, 750.

See Evidence, 6; Insurance, 23-25; Wharves, 8.

### PRINCIPAL AND SURETY.

See Executors and Administrators, 8, 9.

### PRIVATE ROAD.

See Easements.

### PRIVILEGED COMMUNICATIONS.

See Libel and Slander; Witnesses, 2, 4.

### PRIVITY.

See Negligence, 1.

### PROBATE PROCEEDINGS.

See Executors and Administrators; Wills, 16-18.

### PROCESS.

**PROCESS, Civil, Service of.**—A Sheriff has No Authority to Break into a Dwelling-house to serve process in a civil action, and entry through a window is a breaking into a house within the meaning of this rule when the outside door is shut. (Cal.) *Foley v. Martin*, 123.

See Divorce; Judgment, 6, 7.

### PUBLIC LANDS.

**HOMESTEADS ON PUBLIC LANDS—Sale of Timber.**—A contract by a homestead claimant on public lands with a third person, that in consideration of an advance of money to complete the homestead entry and obtain patent for the land, he will sell the timber thereon to such person is valid and not against public policy, and may be consummated by such sale of the timber after issuance of patent. (Miss.) *Butterfield Lumber Co. v. Hartman*, 644.

### RAILROADS.

#### *Leased Railway.*

1. **RAILROAD—Lessor's Liability for Lessee's Negligence.**—A street railroad corporation is liable for injuries caused by the negligent operation of the road by another corporation to which it has leased it. (La.) *Muntz v. Algiers etc. Railway Co.*, 495.

#### *Mortgages.*

2. **RAILWAY MORTGAGES—Limitation upon Right to Give Preference to Other Claims.**—There is no agreement implied on the part of railway mortgagees that the body of the mortgaged property may be used to pay current expenses in operating the road. Such a

preference can only be awarded out of the earnings. (Conn.) *Mersick v. Hartford etc. R. R. Co.*, 977.

**3. RAILWAY MORTGAGES—Awarding Preferences Over, Principles Controlling.**—The principle by which certain preferences are given to a particular class of unsecured creditors over the mortgagees of a railroad is an implied agreement on their part in accepting security for the payment of bonds that current debts contracted in the ordinary course of business of the railroad shall be paid from its current earnings before such mortgagees shall have a claim to the income. (Conn.) *Mersick v. Hartford etc. R. R. Co.*, 977.

**4. RAILWAY MORTGAGES—Preference in Favor of Operating and Like Expenses.**—Where no Part of the Income of a railway has been paid into court or remains in possession of the receiver, the court cannot, in a suit to foreclose a mortgage of the railroad, order that the proceeds of its sale or any part thereof be awarded to persons furnishing supplies for operating the road prior to the appointment of the receiver, there having been no diversion of the current income for the benefit of the mortgagees. (Conn.) *Mersick v. Hartford etc. R. R. Co.*, 977.

**5. RAILWAY MORTGAGES—Preference in Favor of Operating Expenses While Trustee is in Possession.**—The expenses of a trustee in a railway mortgage for wages of employés or other expenses incurred in operating the road while he is in possession of the property for the benefit of bondholders must be awarded preference over the mortgages in distributing the proceeds of a sale of the mortgaged property under foreclosure. (Conn.) *Mersick v. Hartford etc. R. R. Co.*, 977.

**6. RAILWAY MORTGAGES—Preference in Favor of Expenses Paid by a Trustee to Employés for Work Done Before He Took Possession.**—Where a railway mortgage provided that the trustees should be entitled to be reimbursed for all outlays of whatever sort incurred in the trust and that his compensation and disbursements constitute a first lien on the property, preferences out of the proceeds of a sale under foreclosure are proper in his favor for moneys paid to employés for work done before he took possession, if the court finds that without such payment it was practically impossible to resume the operation of the railway. (Conn.) *Mersick v. Hartford etc. R. R. Co.*, 977.

**7. RAILWAY MORTGAGES.—Preference in the Distribution of the Proceeds of a Sale of Mortgaged Property** may be awarded in favor of a person placed in possession of the road by the trustee under the mortgage for money paid by him for rent of a part of a line of railway operated by him in connection with, and for the benefit of, the mortgaged property. (Conn.) *Mersick v. Hartford etc. R. R. Co.*, 977.

**8. RAILWAY MORTGAGES.—Preferences for Money Advanced to Pay Taxes** will not be awarded out of the proceeds of a sale of railway property under foreclosure, where such advance was in the nature of a loan, and was made by a person under no obligation to pay the taxes and without any request from the mortgagees or bondholders. (Conn.) *Mersick v. Hartford etc. R. R. Co.*, 977.

#### *Injury to Property.*

**9. RAILWAY, When not Relieved from Liability for Injuring the Property of Others.**—The fact that a railway corporation is authorized by statute to construct a railway over and along certain property does not imply that it shall be exempt from the duty imposed by the provision of its charter that it shall pay for the use of

any real estate required for the construction of its road. (Conn.) Knapp etc. Mfg. Co. v. New York etc. R. R. Co., 994.

**10. TRESPASS in Constructing a Railway, Cause of Action, When Arises.**—The constructing of a railway on the plaintiff's land was an act of trespass for which an action could be immediately brought, and every day's use of it for railway purposes was a new trespass founding a new claim for damages. (Conn.) Knapp etc. Mfg. Co. v. New York etc. R. R. Co., 994.

#### *Fires.*

**11. RAILROADS—Pleadings—Communicated Fires.**—A complaint alleging that the defendant railroad company, "whose depot was situated on its right of way, allowed fire to remain in or so near to such depot building that the same caught or took fire," and it was thereby communicated to plaintiff's property, states a cause of action in compliance with statutory requirements. (S. C.) Brown v. Carolina Midland Ry. Co., 756.

**12. RAILROADS—Liability for Fires.**—A railroad company heating its depot building for the comfort of its agents is liable to a third person for fire communicated to his property and arising from such heating. (S. C.) Brown v. Carolina Midland Ry. Co., 756.

**13. RAILROADS—Communicated Fires—Evidence.**—Under an allegation that a fire on the property of a third person was caused and communicated by a fire in a railroad depot building, it is competent to show that the fire was caused by a defective stove or heater used in such depot. (S. C.) Brown v. Carolina Midland Ry. Co., 756.

**14. RAILROADS—Communicated Fires—Evidence as to Right of Way.**—In an action against a railroad company to recover for injury from a fire arising on and communicated from its right of way, parol evidence is admissible to show that certain lands constituted such right of way. (S. C.) Brown v. Carolina Midland Ry. Co., 756.

**15. RAILROADS—Communicated Fires—Construction of Statute.** The words "right of way" used in a statute making railroads liable for fires communicated from their right of way, have no reference to the title of the railroad company to the land, but simply designates the locality where the fire must originate to make the company liable. (S. C.) Brown v. Carolina Midland Ry. Co., 756.

**16. RAILROADS—Liability for Fires—Constitutional Law.**—A statute making railroad companies liable for communicated fires, as construed to apply to a fire communicated and arising from heating a depot building by a railroad company for the comfort of its agents, is not unconstitutional as depriving such company of the equal protection of the law. (S. C.) Brown v. Carolina Midland Ry. Co., 756.

#### *Ejection of Trespassers.*

**17. RAILROADS—Ejection of Trespassers.**—A trespasser can be lawfully ejected from a railroad train only after such train is brought to a standstill. (S. C.) Polatty v. Charleston etc. Ry. Co., 750.

**18. RAILROADS—Liability for Injury to Trespasser.**—A railway company is liable to a trespasser upon its passenger train stricken with such force by its agents thereon with rocks, pieces of coal, or sticks, as to cause such trespasser to fall from its moving cars, thereby receiving great bodily hurt. (S. C.) Polatty v. Charleston etc. Ry. Co., 750.

**19. RAILWAYS—Trespassers—Authority of Engineer—Liability for His Tort.**—An engineer on a railroad train is deemed to have been invested by the company with power to preserve order and

expel intruders and trespassers from his engine, cow-catcher, tender and the platform adjoining it, with a view actually to protect the property confided to him by such company; and it is liable for his tort in unlawfully expelling such trespasser. (S. C.) Polatty v. Charleston etc. Ry. Co., 750.

*Fellow-servants and Vice-principals.*

20. **NEGLIGENCE—Vice-principals.**—A railroad company is liable for the death of its fireman caused by the combined negligence of a fellow-servant and a vice-principal, such as a conductor in its employ. (Ark.) St. Louis etc. Ry. Co. v. Haist, 65.

21. **FELLOW-SERVANTS.**—Employees on One Train of a Cable Street Railway are fellow-servants with the employees on the train next preceding. (Ill.) Chicago City Ry. Co. v. Leach, 216.

*Express Messengers.*

22. **A RAILWAY COMPANY May by Contract Relieve Itself from Liability to an Express Messenger for Personal Injuries Suffered by Him** while riding on its trains in the performance of his duty, though such injury was due to the ordinary negligence of the employees of the railway. (Wis.) Peterson v. Chicago etc. Ry. Co., 879.

23. **RAILWAYS, When May Rely Upon an Agreement with a Third Person.**—If a messenger, upon entering the employment of an express company, agrees to exempt it and all the transportation companies with which it deals from liability for personal injuries, whether arising from negligence or otherwise, and taht such agreement is to inure to the transportation companies as fully as if made with them personally, this is a promise, upon sufficient consideration, made to one person for the benefit of another which can be enforced by the railway company, whether it knew of or consented to the promise before the commencement of the action or not. (Wis.) Peterson v. Chicago etc. Ry. Co., 879.

See Carriers; Constitutional Law, 2; Street Railways.

**Note.**

**Railways, trespassers on** are not entitled to recover for negligence, 201.

**RAPE.**

1. **RAPE.**—The Words “Against Her Will” are synonymous with “without her consent,” and sexual intercourse is against the woman’s will when, from any cause, she is not in a position to exercise any judgment about the matter. (Ga.) Gore v. State, 182.

2. **RAPE OF IMBECILE—Necessity of Force.**—A man who, knowing her mental imbecility, has sexual intercourse with a woman incapable of expressing any intelligent assent or dissent, or of exercising any judgment in the matter, is guilty of rape, although he uses no more force than that involved in the carnal act, and although she offers no resistance. (Ga.) Gore v. State, 182.

3. **RAPE—Evidence.**—In a case of rape, where the prosecutrix is under the age of consent, evidence of former acts of intercourse between the accused and prosecutrix, is admissible, unless it tends to solve some disputed fact or issue in the case. (Tex. Cr. Rep.) Barnett v. State, 873.

4. **RAPE—Evidence of Prior Rapes.**—On a trial of one for the rape of his stepdaughter under age of consent, committed with her consent, where the testimony of the prosecutrix is positive, and the defendant’s confession of the offense is proved, evidence of



other prior rapes committed by the defendant on the prosecutrix is not admissible. (Tex. Cr. Rep.) *Barnett v. State*, 873.

5. **RAPE—Evidence of Batteries.**—On the trial of one for rape of his stepdaughter, under the age of consent, evidence of prior assaults and batteries by the accused upon the prosecutrix is not admissible. (Tex. Cr. Rep.) *Barnett v. State*, 873.

6. **RAPE—Evidence of Subsequent Acts.**—On a trial for rape, evidence that subsequently to the commission of the rape as charged, and by agreement, the prosecutrix was married to another man, who in accordance with an arrangement previously made abandoned and turned her over to the accused, who lived with her afterward in other counties as his wife, is inadmissible. (Tex. Cr. Rep.) *Smith v. State*, 849.

7. **RAPE—Evidence of Subsequent Acts.**—On a trial for rape evidence as to carnal acts of the parties subsequently to the rape as charged in the indictment, and in other and different counties, is not admissible. (Tex. Cr. Rep.) *Smith v. State*, 849.

8. **RAPE.—Proof that the Prosecutrix was not the Wife of the Defendant** in rape must be made by direct evidence, and proof that he is a married man with two children is irrelevant and inadmissible to show that he was not the husband of the prosecutrix. (Tex. Cr. Rep.) *Smith v. State*, 849.

9. **RAPE—Belief in Age of Prosecutrix.**—On a trial for rape of a girl under the age of statutory consent, it is no defense that the accused believed her to be over such age, nor can the fact of such belief be taken in consideration in mitigation of punishment. (Tex. Cr. Rep.) *Smith v. State*, 849.

10. **RAPE—Age of Consent—Instructions.**—On a trial for rape of a girl under the statutory age of consent, committed with her consent, the accused is entitled to have the jury instructed that if it believed that the prosecutrix was of the age of statutory consent or over at the time of the alleged rape it must acquit, and, if it has a reasonable doubt whether or not she was of that age or under, it must give the defendant the benefit of such doubt and acquit him. (Tex. Cr. Rep.) *Smith v. State*, 849.

11. **RAPE—New Trial.**—If, on a trial for statutory rape, the issue is as to the age of the prosecutrix, a new trial should be granted for newly discovered evidence which would be most material as tending to raise a reasonable doubt as to the age of the prosecutrix. (Tex. Cr. Rep.) *Brock v. State*, 859.

Note.

Receivers, accord and satisfaction, power of to enter into, 407, 408.

## RECORDS.

**RECORDS.**—The Index to Conveyance Records is no part of the record. (La.) *Agurs v. Belcher*, 485.

See Deeds, 2; Vendor and Vendee, 3-7.

Note.

Records, *idem sonans*, application of rules of to, 338-340.

## RELIGIOUS SOCIETY.

1. **JURISDICTION of Courts Over Church Controversies.**—Civil courts will not enter into the consideration of church doctrine or church discipline, nor will they inquire into the regularity of the

proceedings of the church judicatories having cognizance of such matters. (S. C.) *Morris St. Baptist Church v. Dart*, 727.

**2. CHURCHES—Effect of Action by.**—The action of church authorities in the deposition of pastors and the expulsion of members is final. (S. C.) *Morris St. Baptist Church v. Dart*, 727.

**3. JURISDICTION of Courts Over Church Controversies.**—If a church controversy necessarily involves rights growing out of a contract recognized by the civil law, or the right to the possession of property, civil courts will adjudicate such rights. (S. C.) *Morris St. Baptist Church v. Dart*, 727.

**4. CHURCH CONTROVERSIES—Jurisdiction of Courts.**—A court will not undertake to determine whether a resolution directing expulsion or exclusion of a pastor from a church or church property, was passed in accordance with the canon law of the church, except in so far as it may be necessary to do so in determining whether it was in fact the church that acted as a congregation. (S. C.) *Morris St. Baptist Church v. Dart*, 727.

**5. CHURCH CONTROVERSIES—Jurisdiction of Courts—Church Trials.**—A civil court has no power to require a church court to observe the usual incidents of trial, such as the formulation of charges and notice. (S. C.) *Morris St. Baptist Church v. Dart*, 727.

**6. CHURCH CONTROVERSIES—Deposition of Pastor—Salary.**—While a church is liable to suit by a pastor for arrears of salary which it has contracted to pay, it is not a condition precedent to his deposition that he should be paid in full. (S. C.) *Morris St. Baptist Church v. Dart*, 727.

**7. CHURCH CONTROVERSIES—Pastor's Salary—Costs—Setoff.** If the amount of salary due a deposed pastor of a church is not involved in any issue in a suit between the pastor and his church, costs adjudged against him therein cannot be set off against salary due him. (S. C.) *Morris St. Baptist Church v. Dart*, 727.

**Note.**

**Religious Societies,** civil courts cannot review the expulsion of pastors, 740, 741.

civil courts, jurisdiction of over church trustees, 748, 749.

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civil courts, jurisdiction of over controverted claims, to the use of church property, 745.

civil courts, jurisdiction of over questions involving property rights, 742, 743.

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- Religious Societies**, membership in, expulsion from, irregularities in the proceedings which do not make void, 738.
- membership in, expulsion from, when may be reviewed, 737.
  - membership in, extent to which the courts may inquire into, 738.
  - membership in, injunction against expulsion from, 739.
  - membership in, mandamus to compel restoration to, 739.
  - membership in, notice, whether necessary to authorize expulsion from, 738, 739.
  - membership in, rules for the admission to or expulsion from, 738.
  - pastors of, civil courts have jurisdiction to restore to their temporal rights, 742.
  - pastors of, civil courts have no jurisdiction to restore to their clerical functions, 742.
  - pastors of, equity, when will interfere against or on behalf of, 743.
  - pastors of, respective jurisdiction of the civil courts and of the church tribunals over, 740, 741.
  - presbyteries of, 735.
  - property disputes between warring church factions, jurisdiction of civil courts over, 744-746.
  - sale of property of because of controversy among members as to matters of faith, 745.
  - spiritual matters, decisions of in reference to, when will not be reviewed by the courts, 735.
  - tribunals of, decisions of relating to questions of doctrine and articles of faith, 736.
  - tribunals of, decisions of violating the law of the land, 736.
  - tribunals of, exclusive jurisdiction to determine questions of doctrine, discipline, and ecclesiastical law, 744.
  - tribunals of, judgments of in defiance of the constitutions governing them, 737.
  - tribunals of, jurisdiction of over ecclesiastical questions will not be reviewed by the courts, 735.
  - tribunals of, legislative acts of, 736.
  - tribunals of, pastors are subject to jurisdiction of, 741.
  - tribunals of, property rights, cannot be prejudiced by decisions of, 738.
  - tribunals of, questions which are within the exclusive jurisdiction of, 734, 735.
  - trustees of, discretion of, how far may be controlled by the civil courts, 748, 749.

## RENEWALS.

See Mortgages, 10, 11.

## REPLEVIN.

1. **REPLEVIN—Jurisdiction.**—The Affidavit Required by Statute as a Basis for Replevin Fixes the Jurisdiction of the court as regards the value of the property, unless it is shown that a false valuation was made for the purpose of conferring jurisdiction. (Miss.) *Ball v. Sledge*, 654.

2. **REPLEVIN—Buildings Removed from Land.**—While replevin will not lie for real property, the title to buildings removed therefrom may be determined in such action by an inquiry as to their ownership at a time when they were part of the realty. (Mich.) *Cutter v. Wait*, 619.

**RESCUING FROM PERIL.**

See Master and Servant, 2; Negligence, 4.

**RES GESTAE.**

See Criminal Law, 1.

**RES JUDICATA.**

See Judgments, 4.

**RESTRAINT OF TRADE.**

See Contracts, 1-3.

**REVERSAL OF JUDGMENT.**

See Judgments, 8-11.

**RIPARIAN RIGHTS.**

See Waters and Watercourses.

**SALE.**

**1. VENDOR AND PURCHASER.**—The Burden of Proof is on the Vendor to show an acceptance of the goods by the purchaser, where the right to recover is dependent on such acceptance. (Ohio St.) *Rheinstrom v. Steiner*, 699.

**2. VENDOR AND PURCHASER.**—Acceptance of Goods, When not Inferable from Their Retention.—Where one who has ordered labels, on their arrival, writes to the vendor that the work has not been properly carried out, and in subsequent interviews declares that the labels are worthless to him, and that the best the vendor can do is to burn them, cannot be held to have accepted such goods, on the ground that he did not return them, or, in more express words, offer to return them to the vendor. (Ohio St.) *Rheinstrom v. Steiner*, 699.

**3. SALE of Property to be Acquired in the Future.**—One may contract to convey property to be acquired in the future. He may make the contract conditional upon his being able to acquire title from some one else; but if he contracts absolutely, he will be bound by the terms of his agreement. (Ga.) *Northington-Munger-Pratt Co. v. Farmers' Gin etc. Co.*, 210.

**4. SALE.**—Damages Against Vendor for Failure to Consummate.—Where a sale is made, the title not to pass until the purchase price is paid, and if on default in payment the vendor resells the chattel to a third person, but thereafter, the first vendees refusing to surrender possession, the vendor makes terms with and allows one of them to take or retain the chattel, the second vendee may recover damages for breach of the contract made with him. (Ga.) *Northington-Munger-Pratt Co. v. Farmers' Gin etc. Co.*, 210.

See Negligence, 1.

**SEDUCTION.**

**SEDUCTION.**—Subsequent Marriage as Bar.—In the absence of statute to that effect, the subsequent marriage of the accused



to the injured female is not a bar to a prosecution under a statute providing a penalty for obtaining illicit connection with any female of good repute under the age of twenty-one years. (Kan.) *In re Lewis*, 479.

### SELF-DEFENSE.

See Homicide.

### SENTENCE.

See Criminal Law, 5.

### SETOFF AND COUNTERCLAIM.

1. **JUDGMENTS—Setoff—Practice.**—Motion on a rule to show cause is the proper proceeding to have on judgment set off against another. (S. C.) *Ex parte Hiers*, 713.

2. **JUDGMENTS—Setoff of.**—Though an assignment of a right to recover a statutory penalty for taking usurious interest is invalid, if assigned before judgment, yet if a wife has, on the faith of such assignment, advanced money to enable her husband to prosecute such right to judgment, equity will not deprive her of the fruits of her financial assistance to her husband, by permitting the defendant in such judgment to set off other judgments against such husband, against it. (S. C.) *Ex parte Hiers*, 713.

See Religious Societies, 7.

### SHERIFFS.

1. **A SHERIFF is not Answerable in Exemplary Damages** for the oppressive misconduct of his deputy which he neither authorized nor ratified. (Cal.) *Foley v. Martin*, 123.

2. **RATIFICATION of Misconduct of Deputy Sheriff, Evidence of.**—The fact that a deputy sheriff is not discharged, but, on the other hand, is continued in office after his principal is informed of his oppressive misconduct in the service of a writ is evidence of his ratification of such conduct. (Cal.) *Foley v. Martin*, 123.

3. **SHERIFF AND DEPUTY—Pendente Ratification of Deputy's Wrongful Act.**—If a deputy sheriff is guilty of oppressive misconduct in the service of a writ, of which his principal has no knowledge other than that given by the service of the summons and complaint in an action brought to recover for such wrong, the failure to at once discharge such deputy is not a ratification of the wrongful act. If the plaintiff desires to charge the principal with vindictive damages on the ground of ratification, he must make his cause of action complete before commencing suit by informing the principal of the facts and giving him an opportunity to redress the wrong before being forced to defend it. (Cal.) *Foley v. Martin*, 123.

### SHIPPING.

See Wharves.

### SLANDER.

See Libel and Slander.

**STATUTE OF LIMITATIONS.**

See Limitation of Actions.

**STATUTES.**

**PENAL STATUTES.**—The Object of Construing penal statutes is to discover and give effect to the true legislative intent, and the rule of strict construction is not to be so unreasonably applied as to defeat the true intent and meaning of the enactment. (Ill.) *Zellers v. White*, 243.

See Constitutional Law; Pleading, 1.

**STREET RAILWAY.**

**1. ELECTRIC RAILWAY**—Fall of Trolley.—Negligence is Presumed against an electric railway company from the breaking and falling of its trolley wire in a public street. (Tenn.) *Memphis Street Ry. Co. v. Kartright*, 807.

**1a. ELECTRIC RAILWAY**—Degree of Care Required in Its Operation.—An electric street railway company should be held to the highest or utmost degree of care in the construction, maintenance, and operation of its lines. (Tenn.) *Memphis Street Ry. Co. v. Kartright*, 807.

**2. STREET RAILWAY** — Starting Car Before Passenger is Seated.—A street railway company is negligent if it starts a car before a passenger has gained a secure foothold on the platform, but it is not required to wait until he has taken his seat, or even has entered the doorway, before starting. (La.) *Sharp v. New Orleans City R. R. Co.*, 488.

**3. A STREET RAILWAY Corporation Running Cars on a Public Street** without authority and in violation of law, though without negligence, is liable to a traveler for injuries sustained by him on such street from such cars. (Wis.) *Daly v. Milwaukee Electric Ry. etc. Co.*, 893.

**4. NEGLIGENCE**—Children.—A child six and one-half years of age passing over a cross-walk leading from one side of the street to the other, through which runs the track of a street railway, is not, as a matter of law, necessarily negligent in failing to look and see whether a car is coming or in failing to listen for the ringing of a car gong before attempting to cross. The question of the negligence of such child is for the jury to determine. (Mass.) *McDermott v. Boston Elevated Ry. Co.*, 548.

**5. STREET RAILWAY**—Wrong Transfer, Passenger's Rights Under.—If a passenger on a street-car, when he calls for a transfer over a certain line, is given a transfer over a different line, the carrier is liable to him in damages if he is expelled, over his reasonable explanations, from the car when he tenders the transfer and refuses, on its objection, to pay an additional fare. (Ind.) *Indianapolis Street Ry. Co. v. Wilson*, 261.

**6. STREET RAILWAY.**—A Street-car Transfer ticket is a mere token to be used for the convenience of the railway company, and is not the contract between the carrier and the passenger. (Tenn.) *Memphis Street Ry. Co. v. Graves*, 803.

**7. STREET RAILWAY**—Wrong Transfer.—If a conductor makes a mistake in a transfer ticket, so that the passenger is denied passage thereon and expelled from the car, it is the fault of the railway com-

pany, for which it is liable. (Tenn.) *Memphis Street Ry. Co. v. Graves*, 803.

8. **STREET RAILWAY**—Transfer, Duty of Passenger to Examine. When a passenger on a street-car in good faith accepts a transfer ticket, he is not bound to stop and scrutinize it to see that no mistake has been made; he has a right to presume that the conductor has given him a proper ticket. (Tenn.) *Memphis Street Ry. Co. v. Graves*, 803.

See Municipal Corporations, 10, 11; Railroads, 21.

Note.

**Street Railways**, electricity, duties and liabilities of, when operated by, 536.

### SUBROGATION.

See Taxation, 7.

### SUBTERRANEAN WATERS.

See Waters and Watercourses, 14-17.

### SUBWAYS.

See Municipal Corporations, 10, 11.

### SUICIDE.

See Insurance, 8, 9.

### SUMMONS.

See Process.

### TAXATION.

1. **TAXATION**—Loans by Nonresidents.—A statute providing for the taxation of money loaned, and specifying that such loans shall be taxable, in the county where the lender resides, is temporarily located, or has a place of business, applies to such nonresidents only as have a residence, location, or place of business within the state. (Miss.) *Adams v. Colonial etc. Mortgage Co.*, 633.

2. **TAXATION**—Loans by Nonresidents—Mortgages.—If a nonresident lender of money has no place of business, or location or agent within the state, and accomplishes the loan beyond the limits of the state, the fact that negotiations for the loan were made by a person in the state, and that it is secured by mortgage on property within the state, does not subject it to taxation therein. (Miss.) *Adams v. Colonial etc. Mortgage Co.*, 633.

3. **TAXATION OF CORPORATE FRANCHISE**.—The Manner and Method of Taxing a corporate franchise are entirely within the control of the state, so long as no constitutional right is impaired. (Cal.) *Bank of California v. San Francisco*, 139.

4. **TAXATION OF CORPORATE FRANCHISE**.—A State may Provide for the Taxation of the Franchise of a Banking Corporation as the property of such corporation. (Cal.) *Bank of California v. San Francisco*, 130.

5. **TAXATION OF THE FRANCHISE** to be a Corporation -- Value.—The value of the franchise of a corporation is not limited to

the cost of obtaining it. In determining such value for the purposes of taxation, the assessor is at liberty to consider the difference between the aggregate market value of the stock of the corporation and the value of its tangible property. (Cal.) *Bank of California v. San Francisco*, 130.

**6. CONSTITUTIONAL LAW—Taxation of the Franchise to be a Banking Corporation.**—The fourteenth amendment to the constitution of the United States does not forbid the taxation of the franchise to be a banking corporation, though the business which it authorizes the corporation to carry on is a common business which every private person has the right to engage in. (Cal.) *Bank of California v. San Francisco*, 130.

**7. TAXATION—Subrogation to the Lien of the State.**—One who advances money with which to pay taxes on railroad property which is subject to a mortgage does not thereby acquire the lien which the state might have had on the property. (Conn.) *Mersick v. Hartford etc. R. R. Co.*, 977.

**8. LIENS—Rights of Coholders—Holder of Tax Title.**—If several persons hold claims which are liens upon the same land, equity will not permit one of the lienholders to absorb the common fund by purchasing the land at tax sale. He must be treated as a redemptioner with a preferred claim to the amount paid to redeem. (Iowa.) *Lane v. Wright*, 362.

**9. TAX SALES—Redemption.**—If a son goes to a tax sale intending to pay the taxes on his father's land, but finding that the land is being offered for sale at the time of his arrival, he bids it in to protect his father's interests, the purchase by him amounts only to a redemption. (Ark.) *Grober v. Clements*, 91.

See License Tax.

## TELEGRAPHS AND TELEPHONES.

**MUNICIPAL CORPORATIONS—Rights of Telephone Companies in Streets.**—If two telephone companies are occupying parts of the same street in a city with the permission and under the direction, regulation, and control of the city authorities, the rights of each company in the street are equal, and neither has superior rights to the other, at least so long as the holder of the junior franchise does not interfere in some unlawful manner with the rights of the holder of the older franchise. (Ala.) *American Telephone etc. Co. v. Morgan County Tel. Co.*, 53.

See Injunctions; Municipal Corporations, 8.

Note.

**Telephone Corporations**, liability of to persons injured from uninsulated wires of, 522.

## TENANCY IN COMMON.

*Mortgages.*

**1. COTENANCY—Foreclosure of Mortgage—Demand for Possession.**—If land owned by cotenants is mortgaged and the mortgage is foreclosed, a demand for possession by the purchaser under foreclosure and refusal thereof, such as will destroy the right to redemption, must be made upon each of the cotenants. A demand upon one is not a demand upon the other in this connection, imposing any duty of surrendering possession, although such cotenants are husband and wife. (Ala.) *Harden v. Collins*, 42.



**2. COTENANCY—Foreclosure of Mortgage—Right of Redemption—Demand for Possession.**—If a mortgage on their land by cotenants is foreclosed, the right of one cotenant to redeem from the purchaser is not affected by the fact that the other cotenant has refused to surrender possession demanded by the purchaser, if no such demand has been made upon the cotenant seeking to redeem. (Ala.) *Harden v. Collins*, 42.

**3. COTENANCY—Right to Redeem from Mortgage Foreclosure.**—A cotenant having the right to redeem from a sale of the land of the cotenancy under mortgage foreclosure has a right to redeem the land in its entirety, not merely his undivided interest in it. (Ala.) *Harden v. Collins*, 42.

**4. COTENANCY—Mortgage Foreclosure—Sufficiency of Offer to Redeem.**—If a cotenant having the right to redeem from a sale of the land of the cotenancy under mortgage foreclosure, tenders the purchaser the full amount bid and paid by him, and ten per cent per annum thereon, and offers to pay him in addition all lawful charges, consisting in the value of his permanent improvements, to be ascertained by a disinterested person, and such tender and offer is declined by the purchaser, such declination is sufficient to revest the title in the cotenant with no liability in respect to the permanent improvements. (Ala.) *Harden v. Collins*, 42.

**5. COTENANCY—Mortgage Foreclosure—Sufficiency of Offer to Redeem.**—If a cotenant having a right to redeem from a mortgage foreclosure sale of the property of the cotenancy, makes a valid and sufficient tender and offer, except that he annexes the condition that he will redeem on the terms offered if the purchaser under the foreclosure will rent the land at a specified rental, the condition annexed vitiates the tender and offer rendering it ineffective to revest the title in the cotenant, and releasing the foreclosure purchaser from any duty to accept it. (Ala.) *Harden v. Collins*, 42.

#### *Conveyances.*

**6. COTENANCY—Conveyance by One of Specific Part.**—If one cotenant makes a conveyance by metes and bounds of a part of the common estate, the deed is voidable in so far as it operates to the prejudice of his cotenants, at their election; but conveys the interest of the grantor in the part conveyed as against him, and if in subsequent partition, that particular tract is assigned to the tenant conveying, the title inures by estoppel to his grantee. (Miss.) *Kenoye v. Brown*, 645.

**7. COTENANCY—Conveyance by One of Specific Part.**—A conveyance by one cotenant of a specific part of the common property by metes and bounds is inoperative to impair any of the rights of his cotenants, nor does it convey any interest in any part of the common property not specifically conveyed by such deed. (Miss.) *Kenoye v. Brown*, 645.

#### *Note.*

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**Tenancy in Common**, conveyance in severalty by one cotenant, effect of, in partition, 651.  
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### THREATS.

See Homicide, 1.

### TORTS.

1. **TORT—Justification by Showing Right to do a More Injurious Act.**—One cannot justify injuring another by an unlawful act by showing that he could do a lawful act which would have injured him more. (Conn.) Knapp etc. Mfg. Co. v. New York etc. R. R. Co., 994.

2. **TORTS, Want of Benefit to the Defendant.**—In an action to recover for a wrongful act, the question is not whether it was to the gain of the defendant, but whether it was to the loss of the plaintiff. (Conn.) Knapp etc. Mfg. Co. v. New York etc. R. R. Co., 994.

3. **TORTS—Assignment of Claim for Damages.**—Torts which cause injury strictly personal furnish no claim for assignable damages. (S. C.) Ex parte Hiers, 713.

See Negligence.

### TRADING STAMPS.

See Lotteries.

### TRESPASS.

See Limitation of Actions, 1; Railroads, 9, 10.

### TRESPASSERS.

See Railroads, 17-19.

### TRIAL.

*Instructions.*

See Criminal Law, 4.

1. **JURY—Instructions to the Jury, When Inadequate and Misleading.**—In an action to recover of a merchant for an arrest and false imprisonment due to his employé, an instruction to a jury that ratification may be signified by acts of omission as well as of commission, though correct as a proposition of law, may be prejudicial where the jury are not informed what acts of omission are meant, but left to select any act of omission or commission which they chose, and predicate ratification on it. (Wis.) Cobb v. Simon, 909.

2. **TRIAL BY JURY—Reversal for Conflicting Instructions.**—An instruction that the plea of payment must be established by clear

and satisfactory evidence is not rendered harmless by another instruction that such plea must be established by a fair preponderance of the evidence. The appellate court cannot know by which instruction the jury were controlled. (Wis.) *Meyer v. Hafemeister*, 900.

**3. TRIAL.—Instructions Relating to Specific Portions of the Evidence** need not be given where the jury is instructed to take into account all proper evidence bearing upon the disputed points in the case. (Conn.) *Hart v. Knapp*, 989.

*Remarks of Judge.*

**4. MURDER—Evidence—Remarks of Judge.**—If, on the trial of a wife for the murder of her husband, she has testified that the deceased attempted to strike her at the time of the killing, evidence that the deceased had threatened to kill the accused before the week was out is clearly admissible, and it is prejudicial error for the trial court to remark or comment that he is doubtful if such evidence is admissible, but that he will admit it and give the accused the benefit of the doubt. (Tex. Cr. Rep.) *Wallace v. State*, 855.

*Conduct and Argument of Counsel.*

See Criminal Law, 2.

**5. JURY TRIAL—Statement of Facts by Counsel.**—Issues of fact, in so far as they depend on oral testimony, should be determined on the testimony of sworn witnesses, and statements of fact by counsel in the presence of the jury to influence their verdict are improper. (Ohio St.) *Cleveland etc. R. R. Co. v. Pritschau*, 682.

**6. JURY TRIAL.—Arguments and Statements by Counsel** before the evidence is closed are not in the course of the regular argument. The order of trial should not be disregarded by statements made by counsel during the introduction of evidence, especially under a statute declaring that counsel shall not be heard in argument until all the evidence has been introduced. (Ohio St.) *Cleveland etc. R. R. Co. v. Pritschau*, 682.

**7. JURY TRIAL—Arguments Should not be Permitted.**—The ridiculing of uneducated witnesses because of their ungrammatical speech and the offering of insults to others without cause afforded in the case should be forbidden as tending to the suppression of truth. (Ohio St.) *Cleveland etc. R. R. Co. v. Pritschau*, 682.

**8. JURY TRIAL.—Questions of Counsel** following statements of fact made by him, where the object is to mislead the jury as to the facts in evidence, are improper. (Ohio St.) *Cleveland etc. R. R. Co. v. Pritschau*, 682.

**9. JURY TRIAL.—The Repetition of Incompetent Inquiries** to which objection had been sustained, to prejudice the case in the estimation of the jury, discloses a purpose calling for immediate and complete suppression. (Ohio St.) *Cleveland etc. R. R. Co. v. Pritschau*, 682.

**10. JURY TRIAL.—Improper Conduct of Counsel cannot be Overlooked on the Ground That It may have Prejudiced the Jury Against His Client**, where it does not appear from the record that it in fact resulted in such prejudice. (Ohio St.) *Cleveland etc. R. R. Co. v. Pritschau*, 682.

**11. JURY TRIAL—Power of Court Over Counsel.**—A trial court should not permit such conduct on the part of counsel as must result in a mistrial and render the granting of a new trial necessary in case a verdict is returned in favor of the client of such counsel. (Ohio St.) *Cleveland etc. R. R. Co. v. Pritschau*, 682.

**12. JURY TRIAL—Failure to Suppress Improper Conduct of Counsel, When Requires a Reversal of the Judgment.**—If a trial court, on objection made, fails to suppress improper conduct of counsel in the presence of the jury, as by making statements of fact before the jury, insulting witnesses, and the like, without cause therefor appearing in the case, a judgment in favor of such counsel must be reversed, unless it affirmatively appears that by instructions from the court or retraction by counsel, the prejudicial tendency of his misconduct has been averted. (Ohio St.) *Cleveland etc. R. R. Co. v. Pritschau*, 682.

**13. TRIAL—Improper Remarks of Counsel.**—If, on a trial for rape, counsel remarks to the jury that “in a case like this the law ceased to be a virtue and while I do not believe in mob law as a rule, I will be doing my duty as a citizen and a father if I can induce this jury to hang defendant as high as Haman, and then go to my home and tell my wife what I have done, and hear her remark, ‘Well done, thou good and faithful servant; you have performed your duty.’” his words constitute reversible error, although the court admonishes him to desist and instructs the jury to disregard his remarks. (Tex. Cr. Rep.) *Smith v. State*, 849.

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**Trials, attorneys, improper remarks made by in the course of**, 690.

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misconduct of attorneys, duty of the court to reprimand the offending counsel, 695.

misconduct of attorneys, means of stopping, 698.



**TROVER AND CONVERSION.**

1. **TROVER AND CONVERSION.**—One who carefully removes a pier standing in front of his land without his consent and places it by the shore of the lake, where the materials are taken possession of by the person who erected the pier, is not guilty of conversion. (Wis.) *McCarthy v. Murphy*, 876.

2. **TROVER—Conversion of Money.**—Trover lies for the conversion of money, if there is an obligation on the part of the defendant to return specific coin or notes intrusted to him. (Ala.) *Hunnicut v. Higginbotham*, 45.

3. **TROVER for Conversion of Money by Administrator.**—Trover lies for the conversion of specific money capable of identification, such as money in a bag or package which has been intrusted to a person for safekeeping, and by his administrator mingled with other money without authority to the exclusion of the owner's dominion over it and in denial of his rights. (Ala.) *Hunnicut v. Higginbotham*, 45.

**TRUSTS.***Creation and Dissolution.*

1. **TRUSTS.**—Trustees Take Exactly that Quantity of Interest which the purposes of the trust require. If property is conveyed to one and his heirs and assigns forever as trustee for the separate use and benefit of a married woman, the purpose of the trust is accomplished and the legal title of the trustee is extinguished upon the death of her husband, and the whole title, legal and equitable, becomes vested in her with full power of disposition. (Tenn.) *Temple v. Ferguson*, 791.

2. **TRUST, Dissolution of.**—Where all the beneficiaries in a trust so desire and are before the court, it may decree a dissolution of the trust and a conveyance to them by the trustee of the trust property, unless some reason is shown to the court why they should not be permitted to exercise this right. The trustee has no standing in court to resist the application where he is not interested except that, but for the decree, he might become entitled to compensation for his further services. (Cal.) *Eakle v. Ingram*, 99.

*Married Women.*

3. **TRUST for Married Woman—When Active.**—A conveyance in trust for the separate use and benefit of a married woman creates an active trust. (Tenn.) *Temple v. Ferguson*, 791.

4. **TRUST for Married Woman.—Upon the Death of Her Husband,** property conveyed in trust for the separate use and benefit of a married woman becomes hers absolutely. (Tenn.) *Temple v. Ferguson*, 791.

*Trustee's Sale.*

5. **TRUSTEE'S SALE, Effect of by Relation.**—Under a sale authorized by a trust deed made to secure the payment of a debt and a conveyance made pursuant thereto, the title of the purchaser takes effect by relation as of the date of the trust deed. (Cal.) *Penryn Fruit Co. v. Sherman etc. Co.*, 150.

6. **TRUSTEE'S Sale of Real Property—Effect upon the Title to Growing Crops.**—A purchaser under a trustee's sale, on taking possession, becomes the owner of fruit growing on trees on the property, and his title is not affected by a mortgage covering such fruit

made after the execution and recording of the trust deed. (Cal.)  
Penryn Fruit Co. v. Sherman etc. Co., 150.

See Mortgages, 15.

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## UNRECORDED DEED.

See Vendor and Vendee, 3-7.

## USURY.

**TORTS—Assignment—Usury.**—A right to recover a statutory penalty for taking usurious interest is not assignable before judgment. (S. C.) *Ex parte Hiers*, 713.

## VENDOR AND VENDEE.

### *Miscellaneous.*

**1. VENDOR AND PURCHASER—Option to Purchase.**—A contract to convey a strip of land of a specified width along a railroad, as surveyed, located, and staked, at any time within a specified period from date, when requested by the railroad company and upon the payment of a designated sum, is simply an option to purchase. (Miss.) *Louisville etc. R. R. Co. v. Gulf of Mexico Land etc. Co.*, 627.

**1a. VENDOR AND PURCHASER—Rescission of Contract—Removal of Improvements.**—A person induced to enter into a contract

for the purchase of lands by false representations of the vendor, as to his title, has a right, on rescission of the contract, to place himself in statu quo by removing the improvements made by him, so far as this can be done without injury to the freehold remaining. (Mich.) *Cutter v. Wait*, 619.

**2. VENDOR AND PURCHASER—Removal of Building—Replevin.**—A vendor may maintain replevin for a house built by the vendee on the land while in possession under a contract to purchase, and afterward removed by him. Such building after removal may be treated as personalty. (Mich.) *Cutter v. Wait*, 619.

*Records—Unrecorded Deed.*

**3. VENDOR AND VENDEE—Right to Rely on Records.**—The law protects purchasers of real estate as the title appears of record, unless there is notice of something to the contrary. (Ill.) *Booker v. Booker*, 250.

**4. VENDOR AND VENDEE—Notice of Unrecorded Deed.**—One is not chargeable with notice of an unrecorded deed because he pays an inadequate price for the land. (Ill.) *Booker v. Booker*, 250.

**5. VENDOR AND PURCHASER—Unrecorded Deed.**—The Record of a Mortgage is not, as a matter of law, constructive notice of an unrecorded deed from the holder of the record title to the mortgagor, where the mortgage was executed, not to the grantor in the deed, but to a third person. (Ill.) *Booker v. Booker*, 250.

**6. VENDOR AND VENDEE—Unrecorded Deed.**—Notice to a Husband of an unrecorded deed to his first wife is not chargeable to his second wife, when he was actuated by a selfish and fraudulent purpose in keeping the deed off the records and in dealing with his second wife. (Ill.) *Booker v. Booker*, 250.

**7. VENDOR AND VENDEE—Unrecorded Deed, Laches of Claimant Under.**—If the grantee in an unrecorded deed lives five years after its execution, and seven years after her death the land is conveyed to a third person, who records his deed and holds possession for five years, persons claiming under the unrecorded deed are barred from attacking his title, notwithstanding the false statement of their father that he had no title. (Ill.) *Booker v. Booker*, 250.

See Deeds.

## VICE-PRINCIPAL.

See Master and Servant, 21.

## WATER COMPANY.

**WATER COMPANY—Liability of for Property Destroyed by Failure to Furnish an Adequate Supply of Water.**—If a municipal corporation contracts with a company to furnish water to be used to extinguish fires, the company is not liable at the suit of a taxpayer whose property was destroyed by fire by reason of the company's failure to supply sufficient water to the municipality for that purpose. (Cal.) *Ukiah v. Ukiah Water etc. Co.*, 107.

See Municipal Corporations, 5, 6.

## WATERS AND WATERCOURSES.

*Riparian Rights.*

**1. RIPARIAN OWNERS—Relative Rights.**—Each riparian owner on a stream or inland lake has an equal right to the use of the

water for ordinary purposes, even though such use may in some degree lessen the volume of the water or affect its purity. It makes no difference that the lower proprietor is a municipality instead of an individual. (Mich.) *People v. Hulbert*, 588.

**2. RIPARIAN RIGHTS—Police Power to Regulate or Restrain.** A municipality cannot invoke the exercise of the police power of the state, for the purpose of obtaining a water supply, to prevent the reasonable use of the waters of an inland lake or stream by an upper riparian proprietor for bathing or other ordinary purposes, without the exercise of the right of eminent domain or without compensation. (Mich.) *People v. Hulbert*, 588.

**3. RIPARIAN RIGHTS—Bathing.**—An upper riparian owner on an inland lake has a right to bathe therein as against a city having lower riparian rights and drawing its water supply from such lake. (Mich.) *People v. Hulbert*, 588.

#### *Appropriation.*

**4. WATERS AND WATERCOURSES.—The Doctrine of Prior Appropriation is Established in Wyoming** as a rule of imperative necessity and is an outgrowth of the custom of the earlier settlers upon the public lands for the purposes of mining or rendering the soil available for cultivation. (Wyo.) *Willey v. Decker*, 939.

**5. WATERS AND WATERCOURSES—Appropriation of Waters for Nonriparian Lands.**—Under the doctrine of prior appropriation, it is not now and never has been essential to a water right that the appropriator should apply the water to riparian lands. (Wyo.) *Willey v. Decker*, 939.

#### *Common-law and Statutory Rules.*

**6. WATERS AND WATERCOURSES.—The Common-law Doctrine Concerning the Rights of Riparian Owners** in the water of a natural stream does not prevail, and has never prevailed, in Wyoming. (Wyo.) *Willey v. Decker*, 939.

**7. WATERS AND WATERCOURSES.—Statutory and constitutional declarations** of the state of Wyoming that waters of natural streams are the property of the public and subject to appropriation rather declare and affirm a principle already existing than announce a new one. (Wyo.) *Willey v. Decker*, 939.

**8. WATERS AND WATERCOURSES—Statutes Respecting, Construction of.**—A statute providing that all persons owning or holding a possessory right or title to any lands in the territory of Wyoming, when their claims are on the bank, margin, or neighborhood of a stream of water, shall be entitled to the use of such stream for the purposes of irrigation and making such claim available for agricultural purposes, will be construed as declaratory of pre-existing law, and not as limiting or qualifying pre-existing rights. (Wyo.) *Willey v. Decker*, 939.

#### *Interstate Stream.*

**9. WATERS AND WATERCOURSES—Appropriation in the Case of Interstate Streams.**—The separation of lands capable of irrigation by state lines from the stream whence the water is diverted is of no consequence in the appropriation of water for irrigation. (Wyo.) *Willey v. Decker*, 939.

**10. WATERS AND WATERCOURSES—Appropriation from Interstate Streams.**—In the case of interstate streams parties in possession of lands in either state are entitled to appropriate any water of the



stream not previously appropriated for the irrigation of their lands by diverting the water in the state where the lands are situate. (Wyo.) Willey v. Decker, 939.

**11. WATERS AND WATERCOURSES—Appropriation of Water in One State for Use in Another.**—Where a stream flows from one state into another, water may be appropriated and diverted in the former state for use on lands in the latter. (Wyo.) Willey v. Decker, 939.

**12. WATERS AND WATERCOURSES—Jurisdiction to Enjoin Interference with Waters Appropriated from an Interstate Stream.**—Where waters of a stream running from another state into this have been appropriated in the former state for use in this, its courts have jurisdiction to enjoin a subsequent diversion from such stream in such other state, if its effect is to deprive plaintiff, whose lands are in this state, of waters to which they are found to be entitled by priority of appropriation. (Wyo.) Willey v. Decker, 939.

**13. COURTS—Jurisdiction to Determine Interstate Water Rights.** The courts of this state have jurisdiction to adjudge the right to water diverted from a natural stream in this state to be conveyed to and used in another state, to the extent, at least, of inquiring into and determining the right of the one party to relief by injunction against the other. (Wyo.) Willey v. Decker, 939.

#### *Subterranean Water.*

**14. WATERS—Subterranean.**—The waters of a well-defined subterranean stream cannot be diverted to the injury of an adjoining land owner. (Iowa.) Barclay v. Abraham, 365.

**15. WATERS—Subterranean—Known Channel—Burden of Proof.** Subterranean waters are presumed to be percolating unless the supply is shown to be from a known and defined stream or channel, and the burden of proving the existence of such channel is on the one asserting its existence. (Iowa.) Barclay v. Abraham, 365.

**16. WATERS—Subterranean—Right to Use.**—One under whose land there is subterranean percolating water may make such beneficial use thereof as he may choose, but he has no right to draw from such reservoir within the earth merely to waste the water or carry out a design to injure those having equal access to the same supply. (Iowa.) Barclay v. Abraham, 365.

**17. WATERS—Subterranean.—A Land Owner has No Right to Collect, Drain, or Divert** waters percolating through the earth, merely to carry them from his own land for no useful purpose, when such action on his part will have the effect of materially injuring or destroying the well or spring of another, the waters of which are devoted to some beneficial use connected with the land where found. (Iowa.) Barclay v. Abraham, 365.

See Courts, 3; Navigable Waters; Water Companies; Wharves.

#### **WAYS.**

See Easements.

#### **WHARVES.**

##### *Right to Build.*

**1. NAVIGABLE STREAMS—Riparian Owner's Right to Build Wharves and Piers.**—An owner of land abutting on a navigable inland lake has the right to build piers and wharves in front of his

land out to navigable waters in aid of navigation and not interfering with the public use. (Wis.) *McCarthy v. Murphy*, 876.

**2. NAVIGABLE STREAMS—Riparian Owner's Right to Remove Piers Erected by Others.**—A riparian owner has the right to remove from the front of his land a pier erected there by another person without his consent, because this is in the nature of a private nuisance which may lawfully be removed to prevent injury from its continuance. (Wis.) *McCarthy v. Murphy*, 876.

#### *Liability of Owner.*

**3. SHIPPING—Liability of Dock Owner.**—The owner or occupant of a dock is liable in damages to a person who, by his invitation, express or implied, makes use of it, for an injury caused by any defect or unsafe condition of the dock which the occupant negligently causes or permits to exist, if such person was himself in the exercise of due care. (Mass.) *Garfield etc. Coal Co. v. Rockland-Rockport Line Co.*, 543.

**4. SHIPPING—Dock Owners—Duties of—Negligence.**—An owner or occupant of a dock is not an insurer of the safety thereof, but he is required to use reasonable care to keep it in such shape as to be reasonably safe for the use of vessels which he invites to enter it, or for which he holds it out as fit and ready, and if he fails in this and there is a defect, in his dock, known to him, or which by the use of ordinary care and diligence should be known to him, he is guilty of negligence and liable to the person who, using due care, is injured thereby. (Mass.) *Garfield etc. Coal Co. v. Rockland etc. Line Co.*, 543.

**5. SHIPPING—Negligence of Dock Owner—Assumption of Risk.**—If the master of a vessel uses reasonable care in entering a dock under invitation, he does not assume the risk of injury to his vessel from a sunken ledge of rock, the existence of which is unknown to him, merely because he has to go through some mud of the presence of which he has knowledge. (Mass.) *Garfield etc. Coal Co. v. Rockland etc. Line Co.*, 543.

**6. SHIPPING—Liability of Dock Owner—Representations of Agent.**—The master of a vessel about to take her into a dock is justified in relying upon the statement of the agent of the dock that the berth is a proper one, that there is plenty of water, and that the bottom is good, and is not under any obligation to take soundings. (Mass.) *Garfield etc. Coal Co. v. Rockland etc. Line Co.*, 543.

**7. NEGLIGENCE—Dock Owners—Evidence.**—If a vessel is injured from grounding on a concealed ledge of rock in the mud at the bottom of a dock, it is not necessary in order to recover, to show that the dock owner knew of such ledge, if its existence could have been discovered by him in the exercise of reasonable diligence and the plaintiff was in the exercise of reasonable care. (Mass.) *Garfield etc. Coal Co. v. Rockland etc. Line Co.*, 543.

**8. AGENCY—Limitation on Authority.**—If a person is in charge of a wharf or dock, ostensibly as the agent of the owner, the latter cannot show that the agent has only limited authority in giving directions to vessels coming there. (Mass.) *Garfield etc. Coal Co. v. Rockland etc. Line Co.*, 543.

#### WILLS.

##### *Construction.*

**1. WILLS—Intention of Testator.**—In Construing a Will the intention of the testator should control, and to ascertain such intention

the entire will should be considered in the light of all the circumstances surrounding the testator at the time the will was made. (Ill.) *Blinn v. Gillett*, 234.

2. **WILLS.—The Intention of the Testator** governs the construction of a will, and to ascertain the intention the court may hear evidence of the circumstances, situation and surroundings of the testator when the will was made and the state and description of his property. (Ind.) *Pate v. Bushong*, 287.

3. **WILLS.—Words May be Read into a Clause in a Will** to make plain what is the manifest intention of the testator, considering the will as a whole, but which intention the testator has not accurately or completely expressed by the words he has used. (Ill.) *Blinn v. Gillett*, 234.

4. **WILLS—Extrinsic Evidence.—When a Latent ambiguity is** disclosed by extrinsic evidence, it may be removed by extrinsic evidence. (Ind.) *Pate v. Bushong*, 287.

5. **WILLS—Errors in Description.**—However many errors there may be in the description in a will, either of the devisee or the subject of the devise, it will not avoid the gift, if, after rejecting the errors or false words, enough remains to show with reasonable certainty what was intended when considered from the position of the testator. (Ind.) *Pate v. Bushong*, 287.

6. **WILLS—False Description may be Rejected.**—A devise of lands by a description partly false, as where the wrong section number is given, may be effective if what remains, after rejecting the false, reasonably corresponds with real estate indicated by extrinsic evidence. (Ind.) *Pate v. Bushong*, 287.

7. **WILLS—Partial Intestacy.—The Presumption is**, when one makes a will, that he intends to dispose of his entire estate. (Ind.) *Pate v. Bushong*, 287.

8. **WILLS.—Only a Life Estate Passes to a Devisee**, in Indiana, unless it affirmatively appears that a greater estate was intended. (Ind.) *Pate v. Bushong*, 287.

9. **WILLS, When Pass Only a Life Estate.**—A devise by a man to his wife which does not in express terms give her the fee, nor expressly or impliedly give her power to dispose of the property, and which gives the property to his son after her death, passes only a life estate to her. (Ind.) *Pate v. Bushong*, 287.

10. **WILLS—Gift of Stock Includes What.**—A devise by a man to his wife, for life, of all "the use, dividends, and profits" on bank stock, with remainder to their children, passes to the remaindermen money paid to the widow from some of the banks that went into voluntary liquidation, and also passes to them a stock dividend issued to the widow by one of the banks from its earnings prior to the death of the testator. (Ill.) *Blinn v. Gillett*, 234.

#### *Legacies—Ademption.*

11. **LEGACIES.—Specific Legacies** are bequests of a specified part of a testator's personal estate, distinguished from all others of the same kind. (S. C.) *Rogers v. Rogers*, 721.

12. **LEGACIES.—To Constitute Pecuniary Demonstrative Legacies** it is necessary that there be a gift of a certain sum of money, and such gift must be given with reference to a particular fund, as a primary but not exclusive source of payment. (S. C.) *Ex parte Hiers*, 721.

**13. LEGACIES—Specific—Ademption.**—Specific legacies are adeemed when the thing bequeathed is, in the lifetime of the testator, lost, disposed of, or so substantially changed or altered as not to exist in specie when the will takes effect. (S. C.) *Ex parte Hiers*, 721.

**14. LEGACIES.—Ademption** applies only to specific legacies. (S. C.) *Ex parte Hiers*, 721.

**15. LEGACIES—Specific—Ademption.**—A legacy of all claims held by a testator against his father and of all his interest in his estate is a specific legacy, and the collection thereof by the testator during his lifetime adeems the legacy, and parol evidence is not admissible to show an intent by the testator to substitute as such legacy other property, not mentioned in the will, in lieu of such claims. (S. C.) *Ex parte Hiers*, 721.

*Probate.*

**16. WILLS—Jurisdiction to Probate.**—The probate court of the domicile of the testator has exclusive jurisdiction to determine the validity of his alleged will, and if the will has been admitted to probate by any other court having no jurisdiction, the order of that court is not binding upon the court of the testator's domicile. (Mich.) *Scripps v. Wayne* Probate Judge, 614.

**17. WILLS—Probate—Administration.**—If those interested in a will fail to present it for probate to the proper court of the testator's domicile, any person interested in the estate as heir or creditor may petition that court for the appointment of an administrator. It is no defense to such petition that the deceased made a will which is beyond the jurisdiction of such court. (Mich.) *Scripps v. Wayne* Probate Judge, 614.

**18. WILLS—Failure to Probate—Right to Administration.**—It is not in the power of executors, by suppressing a will, or by refusing to probate it, in the court of the testator's domicile, to prevent those interested in defeating the will from having a hearing on the questions of the testator's domicile and intestacy in the probate court of the testator's domicile. In such case the court cannot refuse to proceed until the will or a certified copy thereof shall have been filed in court by someone claiming under the will. (Mich.) *Scripps v. Wayne* Probate Judge, 614.

See Charities.

**WITNESSES.**

*Miscellaneous.*

**1. EVIDENCE—Transactions of Deceased Agent.**—Under the statutes of Wisconsin a defendant will not be permitted to testify to conversations between himself and an agent of the plaintiff who died prior to the trial. (Wis.) *Meyer v. Hafemeister*, 909.

**2. EVIDENCE—Communications Made to a Prosecuting Attorney.**—Where a servant is prosecuted for a tort committed by him, and his employer calls on the prosecuting attorney and is by the latter informed of the prosecuting witness' version of the transaction, the conversation with the prosecuting attorney cannot be excluded as a privileged communication in an action subsequently commenced against the employer for the same tort. (Wis.) *Colfax v. Simon*, 909.

**3. EVIDENCE—Cross-examination.**—Where the question before the jury was whether a mortgage had been paid in satisfaction of certain pre-existing indebtedness, the defendant, in cross-examin-



ing the plaintiff, should be permitted to question him concerning all the negotiations and conversations respecting payment and satisfaction of such indebtedness and what took place when the securities and property were deposited with and conveyed to the plaintiff. (Wis.) *Meyer v. Hafemeister*, 900.

*Husband and Wife.*

4. **WITNESS—Husband Against Wife.**—In litigation concerning a wife's separate property in which she would, if unmarried, be the defendant, her husband is competent, under the Illinois statutes, to testify for or against her. (Ill.) *Booker v. Booker*, 250.

5. **EVIDENCE—Conversations.**—If husband and wife are sued on a note, and the defense is set up that it was given for his benefit alone, evidence of conversations between them, not shown to have been in the presence of, or communicated to, the plaintiff, is inadmissible. (Mich.) *National Lumberman's Bank v. Miller*, 623.

6. **WITNESSES—Husband and Wife.**—A wife is not a competent witness against her husband in a criminal proceeding with or without his consent, and neither spouse can consent to the other testifying against him or her in a criminal case, except when it is an offense of one against the other. (Tex. Cr. Rep.) *Brock v. State*, 859.

7. **WITNESSES—Husband and Wife.**—In a criminal proceeding against the husband his wife cannot be permitted, either voluntarily or by force of authority he compelled, to state facts in evidence against him, which would render his character infamous. (Tex. Cr. Rep.) *Brock v. State*, 859.

8. **WITNESSES—Husband and Wife.**—Neither husband nor wife can testify as to communications made by one to the other while married, except when such communication goes to extenuate or justify the offense for which either is on trial. (Tex. Cr. Rep.) *Brock v. State*, 859.

9. **WITNESSES—Husband and Wife.**—A wife is incompetent as a witness against her husband in a criminal proceeding even with his consent, except when the offense by him is against her personally. (Tex. Cr. Rep.) *Brock v. State*, 859.

See Evidence.



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